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THE

WEEKLY REPORTER,

1894-95

(FORTY-THIRD YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1894, TO THE 12TH OF AUGUST, 1895.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLIII.

EDITED BY
MARTIN JOSEPH BLAKE,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-third volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The change made, for the first time, last year, in the form of the Annual Digest, has not been continued; and it has been deemed desirable this year to publish the Annual Digest in the old form substantially, with some modifications. Accordingly, the Annual Digest this year contains, as in former years, a summary of all the cases published from the 24th of October, 1894, to the end of August, 1895, in the WEEKLY REPORTER, and in the Law Reports, the Law Journal Reports, and the Law Times Reports, besides those given in the Irish Law Reports. In the body of the Digest, figures following the name of a case denote the page in the WEEKLY REPORTER at which it will be found. Where the name of a case has no figures attached, the case is not reported in this volume of the WEEKLY REPORTER; but the references to the case in other series of Reports will be found in the Tabular Index to the Names of Cases.

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1894—95.

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MARTIN JOSEPH BLAKE,

BARRISTER-AT-LAW.

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COURT OF APPEAL (No. II.)	WILLIAM SHALLCROSS GODDARD, ARNOLD GLOVER, WILLIAM SCOTT THOMPSON, and FRANCIS ARTHUR MORTON, Barristers-at-Law.
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Mr. Justice North	G. BALDWIN HAMILTON, RICHARD SILLEM, and J. ARTHUR PRICE, Barristers-at-Law.
Mr. Justice Stirling	WILLIAM SCOTT THOMPSON and FRANCIS ARTHUR MORTON, Barristers-at-Law.
Mr. Justice Kekewich	FRANCIS THEODORE DUKA and CHARLES CARRINGTON HENSLEY, Barristers-at-Law.
Mr. Justice Romer	JAMES WILLIAM GREIG, J. ARTHUR PRICE, and CHARLES HERBERT BROWN, Barristers-at-Law.
Mr. Justice Vaughan Williams	VILLIERS DE SAUSSURE FOWKE, Barrister-at-Law.
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" " " (CASES IN BANKRUPTCY)	PAUL M. FRANCKE, Barrister-at-Law.
PROB., DIV., and ADM. DIVISION	(Prob. & Div.)...JOHN GERARD LAING, Barrister-at-Law. (Adm.) .....CHARLES FUHR. JEMMETT, Barrister-at-Law.
CROWN CASES RESERVED	THOMAS REGINALD COLQUHOUN DILL, Barrister-at-Law.

A TABLE

OF

THE NAMES OF CASES

REPORTED AND DIGESTED IN THIS VOLUME,

WITH REFERENCES TO THE CONTEMPORANEOUS REPORTS.

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NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

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WEEKLY REPORTER,

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Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Davey, L.JJ.) — Aug. 2, 1894.

In re PARKER.
MORGAN *v.* HILL. (*a.*)

Surety—Mortgage—Co-sureties—Payment off of mortgage debt by surety —Right to prove against estate of co-surety—Mercantile Law Amendment Act, 1856 (19 *&* 20 *Vict. c.* 97), *s.* 5.

A surety who, on default being made by the mortgagors, has paid off a mortgage debt, is entitled to the benefit of a claim for the whole debt made by the principal creditors against the estate of a co-surety, although he can only actually recover the proportion due to him from his co-surety.

Judgment of Kekewich, J., 42 *W. R.* 618, *affirmed.*
Ex parte Stokes, *De G. Bkcy. Rep.* 618, *followed.*

Appeal of the defendant from an order of Kekewich, J., of June 16, reported 42 W. R. 618, where the facts and arguments are sufficiently stated.

T. B. Napier, for the appellant, referred to *Ex parte Stokes*, De Gex Bankruptcy Reports, 618; *Ex parte Snowdon*, 29 W. R. 654, 17 Ch. D. 44; *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 41 W. R. Dig. 16, 192; *In re McMyn, Lightbown* v. *McMyn*, 35 W. R. 179, 33 Ch. D. 575; and the Mercantile Law Amendment Act, 1856, s. 5.

Hadley, for the respondent, was not called upon.

LINDLEY, L.J.—This is an appeal from Kekewich, J., and raises a question which, if it were new and not covered by authority running back to 1848, I should have thought quite worthy of consideration; but, in my opinion, if we were to allow this appeal we should be departing from a recognized rule. [His lordship then stated the facts, and continued:—] What, then, are the rights of these two sureties against the estate of their co-surety? They say they are entitled to the benefit of the proof of the principal creditors for the whole debt, although they admit they are not entitled to get more than one-third. The case turns on the construction of the Mercantile Law Amendment Act, s. 5, which upset the old doctrine that when the debt has been paid off by the sureties it is gone. Now section 5 provides: [His lordship read the section, and continued:—] If the matter were *res nova* it might be more consistent to accede to the argument of Mr. Napier, and say that as the sureties are not entitled to get more than one-third they ought not to be allowed the benefit of the proof for the whole debt. But when we see how the rights in these cases have been worked out ever since 1848, when it was decided in *Ex parte Stokes* that a creditor had the right to prove for the whole debt, although he was only entitled to actually recover a proportion of it, I think that we must affirm the order of Kekewich, J., for we cannot depart from a rule so well settled as that laid down in *Ex parte Stokes*.

LOPES, L.J.—I agree. I think Kekewich, J., was right, and that in point of fact this question is covered by authority.

DAVEY, L.J.—I am of the same opinion. This question has been settled since 1848. The sureties are entitled to the benefit of the proof made by the principal creditors as well as to every other right which the principal creditors had for the recovery of their debt. As to what would have been the result if no claim had been put in by the principal creditors, and the sureties had sought to prove in the first instance in their own right, I express no opinion, but I think it quite possible that their rights would have been different. But in this case the claim has been duly made by the principal creditors, and the sureties are entitled to the benefit of it.

This appeal must be dismissed.

Appeal dismissed.

Solicitors, *Oldman, Clabburn, & Co.*, for *D. Havers*, Norwich; *Sharpe, Parker, & Co.*

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — July 11, 1894.

CHAPMAN *v.* FYLDE WATERWORKS CO. (*a.*)

Waterworks — Highway — Nuisance — Service pipe to private house—Stop-cock and cover in street—Cover out of repair — Liability to public—Fylde Waterworks Act, 1861 (24 *&* 25 *Vict. c. cliv.*)—*Waterworks Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 17), *s.* 28—*Waterworks Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 93), *s.* 17.

The defendants, who were incorporated for the purpose of supplying water within a certain district, at the request of the occupier of a house, who wanted a supply of water, laid down a service pipe under the street from the water main into the house, and fixed therein a stop-cock under the foot pavement, the stop-cock being protected by an iron box with an iron cover level with the pavement. The plaintiff, while walking along the street, tripped against the cover and was injured. The evidence showed that the injury to the plaintiff was caused by the neglect of the persons responsible for the repair of the cover to repair it; and that the cover could not have

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

been repaired without taking out the iron box and breaking up the pavement.

Held, that, even assuming that the property in the service pipe and stop-cock and cover was in the occupier of the house, inasmuch as the defendants had power under section 28 of the Waterworks Clauses Act, 1847, to break up the street and to repair the cover, and as the occupier had no such power, it was the duty of the defendants to keep the cover in proper repair, so that it should not become dangerous to the public using the street, and that they were therefore liable to the plaintiff.

Appeal from the judgment of Day, J., in favour of the plaintiff at the trial with a jury of an action to recover damages for personal injuries owing to the alleged negligence of the defendants.

It appeared that the plaintiff, while walking along a public street in Blackpool, tripped over an iron cover or guard which was laid in the foot pavement of the street, and which protected a stop-cock attached to a service pipe leading from the water main into a private dwelling-house.

The defendants were incorporated under the Fylde Waterworks Act, 1861, for the purpose of supplying water to the inhabitants of, amongst other places, Blackpool, and by section 21 the works which they were authorized to execute comprised the following, with all requisite works and conveniences connected therewith (*inter alia*), "eighthly, the laying down, repairing, and maintaining of all embankments, drains, sluices, cuts, channels, pipes, wells, and other works necessary for supplying water within the limits of this Act." The Waterworks Clauses Act, 1847, was incorporated with that Act. By their rules and regulations, which they were authorized to make, the branch or service pipes from the main in the street into the premises to be supplied with water were to be provided and laid by the company, at the expense of the owner or occupier, on receiving the company's form of order filled up and signed by the owner or his agent.

The defendants, having been duly required to do so, laid a service pipe from the main in the street into the house, and placed a stop-cock in the service pipe, the stopcock being 2 ft. 6 in. below the surface of the foot pavement, and being covered by an iron box resting on brickwork with an iron cover level with the pavement. The evidence showed that the cover could not be repaired without taking out the iron box and breaking up the pavement.

The jury found that the cover was out of repair and would not shut properly, owing to the negligence of those responsible for its repair, and that the injury to the plaintiff was caused thereby, and assessed the damages at £40. The learned judge gave judgment for the plaintiff. The defendants appealed.

Shiress Will, Q.C., and *R. W. Harper*, for the defendants.—The service pipe and its fittings are the property of the householder, and he is bound to keep them in repair. The water company, in placing this stop-cock and cover in the street, acted merely as the householder's agent, and section 17 of the Waterworks Clauses Act, 1863, by making the householder liable to a penalty for non-repair, impliedly authorizes him to do what is necessary to effect the repairs, viz., to break up the street. No doubt the water company have power under section 28 of the Waterworks Clauses Act, 1847, to break up the street in order to repair the service pipe, but they do so only as the agent of the householder, and the householder is liable. The case of *East London Waterworks Co.* v. *Vestry of St. Matthew, Bethnal Green*, 35 W. R. 37, 17 Q. B. D. 475, shows that the water company have power to place this iron box and cover in the street. The water company, therefore, are not liable to the public for the non-repair of this cover.

They also referred to various other sections of the Waterworks Clauses Act, 1847.

C. A. Russell, for the plaintiff.—The Acts have given the water company the sole power of laying this cover in the street, and the duty of repairing it is imposed upon them by section 28 of the Waterworks Clauses Act, 1847, and section 21 of the Fylde Waterworks Act, 1861. The *East London Waterworks Co.'s case* shows that the words "necessary for supplying water" include works necessary for regulating the supply and preventing waste. There is no section in the general or special Act which gives the householder power to repair the service pipe. Sections 48, 51, and 52 of the Act of 1847 give him power to break up the street to lay the service pipe and to remove it if he ceases to take a supply of water; but if he continues taking the supply he cannot remove the service pipe. The service pipe and fittings in this latter case are left under the control of the water company. The water company are therefore liable to repair this cover, and the judgment was right.

He also referred to section 19 of the Waterworks Clauses Act, 1863.

Shiress Will, Q.C., in reply, referred to *Glover* v. *East London Waterworks Co.*, 16 W. R. 310.

Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. The fact of this iron box being placed in and forming part of the surface of a public street which the public had a right to use imposed upon the person who had the control of this box the obligation of keeping it in repair so that it should not be a source of danger to the public. It is not necessary to decide whether the service pipe and its fittings are the property of the water company or of the householder. We may assume for the purposes of this case that the service pipe, with the iron box and cover and the stop-cock, are the property of the householder. But that is not sufficient to determine this case. The question is, Who had the control of the apparatus so far as regards the repairing of it. By section 21 of the Fylde Waterworks Co.'s Act, 1861, "the works which the company are by this Act authorized to execute comprise the following waterworks, with all requisite works and conveniences connected therewith; that is to say, . . . eighthly, the laying down, repairing, and maintaining of all embankments, drains, sluices, cuts, channels, pipes, wells, and other works necessary for supplying water within the limits of this Act."

The case of the *East London Waterworks Co.* v. *Vestry of St. Matthew, Bethnal Green* shows that the words "necessary for supplying water" include works necessary for preventing the waste of water. Therefore, the water company had power to lay down works necessary for preventing the waste of water. By section 28 of the Waterworks Clauses Act, 1847, the undertakers may open and break up the soil and pavement of the streets within the limits of the special Act, and lay down pipes, service pipes, and other works, and from time to time repair, alter, or remove the same, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district. The special Act, therefore, authorized the water company to lay down such an apparatus as this iron box and cover, and also to repair it. The public Act says that the company may break up the streets for that purpose, and when the pipes and other works are laid down the company may break up the streets for the purpose of repairing them. When

the pipes and other works are laid down and completed, who has authority to interfere with the public street after that? The fact of a person owning property under the street does not authorize him to break up the street. Assuming, then, that the service pipe and its fittings are the property of the householder, he has no right to break up the street unless the Act gives him that power. The Act of 1847, by sections 48, 51, and 52, has given him the right to break up the street for the purpose of laying the service pipe from the main, and also for the purpose of removing it if he wishes to do so. He has no power to break up the street for any other purpose. The householder here does not want to remove this pipe. He has no power to break up the street to examine the service pipe or to repair it. He cannot, therefore, repair it or this apparatus. It is idle to suppose that the law says that because he has not done that which he had no power to do, an action will lie against him for negligence in not doing it. The water company, on the other hand, can do the repairs, and for that purpose can break up the street. It is impossible, to my mind, to say that this stop-cock is not placed there partly for the advantage of the water company. I think, indeed, that it is placed there solely for their advantage. It is only in a subsidiary sense that it can be said to be there for the advantage of the householder. But assuming that it is there for the advantage of both, the case then stands thus: the water company, with regard to an apparatus which is there partly for their benefit, have the sole power to keep it in repair and to break up the street for that purpose. That imposes upon them the duty towards the public of keeping it in such a state of repair that it shall not become dangerous to the public using the street. Upon these grounds I think that the judgment is right, and that this appeal should be dismissed.

KAY, L.J.—I am of the same opinion. The plaintiff tripped against the lid of this guard placed over a service pipe leading from the water main to a private house and injured himself. It was found by the jury that the lid was out of repair, and did not properly shut, and that was the cause of the accident. It is apparent from the nature of the guard that it is impossible to remove it without breaking up the surface of the street, the iron box being slightly larger at its base, and the top being placed in a hole cut in the flagstone, so that the flagstone must be removed in order to repair the guard. The water company, upon the requisition of the householder, laid down the service pipe from the main, and of their own accord put in the stop-cock, which can be turned by hand, in the service pipe, the stop-cock being fixed 2 ft. 6 in. below the surface of the street and covered with brickwork, upon which the guard rests.

The water company resist this action, and say that it is not their duty to repair this stop-cock and cover. Now, the water company had power, under their special Act, to lay down the service pipe and to repair it, and by section 28 of the Waterworks Clauses Act, 1847, they have express power to break up the street, not only to lay down the pipe, but also to repair it, and to do all other acts which the undertakers shall from time to time deem necessary for supplying water. Upon that section it was held in *East London Waterworks* v. *Vestry of St. Matthew, Bethnal Green* that the placing of such a guard-box as this was within the powers conferred by that section. I have looked through the Act, and I cannot find any express power given to the occupier of a house to repair the service pipe at all. There is certainly no power given to the occupier to break up the street to repair it. In the group of sections from section 48 to section 53 there is power given to the occupier to lay down a service pipe from the main into his house and to remove it, and by section 52 for those two purposes, and those two purposes only, he has power to break up the street. Therefore, the only person who has power to break up the street to repair this guard is the water company. We were referred to the Waterworks Clauses Act, 1863, and it was said that section 17 impliedly gives the householder power to break up the street to repair this service pipe and guard, because it subjects him to a penalty if he "wilfully or negligently causes or suffers any pipe, valve, cock, cistern, bath, soil pan, water-closet, or other apparatus or receptacle to be out of repair or to be so used or contrived" as to waste the water. It cannot be denied that most of the things there specified are things upon the premises of the occupier of the house, and, therefore, judging from the association of the words "pipe, valve, or cock" with the other words, it seems clear that the pipe, valve, or cock there referred to must be upon the householder's premises. They do not refer to a pipe, valve, or cock in the street so as to give him implied power to break up the street to repair it. Therefore, I think that the section refers to internal fittings. Then section 19 seems somewhat material. It prohibits the occupier of any premises supplied with water from affixing or permitting to be affixed any pipe or apparatus to a pipe belonging to the undertakers, or to a communication or service pipe belonging to or used by such occupier, or to make any alteration in any such communication or service pipe, or in any apparatus connected therewith, without the consent of the undertakers. Therefore, we have a clear provision in section 19 that this apparatus connected with the service pipe, whether it belongs to the occupier or not, cannot be altered by the occupier except with the consent of the water company. In my opinion the meaning of all this legislation is this; it is not everybody who can break up a street to repair a service pipe; the water company alone can do that; that is a provision inserted for the benefit of the public. Therefore, if this action were brought against the occupier, his answer would be that he had no power to break up the street to repair the guard, and an action would not lie against him for omitting to do that which he had no power to do. Who, then, is the person liable? Clearly the person who has the power to repair the guard and to break up the street for that purpose, namely, the water company. For these reasons, I think that the appeal fails.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Woodcock, Ryland, & Parker*, for *T. W. Markland*, Manchester.

Solicitors for the defendants, *Arkcoll, Cockell, & Chadwick*, for *W. J. Dickson*, Kirkham.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — July 5, 1894.

WARREN v. MURRAY. (a.)

Limitations, Statute of—Building agreement—Builder entitled to lease at peppercorn rent—Possession taken under agreement—No lease granted—Right of lessor

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

to enter—Tenant at will—3 & 4 Will. 4, c. 27, ss. 2, 7, 15.

Where builders, under a building agreement, have entered into possession of land and erected buildings thereon, and have become entitled to have leases granted to them of certain houses so built by them at a peppercorn rent for a term of ninety-nine years, but no such leases have ever been granted, and no rent has ever been paid in respect thereof, the Statute of Limitations does not run against the landlord during the currency of the ninety-nine years.

Drummond *v.* Sant, 20 *W. R.* 18, *L. R.* 6 *Q. B.* 763, *approved.*

Appeal from the judgment of Wills, J., at the trial of the action without a jury.

The action was brought against the trustees of the Marquis Camden's estates to recover possession of two houses, Nos. 3 and 4, Archer-street, Camden Town, and also for damages for trespass.

By articles of agreement under seal, dated the 2nd of June, 1790, made between the trustees of the then Earl Camden of the one part, and Joseph Kirkman and Alexander Hendy of the other part, after reciting that Kirkman and Hendy proposed to take and build upon certain land belonging to the trustees, Kirkman and Hendy covenanted and agreed that they would within three years from Michaelmas, 1790, erect and build thereon certain messuages and buildings of the value altogether of £50,000, and that they would pay for the said land the annual rent thereinafter mentioned, and the trustees covenanted and agreed that they would, as soon as Kirkman and Hendy or their assigns had erected and finished such messuages and buildings, grant unto them or their nominees indentures of lease of the several messuages and buildings, as the same should be severally erected and covered in, for the term of ninety-nine years from Michaelmas, 1790, at the yearly rent of one peppercorn for the first three years of the said term, and for the residue of the said term at the yearly rent of £25 for every acre of the said land. Kirkman and Hendy were let into possession of the said land and proceeded to build thereon in pursuance of the above agreement. The full amount of the stipulated rent of £25 per acre having been reserved by leases of other houses, Kirkman and Hendy or their nominees became entitled to have leases granted to them of the two houses in question at the yearly rent of one peppercorn for the term of ninety-nine years from Michaelmas, 1790, but no leases of these two houses were ever asked for or granted. The interest of Kirkman and Hendy in part of the said land, which included the site of the two houses, became vested by assignment in the plaintiff's father and predecessor in title, who entered into possession. The possession of the plaintiff's father and of the plaintiff continued until the expiration of the term of ninety-nine years, when the defendants took possession. No rent was ever paid in respect of the two houses.

The plaintiff contended that under the above circumstances Kirkman and Hendy became tenants at will, and that by virtue of the Statute of Limitations of 1833, ss. 2, 7, and 15, the rights of the original landlords were extinguished, and Kirkman and Hendy and their successors acquired a title in fee simple.

The defendants contended that the effect of the agreement of 1790 was to create a trust, and that, therefore, the Statute of Limitations did not apply.

Section 7 of the Statute of Limitations, 1833, enacts that "when any person shall be in possession . . . of any land . . . as tenant at will, the right of the person entitled subject thereto . . . to make an entry or distress, or to bring an action to recover such land . . . shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined, provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

At the trial of the action Wills, J., gave judgment for the defendants.

The plaintiff appealed.

J. G. Joseph, for the plaintiff.

Sir R. E. Webster, Q.C., and *J. F. P. Rawlinson*, for the defendants.

The following cases were cited: *Marquis of Camden* v. *Batterbury*, 7 C. B. N. S. 864; *Doe* v. *Clare*, 2 T. R. 739; *Doe* v. *Rock*, 4 Man. & Gr. 30; *Beckford* v. *Wade*, 17 Ves. 87; *In re Sands and Thompson*, 31 W. R. 397, 22 Ch. D. 614; *Drummond* v. *Sant*, 20 W. R. 18, L. R. 6 Q. B. 763.

Lord ESHER, M.R.—The decision in *Drummond* v. *Sant* is this, that, in considering the effect of the Statute of Limitations on a right of entry upon land, the court ought to ask itself what the whole of the actual legal rights of the parties are, including, in the expression "legal rights," equitable rights as well as common law rights. If the persons against whom the statute is alleged to have run were in this position, that, though they had a common law right to enter, any exercise of that right would have been liable to be immediately restrained by a court of equity, then the Statute of Limitations does not apply. That appears to me to be a sensible view of the statute, and I think it only natural that the court in *Drummond* v. *Sant* should have come to that conclusion. We agree with that decision, and we have to apply it to the present case.

The rights of the parties and their predecessors are determined by the agreement of 1790. We must, in the first place, construe that agreement as if no Statute of Limitations existed, and then, having ascertained what the rights of the parties under that agreement were, we shall be able to say whether the Statute of Limitations applies. By the deed of 1790 the grantors entered into an agreement with the grantees that if the grantees duly performed their part of the agreement they should remain in possession of the property in question for ninety-nine years. We have to ask whether under that agreement the grantors could have entered against the grantees during the ninety-nine years, if the grantees continued to perform all the covenants binding upon them. It seems to me to be clear that, although it may be said that the grantees were at law tenants at will, yet any attempt on the part of the grantors to treat them as tenants at will and to turn them out would have been immediately restrained by injunction; and, therefore, according to the whole law, the grantors were never in a position to enter against the grantees so long as they duly performed their covenants. The grantors might, if they had thought fit, have called upon the grantees to take leases; and the grantees might, if they had chosen, have insisted on having leases granted to them. That is a consideration which may be used as a test in asking the question whether the grantors could at any time during the ninety-nine years have entered against the grantees. It is clear that they had no such right of entry. On that ground I am of opinion that no part of the Statute of Limitations is applicable to the present case. If it is necessary to put a construction on section 7, I should say that it applied only to tenancies at will which are in fact tenancies at will simply, and

that it does not extend to tenancies as to which there is any clog in the way of the lessor's exercising his will as he pleases. But, however that may be, the plaintiff cannot rely on section 2, because the defendants never had a right of entry at all. I think that the judgment of Wills, J., is right, and that this appeal must be dismissed.

KAY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Wood, Bird, & Wood.*

Solicitors for the defendants, *Farrer & Co.*

High Court of Justice.

Chan. Div. } Chitty, J. } July 13, 20, 1894.

LAMBTON *v.* MELLISH.
THE SAME *v.* COX. (*a.*)

Injunction—Nuisance by noise—Nuisance from acts of several persons.

If the acts of several persons amount in the aggregate to what is remediable by injunction, each is separately liable and amenable to the remedy against the aggregate cause of complaint, and it is no defence for any one among them to show that he is not acting in concert w th the others, and that what he does is by itself inappreciable.

On a motion, in each of two actions, to restrain a nuisance by noise from the acts of the defendant,

So held, applying the dictum *of* James, L.J., *in* Thorpe *v.* Brumfitt, *L. R.* 8 *Ch. App.* 650, 656.

Motion.

The plaintiff, the Hon. D'Arcy Lambton, was the lessee and occupier of Woodfield-house, Ashtead-common, Surrey. The premises of the defendant Mellish were situate about 66 yards and those of the defendant Cox about 128 years from the plaintiff's premises. Both the defendants were refreshment contractors who catered for excursionists to the common, and both possessed merry-go-rounds and were in the habit of using organs on their premises. For some three months or more of the summer these organs were being practically continuously played from 10 or 11 a.m. until 6 or 7 p.m. The plaintiff alleged very great discomfort and annoyance to himself, and that the noise had made his wife ill. When both organs were played together the noise was alleged to be maddening. There was evidence that Mellish used a small hand organ emitting comparatively little sound, whereas Cox's organ was a comparatively large organ emitting sounds which could be heard a mile off.

The plaintiff now moved against the defendant in each action for an injunction to restrain the defendants from playing any organs or other instruments on their respective premises at Ashtead-common adjoining the property of the plaintiff, so as to cause a nuisance or injury to the plaintiff or his family or other occupiers of the plaintiff's property.

The arguments, which sufficiently appear from his lordship's judgment, turned on the case of *Thorpe* v. *Brumfitt*, L. R. 8 Ch. App. 650, 656.

Farwell, Q.C., and *Borthwick*, for the plaintiff.

Whitehorne, Q.C., and *Butcher*, for the defendant Mellish.

Moloney, for the defendant Cox.

CHITTY, J.—Notwithstanding the conflict of evidence, I think that the plaintiff is entitled to the injunction he asks for as against the defendant in each action. A man may tolerate a nuisance for a short period of time. Thus, a passer-by would not find any nuisance in these organs. But the case is plainly different when the noise has to be continuously endured. Under these circumstances it can scarcely be an exaggeration to style it "maddening." With regard to the point of law raised in this case, it was said for Mellish that two rights cannot make a wrong. What was meant was that if one man made a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another, not acting in concert with the first, made a similar noise, each was responsible for the noise made by himself, but not for that made by the other. If the two agreed, and acted in combination, no doubt each would be a wrong-doer. But if a man shout outside a house for most of the day, and another, who is his rival (for it is to be remembered that these defendants are rivals), come and do the same, is there no remedy for the inhabitants of the house? Each knew that the other was making a noise, and added his *quantum* to the whole, which was a nuisance. In my opinion each would be separately liable, and it would be contrary to law and good sense if it were held to be otherwise, and if the complainant were to be left without remedy. I think that the point falls within the principle laid down by James, L.J., in *Thorpe* v. *Brumfitt*. That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. The Lord Justice said (L. R. 8 Ch. App., at p. 656): "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence for any one person among the hundred to say that what he does causes of itself no damage to the complainant." There is no distinction in this respect between a right of way case and a nuisance by noise case. If the acts of a person amount in the aggregate to what is remediable by injunction, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an injunction in both actions in terms of the notices of motion.

Solicitors, *Miller, Smith, & Bell; Carr & Son; Francis Rudall.*

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Chan. Div. North, J. July 25, 1894.

In re HYSLOP.
HYSLOP *v.* CHAMBERLAIN. (*a.*)

Will—Executor—Legacy to executor—Debt due by executor to testator—Unsigned testamentary paper—Intention.

Testator appointed a debtor owing him the sum of £100 one of the executors of his will, and bequeathed to him the legacy of £500 in consideration of his undertaking to be his executor and carrying out testator's instructions and wishes to the best of his ability, which instructions were contained in letters addressed to him. After testator's death an unsigned letter was found with his will addressed to the debtor, in which the following words occurred:—"The hundred pounds I lent you does not form part of the money left you; it is cancelled."

Held, that, there having been no communication to the debtor of the intention to cancel the debt, his appointment as executor did not suffice to exonerate him from his obligation to pay, the unsigned letter which professed to release him being a testamentary document improperly executed, which could not be received in evidence.

Strong *v.* Bird, 22 *W. R.* 788, *L. R.* 18 *Eq.* 315, *distinguished.*

This was an originating summons for the determination of certain questions arising on the will of the late Colonel Alexander Hyslop, of Chiswick, in the county of Middlesex, who died the 2nd of May, 1891.

The will was dated on the 16th of October, 1889. After revoking all previous wills, testator continued: "I appoint the Rev. Henry Hart Chamberlain and Emma Charlotte Hyslop to be the executors of this my will. I direct my executors to pay my just debts and funeral and testamentary expenses. And after a bequest of £300 each to a brother and two sisters therein named, testator continued: "I give to my brother-in-law, the Rev. Henry Hart Chamberlain, the sum of £500 in consideration of his undertaking to be my executor and carrying out my instructions and wishes to the best of his ability. The instructions are contained 'in letters addressed to him.'" And after a bequest of £200 to one Helen Meiklereid, testator continued: "I give, devise, and bequeath all my real and personal estate of what nature or kind soever not herein otherwise disposed of to Emma Charlotte Hyslop to be by her used according to her discretion (as regards the interest) during her lifetime for the benefit of such members of the Hyslop family as may from time to time most require it, and at her death the principal sum is to be divided (at her discretion) with the above idea in view."

In August, 1880, or thereabouts, the testator agreed to lend the sum of £100 to the above-named Rev. Henry H. Chamberlain, who was one of the defendants to the summons. According to Mr. Chamberlain's affidavit, testator stated that Mr. Chamberlain should pay interest on the loan at the rate of four per cent. per annum and that the capital should become his (Mr. Chamberlain's) in the event of his surviving the testator, but should be repaid by Mr. Chamberlain's estate should the testator survive.

In August, 1881, Mr. Chamberlain sent the testator £4 as interest on the loan, which the testator returned to him. Mr. Chamberlain, however, continued to pay the interest regularly to the date of testator's death. The testator left with his will three letters of instruction, which, however, were unsigned. Two of them were, however, filed, but not admitted to probate. One of these two letters, which was headed General Instructions for the Rev. H. Chamberlain, and dated the 10th of October, 1889, contained the following sentence: "The hundred pounds I lent you does not form part of the money left you; it is cancelled." The will was proved by both the executors.

On the 28th of March, 1894, the plaintiff took out the summons to determine, *inter alia*, the following question: Whether the sum of £100 advanced by testator to the defendant Chamberlain formed part of the testator's residuary estate for which the said defendant was accountable?

Adelaide Annie Hyslop, another sister of the testator and one of the pecuniary legatees, was also a defendant to the summons.

Upjohn, for the plaintiff.—Mr. Chamberlain must repay the money to the estate. The document produced on his behalf is not a document on which the court should act, as it was never communicated to him, and, being unsigned, is inadmissible as evidence.

Theobald, for the defendant Chamberlain.—The debt is cancelled by the appointment of the defendant as an executor. The paper headed General Instructions is available to show the testator's intention as to the debt, although it can have no force as a will.

He cited *Strong* v. *Bird*, 22 W. R. 788, L. R. 18 Eq. 315; *In re Applebee, Leveson* v. *Beales*, 40 W. R. 90, [1891] 3 Ch. 422.

Gore Brown, for the defendant A. A. Hyslop.

NORTH, J.—In my opinion the appointment of the defendant Chamberlain as executor is not sufficient to cancel the debt. This case is distinguishable from *Strong* v. *Bird* in that the intention of the testator to cancel the debt was not communicated to the executor. If there had been a separate independent communication to the defendant it might have sufficed. As things stand, however, the defendant has no equity. The document on which he relies is a testamentary document, which, however, is not properly executed, and so cannot be put in as evidence, and therefore cannot suffice to exonerate him from the debt, which he must pay to the estate.

Solicitors, *Campbell, Reeves, & Hooper; Cunliffes & Davenport.*

Chan. Div. North, J. July 11, 1894.

WEST SURREY WATERWORKS CO. *v.* CHERTSEY UNION. (*a.*)

Waterworks—Sanitary authority—Water used to flush sewers—Supply of water—Local government—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 51, 52.

A rural sanitary authority in a district, in which there was a waterworks company duly constituted, constructed sewerage works, and obtained water from other parties than the waterworks company aforesaid to flush such sewers and for other purposes in connection with their drainage works. The waterworks company objected to their proceedings, on the ground that, they being able and willing to supply the water, the local authority's action constituted an infringement of their rights under section 52 of the Public Health Act, 1875.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Held, that the proposed works were not an infringement of the waterworks company's rights, section 51 of the Public Health Act relating only to the supply of water to the general public, and not interfering with the local authority's rights to supply itself with water to be used for its own purposes.

This was an action to restrain the defendants, the Guardians of the Chertsey Union, from constructing waterworks and aqueducts, from making or maintaining tanks and reservoirs for supplying water, from erecting pumping machinery, from taking water except from the plaintiffs, and from supplying water within the limits of the plaintiff's water supply. The action came before the court on an agreed statement of facts. The plaintiffs were a duly incorporated water company incorporated under a special Act passed in 1869. The defendants were by virtue of the Public Health Act the rural sanitary authority for the Chertsey Union. The defendants were engaged in constructing, for the purpose of disposing of the sewage of the parish of Weybridge and the drainage district of Oatlands, a new system of sewerage, and were also providing certain automatic flushing chambers with a total capacity of 28,750 gallons for the purpose of keeping the sewers clean, and were laying down three miles of iron water pipes at the same depth as their sewers to convey the water to their flushing chambers. To obtain water for the purpose of flushing their chambers, the defendants had entered into an agreement with the Thames Conservators, and it had been arranged they should be at liberty to take water from the Thames. It was proposed to carry the sewage along sewers from which all surface waters were excluded to a point near the Thames where it could be disposed of. At this spot the defendants were engaged in erecting a pump and steam engine, and constructing a well for the purpose of dealing with the sewage.

The following questions were submitted to the court:—

(1) Whether the works (or some of the works) constructed or proposed to be constructed by the defendants were waterworks within the meaning of the Public Health Act, 1875?

(2) Whether the proposed dealing with the water by the defendants is a supply of water, and whether the said works or proposed works are for "supplying or used for supplying water," in contravention of the provisions of the Public Health Act, 1875?

(3) Whether the defendants have the right to take, pump up, store, and distribute, by way of pipes or otherwise, such water as they may require for their own use for the purposes of their condensing engines and for flushing their sewers in the parish and district aforesaid?

Cozens-Hardy, Q.C., and *Mulligan*, for the plaintiffs.—The proposed works are an infringement of the plaintiffs' rights under section 52 of the Public Health Act, 1875. That section makes it unlawful for a sanitary authority to construct waterworks if there is in its district a waterworks company having power to supply the district with water able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority.

They also referred to section 55.

Swinfen Eady, Q.C., and *Gore Browne*, for the defendants.—The proposed works are not waterworks within the meaning of section 52 of the Public Health Act. The defendants are not undertaking in any way to supply the district with water, but are simply using it to clean their sewers. This is not a "dealing with water" contemplated by the Acts. The defendants can obtain water more cheaply in this way than by going to the plaintiffs.

NORTH, J.—The plaintiffs' case rests on this: that these are waterworks and that they have a monopoly—that is to say, that the waterworks which the sanitary board have established are waterworks within the meaning of the Act, which, therefore, the board had no right to erect without first giving the option to the plaintiffs of supplying the water that is required, which the plaintiffs are ready and willing to do. The answer to that is, that the defendants do require water, but they do not require the filtered article which the plaintiffs produce to sell. It is their duty to obtain water in the cheapest way they can, for the purpose of saving the rates imposed upon the ratepayers. The best thing they can do for this purpose is to take the water out of the Thames, and they have obtained leave to take it, and they can do it very much more cheaply than if they had to pay the waterworks company, who have only one set of mains for supplying water and who are bound to supply pure, wholesome drinking water in those mains, and who therefore, cannot possibly afford to let the defendants have it at the same price at which the defendants can take it for themselves in this way.

I come to that conclusion for this reason: that if the defendants could get water supply more cheaply than in the way the plaintiffs propose, I think it would be their duty to do so for the sake of the ratepayers. It is obvious that the expense they are incurring is because they see their way to saving money to the ratepayers by adopting the course which they are adopting. The only question is whether they are infringing the rights of the plaintiffs as to waterworks under the Public Health Act. It is admitted that the Waterworks Clauses Act and the special Act do not in any way prevent the defendants from doing what they are now doing. The case is put upon the provisions of the Public Health Act, 1875, only, at which we must now look. The Act is divided into parts, and at part 3 we have a division under the head of "sanitary provisions." First of all we come to the provision relating to sewerage and drainage, which is sub-divided again into regulations upon these points—sewage works within the district, sewage works without the district, and so on. The sections as to sewerage and drainage extend down to the 34th section. Then under a different heading they put "privies, waterclosets," &c. Then "scavenging and cleansing," and so on. The topic of the 51st section is "water supply," the 1st sub-section being "Powers of local authority in relation to water supply." What is "supply"? "Supply" I understand to mean the passing of water from persons who have it to persons who want it. I do not see how it could be said that supply of water means supplying "yourself" in the natural meaning of the words, especially when we come to look at the particular words used in this 51st section, which I am now going to read:—"Any urban authority may provide their district, or any part thereof, and any rural authority may provide their district or any contributory place therein"; that is, referring to other provisions of the Act, "or any part of such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may (1) construct and maintain waterworks, dig wells, and do any other necessary acts; and (2) take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any

water company; and (3) contract with any person for a supply of water."

Then comes the 52nd section: — "Before commencing to construct waterworks"—that means under the previous section, and the question is whether what is being done is the construction of waterworks under that previous section. In my opinion it is not—they are not providing their district, or any contributory place therein, or any part of such contributory place with a supply of water proper and sufficient for public and private purposes; they are only obtaining water and putting into their own sewers, which are their own property, the water that is necessary for the purpose of flushing those sewers, and which is never intended to go out of those sewers at all. It is not supplied to anybody, but it is to be contained in those sewers until the contents of the sewers are discharged where the matter discharged is chemically dealt with. Therefore, so far from supplying the water to the district or contributory place they are getting the water themselves for their own purposes, and using it for their own purposes only. No doubt persons who use the sewers have the benefit of having the sewers purified and kept clean in this sort of way, but that is all. Now the 52nd section says: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purpose for which and (as far as may be practicable) the extent to which water is required by the local authority." These words seem to me to be very important, because they show exactly what this is intended to effect. The sanitary authority may provide waterworks to supply water to its district. If they are lucky enough to have a pure well with a sufficient quantity of water in it they have nothing to do but to distribute it, otherwise they may have to take steps to procure it from a distance; but there may be another company already supplying that district, and they are not to be interfered with by a public board under the Act setting up rival works without having the chance of furnishing the supply themselves, and if they can supply what is required they are to have the option of doing so, and waterworks are not to be constructed to interfere with the supply of water by them. This and what follows shows clearly that what is contemplated is a local authority proceeding to supply water in the way in which the water company was in the habit of supplying it, and they are not to poach upon the preserves of the water company if the water company can do it. Then, to proceed with the 52nd section: "It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority." Then there is a provision as to settlement of any difference as to price to be charged by the local authority.

Still, the question remains as to what exactly construction of waterworks is, and as I read these sections they are waterworks for the supply of water, meaning to the persons who require the supply of water in the district, and not meaning to refer to what is merely taking water for the purposes of the body itself for its own purposes as distinguished from supplying it to other persons. It is not disputed that under the Act anybody may dig a well on his own land and there pump water for his own purposes, and it is not really disputed that this sanitary board may, if they please, dig a well in the garden of the workhouse and pump water from that for the supply of the workhouse. I do not see why, if they do that, they should not use it also for the purpose of watering their roads. How it can be said that taking it from the Thames for their own purposes is supplying water in the sense in which that phrase is used in the Act I do not understand. If one looks at the interpretation clause or at the subsequent sections under the head of water supply following upon the 51st and 52nd sections, I think it is clear that what I have stated is the meaning of the supply of water to which these sections relate. Then section 54 says: "Where a local authority supply water within their district, they shall have the same powers and be subject to the same restrictions for carrying water mains within and without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force."

That is to say, they may enter upon land and so on. Then the 55th section is an important one: "A local authority shall provide and keep in any waterworks constructed or purchased by them a supply of pure and wholesome water." And it is contended that under that the water to be used for cleansing the sewers must necessarily be of the same high class and quality as is required to be supplied to householders for the purpose of domestic consumption, and I think it would be absurd to suppose that it was necessary for the defendants here not to use for the purposes of their works any water except pure and wholesome water, because that is what it comes to. Supposing that the plaintiffs could not supply the quantity, and therefore the defendants were authorized to make these works, then they are bound by the 55th section to keep up and supply pure and wholesome water. That must mean water not such only as is required for sewers, but for the purpose of supplying the district. It seems to me to be carrying matters to an absurd conclusion. I do not intend to go through them, but the subsequent sections 56 and so on down to the 67th all contain various phrases showing what is meant by the phrase "supplying water," that it is supplying water to the general public in the whole district or part of the district to which it is supplied —to everyone who takes it—and it has no reference to such a case as the present.

In the present case I am of opinion that there is nothing in the Act which prevents the defendants from doing what they have done or are proposing to do, and I dismiss the action with costs.

Solicitors, *Batten, Profitt, & Scott; Trinder & Capron*, for *Paine & Brettell*, Chertsey.

Q. B. Div.
(Mathew and Kennedy, JJ.) } August 7, 1894.

THE VESTRY OF THE PARISH OF ST. MARTIN-IN-THE-FIELDS v. BIRD. (a.)

Local government—Drainage—Lowther Arcade—Row of houses with common roof—"One building"—"Premises within the same curtilage"—"Drain"—"Sewer"—Liability for repairs—Metropolis Local Management Act, 1854-5 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 250.

The drainage of the Lowther Arcade (a passage with a gate at each end, arched over by a common roof, and containing a range of twenty-five houses and shops) is re-

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

moved by a construction running down the centre of the arcade, which receives the draining of each house and shop.

Held, that the construction was not a "drain"; that the Arcade was not "one building" or "premises within the same curtilage"; and that the construction was a "sewer," for the repair of which the local authority and not the owner was liable under the Metropolis Local Management Act, 1854-5 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, *and* 250.

Special case.

The plaintiffs, the Vestry of the Parish of St. Martin-in-the-Fields, claimed a declaration that the defendant, the owner of the Lowther Arcade, was liable to execute certain works for the abating of a nuisance in connection with the drainage of the Arcade.

The Arcade is a passage arched over by a common roof, with a range of houses and shops, which are approached by the passage. The passage is used in common by the occupiers of the houses and shops, and is essential to the enjoyment of such houses and shops. There are gates at each end of the passage, enabling it to be closed.

The drainage of the Arcade is carried away by a construction of brickwork, which runs down the centre of the premises and receives in its course the drainage of each house or shop. The plaintiffs (the vestry) alleged that certain repairs in the drainage arrangements were necessary, and called upon the defendant (the owner) to carry them out, on the ground that either the Arcade was "one building," and the drainage arrangement a drain "for the drainage of one building only," or that the Arcade consisted of "premises within the same curtilage," and that the drainage arrangement was "made merely for the purpose of communicating with a cesspool or other like receptacle."

By the Metropolis Local Management Act, 1854-5 (18 & 19 Vict. c. 120), s. 68, sewers (except main sewers) are vested in vestries and district boards, and by section 69 vestries and district boards are liable to repair, &c., all sewers vested in them.

By section 250: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed . . . and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain,' interpreted as aforesaid, applies."

Beavan, for the vestry (plaintiffs).—It is necessary to show that the Arcade is "one building only" or "premises within the same curtilage." It is submitted that the Arcade is both, and that the construction is a "drain." It is "one building," in the same way as is a college, the Crystal Palace, or a railway station. The distinction drawn in sections 68 and 69 of the Act is that a "drain" is an arrangement for one building or premises within the same curtilage, while a "sewer" is an arrangement for two or more buildings. If not "one building," the arcade is "premises within the same curtilage": Turner, L.J., in *Lethbridge* v. *Lethbridge*, 10 W. R. 449, 4 De G. F. & J. 35, at p. 40; Sheppard's Touchstone, p. 94; Giffard, V.C., in *Marson* v. *London, Chatham, and Dover Railway Co.*, L. R. 6 Eq. 101, 17 W. R. Ch. Dig. 149; and Romilly, M.R., in *Read* v. *Read*, 15 W. R. 165. All these shops and houses belong to one owner, and stand on his private ground. They are separated from the street by gates. The owner must, therefore, make the necessary repairs.

Macmorran, for the owner (defendant).—The drainage arrangements of the Arcade are vested in the local authority, and the plaintiffs are liable to repair under sections 68 and 69 of the Act. Each of the houses and shops has a curtilage of its own. The fact of there being a common passage only makes the case similar to a private street. The premises are distinct, separately occupied and rated, and separately drained.

He cited *Travis* v. *Uttley*, 42 W. R. 461 [1894] 1 Q. B. 233; *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580 [1893] 2 Q. B. 135.

Beavan replied.

MATHEW, J.—I think that this drainage construction is vested in the local authority under the Metropolitan Local Management Act, 1854-5, and that the owner of the Lowther Arcade cannot be called upon to repair.

The Act declares, in section 250, that what is not a "drain" is a "sewer." This is not a "drain" under the Act unless it is "used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." It is admitted here that there has been no order of a vestry or district board, and the latter part of section 250 does not apply to this case.

Is this a "drain" within the meaning of that section? I cannot bring myself to think that the Arcade is anything but a row of shops occupied in a particular way to insure privacy. The mere fact of the existence of gates does not prevent a separate tenancy. Does it cease to be a row of shops because they are situated in a passage? I cannot see why it should. Nor does the shelter of one roof make the Arcade "one building." Then, is it "premises within the same curtilage"? I think not. Each shop stands by itself, and has its own curtilage. It would be extravagant and extraordinary to hold that there is one curtilage because there are gates at each end of the passage. The lessee of the Arcade is exempt from liability, and the duty of repairing falls on the vestry.

KENNEDY, J., concurred.

Vestry held to be liable.

Solicitor for the plaintiffs, *Fladgates.*

Solicitors for the defendant, *Shepheards & Bird.*

Q. B. Div. (Mathew and Kennedy, JJ.) — July 27; Aug. 6, 1894.

In re AN ARBITRATION BETWEEN THE LONDON AND NORTH-WESTERN RAILWAY CO. AND LORD GERARD. (*a.*)

Railway company—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77-85—*Compensation—Coal mines lying under or near projected railway—Purchase by the company of other strata besides the surface soil.*

The provisions of sections 77-85 *of the Railways*

(*a.*) Reported by T. H. WALKER, Esq., Barrister-at-Law.

Clauses Consolidation Act, 1845, *are not restricted to the case of a company purchasing the surface soil only; and where a company includes in its notice to treat all sand, stone, clay, and gravel within and under the lands required, the coal owner cannot obtain compensation in respect of his mines in the arbitration under the notice to treat, but must give the notice and take the steps prescribed by section* 78 *of the Act of* 1845.

This was a rule *nisi* obtained at the instance of the London and North-Western Railway Co., calling upon Lord Gerard to show cause why a submission to arbitration should not be revoked on the ground that the arbitrator had wrongly admitted certain evidence.

The company had given Lord Gerard notices to treat in reference to certain lands of which he was the owner, and to the stone, sand, clay, and gravel within and below them. Several seams of coal of great value ran through the land, and in the arbitration under the notice to treat Lord Gerard sought to obtain compensation for the interference with his power of working his mines and for the severance of them which the railway works would bring about. The arbitrator admitted evidence on these heads, and the present proceedings were brought to test at the earliest moment and in the simplest manner the admissibility of such evidence, it being contended that such compensation could not be recovered in this arbitration, but must be sought under the provisions of the sections (77-85) of the Railways Clauses Consolidation Act, 1845, which specially deal with the question of mines adjacent or subjacent to a railway.

Sir R. Webster, Q.C., Moulton, Q.C., and *Pollard*, on behalf of Lord Gerard, showed cause.

Sir H. James, Q.C., Green, Q.C., and *Page*, appeared for the railway company.

The following cases were referred to in the course of the argument:—*Elliot* v. *North-Eastern Railway Co.*, 11 W. R. 604, 10 H. L. 333; *London and North-Western Railway Co.* v. *Evans*, 41 W. R. 149, [1893] 1 Ch. 16; *Errington* v. *Metropolitan District Railway Co.*, 30 W. R. 663, 19 Ch. D. 559; *Ruabon Brick and Terra Cotta Co.* v. *Great Western Railway Co.*, 41 W. R. 418, [1893] 1 Ch. 427; *Great Western Railway Co.* v. *Bennett*, 15 W. R. 647, L. R. 2 H. L. 27; *Holliday* v. *Mayor, &c., of Wakefield*, 40 W. R. 129, [1891] A. C. 81

Cur. adv. vult.

The judgment of the COURT (MATHEW and KENNEDY, JJ.) was delivered by

KENNEDY, J.—In this case the application is in form to revoke a submission to arbitration. In reality it is made for the purpose of obtaining a decision from the court as to the validity of certain heads of claim which one of the parties to the arbitration has put forward, and which the other party asserts to be improper. In order that the point may be raised before us, the claimant has adduced, as early as possible in the arbitration proceedings, and the learned arbitrator has received, certain evidence, which is admissible only if the disputed heads of claim are proper; and thereupon the question of law which the parties desire to have authoritatively decided before further expense is incurred in the arbitration has been raised in its simplest and most convenient form by the application which is now before us.

The material facts are these: Lord Gerard is the tenant for life of certain lands having subjacent mines near Wigan, through which passes the line of the London and North-Western Railway Co. In reference to a portion of these lands the railway company gave a notice to treat on the 3rd of June, 1889; and in reference to another portion of them, the railway company gave a notice to treat on the 23rd of July, 1891. The agreement of reference, reciting these notices, bears date May 7, 1894. The only material point in regard to these notices—and indeed it is this point that gives rise to the present dispute between the parties—is that in each notice the railway company states that it requires to purchase and take, not merely the lands set out in the schedule to the notice, but also "the stone, sand, clay, and gravel within and under the same." In substance, that is to say, the railway company requires to purchase and take the surface lands, and also all the strata underneath the lands, with the one important exception of the coal, several seams of which run under parts of the lands in question, and are there as yet unworked.

Lord Gerard claims, and he has tendered evidence to the learned arbitrator in support of this claim, that he is entitled to receive present compensation in consequence of being bound in law to leave unworked large quantities of coal, both subjacent and adjacent to the land (including in the term "land" those minerals which are specified in the notices to treat), in order to afford the necessary vertical and lateral support to such lands and minerals, and also in consequence of it being impossible to work the coal (as he alleges) without taking away part of the land and minerals actually sold. He also claims present compensation, on the ground that, in consequence of the railway company taking the minerals specified in the notice to treat, he will have (as he alleges) no power or right to remove or pass through such minerals, and will thus be prevented from working certain of the coal belonging to him, either at all, or at the same cost as that at which he might otherwise have worked it.

The evidence objected to by the railway company and admitted by the learned arbitrator is evidence in support of these claims of Lord Gerard. From a pecuniary point of view, as the claims under these heads amount to upwards of £180,000, the matter is one of great importance. If Lord Gerard's contention is well founded, the effect of the notice to treat is to make the railway company pay at present not only the price of the lands and the clay, sand, stone, and gravel specified in the notices, but also compensation in respect of all the subjacent coal, and, further, of the adjacent coal to the extent of the buttresses required to support the minerals included in the notices, besides additional compensation for severance by reason of the property taken by the railway company preventing the coal on the one side of the line from being worked from pits on the other side, and so necessitating the sinking of pits on both sides of the line.

The argument put forward by Lord Gerard's counsel is this:—"The railway company is not merely taking 'lands'; if it was," say they, "we conceive that these claims could not be put forward now, or in this arbitration. The matter would be one which could be dealt with only when the owner of the coal seeks to win his coal under and near the railway, and it would then be dealt with under the provisions 'in respect to mines lying under or near the railway' which are contained in the 77th and following sections of the Railways Clauses Act, 1845. But in this case the railway company is taking, besides 'lands,' the stone, sand, clay, and gravel within and under the lands; all the strata, in effect, under the surface, except the coal. The effect of this is that, as regards the subjacent coal, the owner of the coal cannot get any of it. It is so interposed between the strata which the railway company has bought from us that

he cannot win it without removing and taking away portions of those strata, and he cannot lawfully remove and take away that which is not his, but the company's property. To do so would be a wrongful act. In the next place, apart from any question as to letting down the surface of the lands, the owner cannot get his coal without letting down the strata which the railway company has bought from him. With the grant to the company of the stone, sand, clay, and gravel, there has passed to the company the right to have these strata supported. Therefore the coal-owner cannot lawfully get the coal, either subjacent or adjacent, by which they are supported. Lastly, by reason of the purchase of the specified minerals, as well as the lands, the coal-owner cannot work the coal on one side of the railway, as he might otherwise have done, from the other side without committing a trespass. Therefore he must sink pits on both sides. For all these losses he is entitled to be compensated immediately."

It appears to us that these contentions are not well founded in law. In our judgment, the provisions of the 77th and following sections of the Railways Clauses Act, 1845, apply not merely where no mines and minerals are taken by the railway company with the lands, but in every case in which any mine or mineral is not taken with the lands.

The 77th section enacts that, unless they are expressly included, subjacent mines of coal, ironstone, slate, or other minerals, are not included in a purchase of "lands." The 78th section enacts that if the person entitled to any mines or minerals under or near the railway or the railway works wishes to work them he must give the railway company a certain notice of his intention, and if the railway company deem it needful for the safety of their works to prevent such getting of the mines or minerals, the railway company may prevent the owner from getting them, paying him compensation for such prevention. If the railway company is not willing to entertain the question of compensation, then under the 79th section it is lawful for the mineowner to work "the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate."

The 80th, 81st, and 82nd sections, as to the effect of which there is an instructive passage in the judgment of Pearson, J., in *Midland Railway Co. v. Miles*, 34 W. R. 136, 30 Ch. D., at pp. 639, 640, 641, deal with the case of severance by reason of the railway company having, for the safety of their works, prevented the working of mines under their railway by purchasing them, and so severed mines on the one side of their railway from mines on the other side. In such a case the owner of the severed mines may make all necessary mining communications through the barrier which the railway company's action has created, but not over the railway or railway works, or so as to injure them or impede the passage thereon. The railway company, on its part, is bound to compensate the mineowner for additional cost and loss thrown upon him in the getting of his minerals and for all coal which he is altogether prevented from getting by the making and maintenance of the railway and railway works. The railway company is further bound to compensate any third party who is the owner of surface-land injuriously affected by the mineowner's making the mining communications for loss or damage caused to such third party thereby.

Sections 83, 84, and 85 contain provisions for securing to the railway company means to detect and prevent any improper working of mines which threatens the safety of their works.

We see nothing in these sections to render their provisions inapplicable to a case in which the railway company has, as in the present case, purchased with the "lands" certain specified subjacent minerals, but has left the others to the owner; nothing which confines their provisions for the adjustment of the relations between the railway company and the owner of subjacent minerals to the purchase of "lands" only. We fail to find any ground for the distinction, contended for by Lord Gerard's counsel, between letting down surface soil and letting down minerals bought by the company with the soil, or for the argument that Lord Gerard would be a wrongdoer if in properly working his works he interfered, by removal or otherwise, with the clay or sand which the company has bought under the surface, when he would not be a wrongdoer if he interfered with the soil on the susface.

The railway company can legally acquire either surface or minerals for the purpose of their undertaking and for that purpose only, and the scheme of these statutory provisions appears to us clearly to be that the owner of any subjacent mineral, not purchased by the company, may lawfully get his mineral by proper working, whatever else the company may have bought, subject only to the due protection of the works of the undertaking, and if, and so far as, such due protection prevents his getting his mineral or renders it more costly, he is to be compensated when the time for working under or near the railway works arrives, and not before.

For these reasons, in our judgment, these claims of the respondent to this application fail, and the learned arbitrator should have rejected the evidence tendered in support of them.

We will only add that several cases were cited to us in the course of the argument, but we do not think it would serve any useful purpose to refer to them particularly. None appear to us to be authorities directly in point.

Rule made absolute.

Solicitors for Lord Gerard, *Meyrell & Pemberton.*

Solicitors for the London and North-Western Railway, *C. H. Mason.*

Q. B. Div. (Mathew and Kennedy, JJ.) — Aug. 3, 1894.

LONDON COUNTY COUNCIL *v.* WORLEY. (*a.*)

Metropolis — Building — Erection of buildings of excessive height—Continuation of building—Penalties for a continuing offence—Complaint within six months —Metropolis Management Amendment Act, 1862 (25 *&* 26 *Vict. c.* 102), *ss.* 85, 107—*Summary Convictions Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

By the Metropolis Management Amendment Act, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 85, "*no building . . . shall be erected on the side of any new street of a less width than fifty feet which shall exceed in height the distance from the . . . front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works*" (*now the London County Council*); "*nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; . . .*

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

and every person committing any offence under this enactment shall be liable to a penalty of five pounds, and in case of a continuing offence to a further penalty of forty shillings for every day during which such offence shall continue after notice from the said board" (now the London County Council).

By section 107 the complaint respecting any offence under the Act must be made "within six months next after the commission or discovery of such offence."

The builders of a house having been convicted in October, 1893, for the offence of "erecting" a building of excessive height under section 85 (the owner knowing that the offence was being committed), and the builders having completed and handed over the house to the owner on the 8th of February, 1893, the London County Council sought to recover penalties from the owner under section 85 for that he, "having on the 31st day of December, 1893, and on each of the then succeeding days up to and including the 7th day of March, 1894, . . . committed an offence . . . by erecting a building" of excessive height, "unlawfully did continue the said offence . . . by continuing the said building, . . . and by permitting and suffering the said building to continue erected."

Held, that the penalties were recoverable from the owner.

Case stated by a metropolitan police magistrate.

On the 7th of March, 1894, the appellants summoned the respondent before a metropolitan police magistrate for that he "having on the 31st day of December, 1893, and on each of the then succeeding days up to and including the 7th day of March, 1894, . . . committed an offence under the 85th section of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), to wit, by unlawfully erecting a building on the south side of . . . a new street of a less width than 50 feet exceeding in height the distance from the . . . front of such building to the opposite side of such street without the consent . . . of the London County Council, unlawfully did continue the said offence, to wit, by continuing the said building so erected, and by permitting and suffering the said building to continue erected." It was proved that the building had been erected for the respondent as owner, and that it had been carried above the height allowed by section 85 of the abovementioned Act under his directions, and after notice from the appellants to the builders, Messrs. Lawrance & Sons, that proceedings would be taken if the height were exceeded. The notice was brought to the knowledge of the respondent. The builders were convicted of the offence of "erecting" the building in October, 1893, after a decision of the Court of Queen's Bench. The builders gave up possession to the respondent on the 8th of February, 1893. On the 7th of September, 1893, the respondent applied to the appellants to give their consent *nunc pro tunc* to the erection of the building beyond the statutory height, which the appellants refused on the 16th of October, 1893.

A penal notice was served on the respondent on the 23rd of December, 1893, requiring him to comply with the requirements of the law in respect of the building, subject to the penalty and continuing penalties provided in the statute. A similar notice had been served on the builders and brought to the notice of the respondent on the 7th of October, 1892. It was contended for the respondent, before the magistrate, that he was not liable to any penalty for the continuing offence, as he had not been summoned for or convicted of the original offence, and proceedings had not been taken against him within six months of the commission or discovery of the offence, as required by the 25 & 26 Vict. c. 102, s. 107, and the 11 & 12 Vict. c. 43, s. 11. For the appellants it was said that the limitation of time did not apply in the case of a continuing offence; that the respondent had in fact committed the original offence; and that he was liable to the continuing penalties for continuing the offence after the penal notice served on him on the 23rd of December, 1893.

The magistrate held that section 107 of the 25 & 26 Vict. c. 102 and section 11 of the 11 & 12 Vict. c. 43 applied, and that the summons was out of time. He stated a case.

Poland, Q.C., and *Avory*, for the appellants.—The offence of the respondent was a continuous one, and the appellants are entitled to recover from him the continuous penalties under section 85 of the Act.

They cited *London County Council* v. *Lawrance & Sons*, 41 W. R. 688, [1893] 2 Q. B. 228; *Wallen* v. *Lister*, 42 W. R. 318, [1894] 1 Q. B. 312; *Metropolitan Board of Works* v. *Anthony & Co.*, 33 W. R. 166, 54 L. J. M. C. 39; *Rumball* v. *Schmidt*, 30 W. R 949, 8 Q. B. D. 603; *Higgins* v. *Guardians of Northwich Union*, 22 L. T. 752; *Reg.* v. *The Catholic Life and Fire Assurance Institution*, 48 L. T. N. S. 675, 31 W. R. Dig. 140.

Dickens, Q.C., and *C. Lloyd*, for the respondent.—If the appellants' contention is right, the County Council might wait for twenty years and then sue for the accumulated penalties. The complaint was not made "within six months next after the commission or discovery" of the offence as section 107 requires. Section 85 refers to "the" offence—*i.e.*, the offence of erection. That offence was completed when the building was roofed in, in July 1892, and the penal notice was not served upon the respondent till December, 1893.

Poland, Q.C., replied.

MATHEW, J.—We have made every effort to entertain a doubt in this case, and have failed to do so. It seems to me that the construction of sections 85 and 107 of the Metropolis Management Act, 1862, is perfectly clear. By section 85 "no building . . . shall be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the . . . front of such building to the opposite side of such street" without the consent of the London County Council, "nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance." Do those words contemplate only the erection of a building above a certain height, or do they also treat as an offence the erection and continuation of such a building? The subsequent part of the section places the matter beyond doubt, for it enacts that "every person committing any offence under this enactment shall be liable to a penalty of five pounds, and in case of a continuing offence to a further penalty of forty shillings for every day during which such offence shall continue after notice from the said board."

The section is directed against anybody wh either builds or continues to build. Building and continuing a building are both treated as offences. By section 107 the complaint must be made "within six months next after the commission or discovery of the offence." In this particular case the offence charged against the respondent was that of continuing a building, and a penalty was claimed for each day during which the offence continued. It seems to me that those penalties are recoverable. The only limitation upon them is the limitation of period. The Act does not allow the recovery of penalties for an offence committed more than six months before

the complaint. As I understand Mr. Dickens, he contends that the offence cannot be committed by anyone but the builder, and the builder is the only person who can be proceeded against. If that were so, a mode of escape from the Act would be provided; for, to escape liability, a builder need only sell the building. Mr. Dickens further urges upon us that Mr. Poland's construction of the Act is unreasonable, because the London County Council might lie by and delay serving a notice upon the offender till the penalties had accumulated. It is true that the Act does not prevent their taking such a course, but we have no reason for supposing that the London County Council will not take their proceedings promptly.

The case must go back to the magistrate with a direction to convict.

KENNEDY, J.—I have come to the same conclusion, though not without hesitation; for there are possible cases in which, for the reasons pointed out by Mr. Dickens, hardship might result. I think the decision in *Metropolitan Board of Works* v. *Anthony* governs the case.

Case sent back to magistrate to convict.

Solicitors for the appellant, *Poole & Robinson.*

Solicitor for the respondent, *Blaxland.*

Q. B. Div.
(Wills and Kennedy, JJ.) July 16, 1894.

LONDON COUNTY COUNCIL *v.* HUMPHREYS (LIMITED). (*a.*)

Metropolis—Management—Metropolis Management and Building Acts Amendment Act, 1882 (45 *Vict. c.* 14), *s.* 13—*Wooden structure or erection of a movable or temporary character—Wooden building erected for the purpose of exhibition and sale.*

A building constructed of wood and corrugated iron, and capable of being easily moved, was placed by a firm whose business it was to manufacture such buildings upon a piece of land adjoining their manufactory within the metropolis. It was placed there for the purpose of exhibition, with a view to its being purchased and removed by the purchaser.

Held, that, as the building was not intended for use on the spot where it was placed, but was placed there for sale as a part of a tradesman's wares, it was not an erection of a movable or temporary character within section 13 *of* 45 *Vict. c.* 14, *and no licence from the London County Council was required for its erection.*

Case stated by a metropolitan police magistrate.

Complaint was made to the magistrate on the 22nd of February, 1894, on behalf of the London County Council, that the respondents, on the days between the 17th of October, 1893, and the 22nd of February, 1894, at a place within the metropolitan police district, did unlawfully continue erected and set up a wooden structure of a movable and temporary character (called a bungalow) without a licence in writing first had and obtained from the London County Council as successors in law to the Metropolitan Board of Works, contrary to section 13 of the 45 Vict. c. 14 and 51 & 52 Vict. c. 41.

The facts were as follows:—The respondents were manufacturers of and dealers in buildings constructed of wood and corrugated iron, and carried on business at Knightsbridge. Their premises included a piece of land where for two years numerous cottages, bungalows, stables, &c., constructed as stated, had been shown and sold to customers.

The bungalow complained of was erected on this piece of land in March, 1893, and continued there until February, 1894, when it was sold and removed. It was 31 feet long, from 22 to 28 feet wide, the height to the eaves being 9 feet, and to the ridge of the roof 17 feet. The floor was of wood, the sides and ends of wooden uprights and cross pieces, lined on the inside with match-boarding, and covered on the outside partly with corrugated iron and partly with wood. The roof was formed of wooden rafters covered with corrugated iron. The interior was divided into four rooms by wooden partitions. It rested on the ground, and had no foundations nor any chimney or flue.

It was set up for sale and to attract purchasers and as an advertisement, but more particularly as a specimen building to be seen by intending customers.

No licence for the erection of the bungalow was ever applied for or held by the respondents.

At the hearing before the magistrate it was contended for the appellants that the bungalow, being, in fact, a wooden structure, or erection of a movable or temporary character, came within section 13 of 45 Vict. c. 14, and that, being such as it was, the purpose for which it was erected was wholly immaterial. The respondents contended that they had merely exhibited on their own premises an article which they had for sale, and that the section did not apply to such a case.

The magistrate found that the bungalow was a wooden structure of a movable or temporary character placed there merely for the purpose of sale and as a specimen of the wares sold by the respondents, and he was of opinion, as a matter of law, that, inasmuch as it was merely exhibited by the respondents as wares which they had for sale, upon the true construction of section 13 of 45 Vict. c. 14, the respondents had committed no offence against the section. He therefore dismissed the complaint, subject to this case.

The question for the court was whether the magistrate's decision was right. The Act 45 Vict. c. 14 confers certain powers on the Metropolitan Board of Works with respect to streets and buildings. Section 13 provides as follows:—"It shall not be lawful for any person to erect or set up in any place any wooden structure or erection of a movable or temporary character (unless the same be exempt from the operation of the first part of the Metropolitan Building Act, 1855) without a licence in writing first had and obtained from the board for the erection or setting up of such structure or erection in such place, and every such licence may contain such conditions with respect to such structure or erection and the time for which it is permitted to continue in such place as the board may think expedient": a person infringing the provisions of the section is made liable to a penalty. By virtue of the Local Government Act, 1888, the London County Council are the successors of the Metropolitan Board of Works.

F. F. Daldy, for the appellants.—The decision of the magistrate was wrong; the bungalow is a wooden structure of a movable and temporary character within the meaning of section 13. No hard and fast line can be drawn as to what is a substantial structure within the section and what is to be considered as the wares of a tradesman; but some guidance on the point can be obtained from the decisions of the court in *Hall* v. *Smallpiece*, 59 L. J. M. C. 97; *London County Council* v. *Candler*, 60 L. J. M. C. 114; and *London County Council* v. *Pearce*, 40 W. R. 543, [1892] 2 Q. B. 109, and, according to the principles underlying those decisions, the respondent's building is within the section. The county council do not seek to prohibit the exhibition of these buildings for

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

the purposes of sale or to interfere with the respondents' business, but it is right, for the protection of the public against fire, that the council should be able to impose conditions subject to which structures of this kind should be permitted to be erected and maintained.

He also cited *Stevens* v. *Gourley*, 8 W. R. 85, 7 C. B. N. S. 99.

Poland, Q.C. (*Travers Humphreys* with him), for the respondents.—This building is not within the provisions of section 13. It is merely a part of the wares of the respondents exhibited by them in such a way as to allow their customers to inspect them. It is necessary to the respondents' business that they should do this, and it would be unreasonable to oblige them and vendors of summer-houses and similar buildings to obtain licences from the county council. The cases cited have no bearing upon the present question, and the facts are sufficient to exclude this building.

Daldy replied.

WILLS, J.—This case is one of some difficulty. There is no doubt that the structure complained of comes within the actual words of the section, but the authorities cited show that that in itself is not conclusive. The question is whether the section is intended to apply to structures which are not purposed to be used where they stand, but are really part of a manufacturer's stock-in-trade. It is impossible to draw a strictly logical line, but the question must be answered in each case by considering what is the purpose of the structure and what is the object of placing it where it is placed. If the object is merely exhibition, with a view to removal as soon as a purchaser is found, then the principle which underlies the cases cited applies, and the structure is outside the provisions of the Act.

KENNEDY, J.—I am of the same opinion. I think on the whole that we are not compelled to hold that this temporary structure comes within the operation of the Act. It would be very difficult to frame a definition of what buildings are within the Act, but in the present case there is one salient point. The building was on the respondents' premises solely for the object of immediate sale; it was not intended for use on the spot where it was erected. No doubt the Act is intended to apply to movable and temporary buildings, but the building must be intended for use on the spot. If the Act be held to cover the present case no one could expose for sale outside their business premises any summer-house or any kind of habitation without a particular licence from the county council in each case. I shrink from holding that that is necessary. For these reasons I think that the decision of the magistrate must be affirmed.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitor for the respondents, *F. Duerdin Dutton.*

C. C. R.
(Lord Russell of Killowen, C.J., Mathew, Day, Vaughan Williams, and Kennedy, JJ.) — July 28, 1894.

THE QUEEN *v.* SILVERLOCK. (*a.*)

Criminal law—False pretences—Sufficiency of indictment—Allegation of false pretences made "to her Majesty's subjects"—Evidence—Handwriting—Witness not a professional expert.

A prisoner was convicted for obtaining a cheque by false pretences upon a count in an indictment which alleged that he inserted an advertisement in a newspaper and thereby "did falsely pretend to the subjects of her Majesty the Queen," &c., and by means of such false pretence did unlawfully obtain from A. B. (the prosecutrix), &c.

Held, that the count sufficiently stated the offence, and that the prisoner was rightly convicted.

Reg. *v.* Sowerby, 42 *W. R.* 608, [1894] 2 *Q. B.* 173, *distinguished.*

Per Mathew, J.—*If the averment that the false pretence was made to the prosecutrix was imperfect, the imperfection was cured by verdict.*

A solicitor who had made a study of handwriting, but was not by profession an expert in handwriting, gave evidence that, in his opinion, certain documents were written by the prisoner.

Held, that the evidence was admissible.

Case stated for the opinion of the court by the chairman of the Worcestershire Quarter Sessions.

The prisoner was charged with having obtained a cheque for £5 from Rosa Alice Coates.

The indictment contained two counts. The first count, which is not material for the purposes of this report, alleged that the prisoner had falsely pretended to Rosa Alice Coates that he was in want of a housekeeper, &c.

The second count, upon which the verdict was taken, and which was now in question, stated that "the said George Silverlock on the seventeenth day of May in the year aforesaid, by inserting and causing to be inserted in a certain newspaper called the *Christian World* a fraudulent advertisement in the words and figures following—that is to say, 'House-keeper wanted for branch business establishment in Midlands; one from country preferred.—Address S. C., *Christian World* Office,' did falsely pretend to the subjects of her Majesty the Queen that he, the said George Silverlock, then required a housekeeper for a branch business establishment, by means of which said last-mentioned false pretence the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security, to wit, an order for the payment of money, commonly called a banker's cheque, and of the value of five pounds, with intent to defraud, whereas in truth and in fact he, the said George Silverlock, did not then require a housekeeper for a branch business establishment in the Midlands, as he, the said George Silverlock, well knew at the time when he did so falsely pretend as last aforesaid against the form of the statute," &c.

Before the prisoner pleaded, his counsel applied to have the second count of the indictment quashed, on the ground that it was not stated therein that the false pretence was made to any definite person, but to all the subjects of her Majesty the Queen, and that, therefore, it was bad in law, on the authority of *Reg.* v. *Sowerby*, 42 W. R. 608, [1894] 2 Q. B. 173. The prosecution contended that in the offence of false pretences by advertisement, no specific person could be named, and they relied on the cases of *Reg.* v. *Cooper*, 24 W. R. 279, 1 Q. B. D. 19, and *Reg.* v. *Sargent*, 39 J. P. 760, and further contended that, even if the second count was bad in law, the first count would still be good in law. The chairman did not consider that the point had been taken in *Reg.* v. *Sowerby*, and overruled the objection, subject to the opinion of the court.

It became necessary to prove that certain documents were in the handwriting of the prisoner. To do this the prosecution called a witness, who pro-

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

duced a letter and envelope that he had seen the prisoner write, and a letter that the prisoner had told the witness was in his (the prisoner's) handwriting.

It was then proposed to prove a certain draft advertisement of "S. C." and certain letters alleged to be in the prisoner's handwriting by comparison of the handwriting in such draft advertisement and letters with that of the admitted handwriting of the prisoner, and the solicitor for the prosecution was called as an expert for this purpose. Counsel for the prisoner objected that the solicitor was not an expert, and could not give evidence as to his opinion, and cited the case of *Reg.* v. *Harvey*, 11 Cox C. C. 546, and Blackburn, J.'s *dictum* therein, that a policeman was not an expert. The solicitor himself said that he had, quite apart from his professional work, for some years—*i.e.*, since 1884—given considerable attention and study to handwriting, and especially to old parish registers and wills; he said he had on several occasions professionally compared evidence in handwriting, but had never before given evidence as to handwriting. He stated that he had formed an opinion that the prisoner was guilty before he began to compare the handwriting.

The chairman overruled the objection and admitted the evidence, on the ground that all the objections went to the weight, not to the admissibility, of the evidence, and that there was nothing in the Act 28 & 29 Vict. c. 18 which makes it necessary to have the evidence of handwriting given by a professional expert, and that anyone who had studied handwriting was competent to give evidence, the weight to be given to such evidence being a matter for the jury.

The jury convicted the prisoner, and the chairman stated this case for the opinion of the High Court on the following questions of law:—

1. Whether the indictment for false pretences by advertisement must allege a specific person to whom the false pretence was made, or will an indictment for false pretences by advertisement alleging a false pretence to all the Queen's subjects, be good in law?

2. Whether it is necessary, in the case of proving handwriting by comparison, for the person who draws attention to the points of resemblance to be a professional expert, or a person whose ordinary business leads him to have special experience in questions in handwriting, or will the evidence of any person who has, or states he has, for some years studied handwriting be admissible for that purpose?

If the court should be of opinion that the first part of the first question should be answered in the negative and the second in the affirmative, and the first part of the second question in the negative and the last part in the affirmative, the conviction was to stand, otherwise to be quashed.

By 28 & 29 Vict. c. 18, s. 8 (which by section 1 applies to all courts of criminal judicature), "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Le Marchant, for the defendant.—The second count is bad for want of an allegation of the person to whom the false pretence was made: *Reg.* v. *Sowerby*. An allegation that it was made to all the Queen's subjects is too vague and is insufficient. Secondly, the evidence of the solicitor was not admissible under 28 & 29 Vict. c. 18, s. 8. In order to give evidence on matter of opinion a witness must be not only skilled, but he must be skilled by virtue of his business—he must be an expert: *Reg.* v. *Harvey*; *Reg.* v. *Wilbain*, 9 Cox C. C. 448. The study of handwriting is no part of a solicitor's business, and the study of an art by an amateur does not make him capable of giving evidence upon it: *Bristow* v. *Sequeville*, 5 Ex. 275, where a layman who had studied foreign law in a foreign university was held incapable of giving evidence as to the law of the foreign country.

He also cited *Rowley* v. *London and North-Western Railway Co.*, 21 W. R. 869, L. R. 8 Ex. 221; Best on Evidence, 8th ed., p. 467; Stephen on Evidence, 4th ed., p. 58; Taylor on Evidence, 8th ed., s. 1870.

Vachell, for the prosecution, was called upon as to the first point only.—The count is good. It sets out the actual facts instead of alleging a legal fiction. It would have been incorrect to allege that the false pretence was made to a particular person, for when the advertisement was sent to the paper there was no particular person to whom it could be addressed. It was addressed to all the world, including the prosecutrix, and the count sufficiently alleges that the false pretence was made to and the money obtained from her. *Reg.* v. *Sowerby* is not in point, for there was in that case no averment of the person from whom the money was obtained or the person to whom the false pretence was made.

He referred to *Reg.* v. *Cooper*.

Lord RUSSELL OF KILLOWEN, C.J.—I am of opinion that this conviction should be affirmed. The prisoner was tried at quarter sessions upon an indictment containing two counts. The first count states in an unobjectionable way that the defendant made a false pretence to Rosa Alice Coates, that it was false to his knowledge, and that on the faith of it he obtained from her a cheque for £5. The second count, which alone we have to consider, alleges that he inserted an advertisement in a newspaper, and it sets out the advertisement and avers that by means of the advertisement he falsely pretended to the subjects of her Majesty the Queen that he required a housekeeper, by means of which false pretence he obtained the cheque from Rosa Alice Coates. At the trial the second count was objected to, but no objection was, or could have been, taken to the first count. As, however, the verdict was taken generally, and not separately on each count, the conviction must be quashed if the second count is bad.

There is no doubt as to what are the essentials of this offence: there must be a false pretence made to a definite person, and it must be proved that such person on the faith of the false pretence parted with his money or goods. Those essentials must be stated in the count charging the offence, and the question here is whether the second count complies with these conditions. I cannot say that I have felt no hesitation upon the matter, but upon the whole I think that the count does sufficiently state the offence. The advertisement is addressed to all persons to whose knowledge it may come, and if a particular person, after seeing or hearing it, acts upon it, it becomes an advertisement to that particular person who is one of the class of persons for whom it was intended. Does that sufficiently appear in this count? I think that it does; it states that the defendant procured the insertion of the advertisement, that by so doing he made a false pretence to her Majesty's subjects, and it proceeds with the important averment that by means of that false pretence he obtained a cheque from Rosa Alice Coates. I think, therefore, that this count does satisfy the requirements of the law by stating the essential conditions of the offence, although I feel bound to add that it is loosely, inartistically, and anything but clearly drawn.

The case of *Reg.* v. *Sowerby* was referred to during the argument. We should, of course, regard that decision, if in point, as a binding authority, but when it comes to be examined it proves to be no authority at all for the defendant's contention. In that case two essential averments were wanting. There was no allegation as to the person to whom the false pretence was made, whereas here it is alleged to have been made to all the Queen's subjects, an allegation which becomes particular as regards the particular person who acts upon it; and, secondly, there was no allegation as to the person from whom the money was obtained, an averment which appears in the count under consideration. The decision in *Reg.* v. *Sowerby*, therefore, only came to this, that in the absence of those two material allegations the count was bad.

The second objection related to the proof of the handwriting—a good illustration of that class of evidence called evidence of opinion. No doubt the witness who is called upon to give evidence founded on a comparison of handwritings must be *peritus;* he must be skilled in doing so, but it is not necessary that he should have become *peritus* in the way of his business or in any definite way. Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business. It is, however, really unnecessary to consider this point, for it seems from the statement in the present case that the witness was not only *peritus*, but was *peritus* in the way of his business. When once it is determined that the evidence is admissible, the rest is merely a question of its weight, and this is entirely a question for the jury, who will attach more or less weight to it according as they believe the witness to be *peritus*. Two cases have been cited, one containing a decision of Blackburn, J., and the other (an Irish case), a decision of Pigot, C.B., but neither of them is an authority for the proposition contended for; in each case the witness was a policeman, and the judge thought that under the circumstances of the case his evidence was not such as ought to be received. I think, therefore, that there has been here no misreception of evidence, and that, as the second count is good, the conviction must stand.

MATHEW, J.—I am of the same opinion. The first question is the only one which presents any real difficulty, and the difficulty might have been avoided had the verdict been taken separately on each count, a practice which it is important to bear in mind, seeing that we are still hampered with regard to indictments by rules of pleading which were in force before the Common Law Procedure Act, 1854. It was then necessary in an action for deceit to state with particularity all the ingredients which went to make up the defendant's liability, and in an indictment for false pretences the ingredients of the offence must be set forth in the same way. There is an excellent description of the requirements of the law in this respect in the judgment of the present Master of the Rolls in *Reg.* v. *Aspinall*, 25 W. R. 283, 2 Q. B. D. 48. He says: "To support a charge of obtaining money, &c., by false pretences it is necessary to show, and therefore to allege, that the prisoner with a wicked or criminal mind stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, &c.; that he knew his statement was—that is to say, so far as his mind was concerned he intended that his statement should be—false; that by the statement he did so act on the mind of the prosecutor that he did thereby obtain money, &c.; that the statement was in fact untrue in the sense of being incorrect." The present count clearly offends against the old rules. But although after verdict we cannot supply an absent averment, an imperfect averment may be treated as cured by verdict.

In the present case it is not shown in the second count how the money was obtained in consequence of the advertisement, but this is clear from the first count, and we are therefore entitled to infer that the jury had all the facts before them, and that it was in consequence of the advertisement that the prosecutrix parted with her money. In connection with this the same learned judge, in *Reg.* v. *Aspinall*, quotes from the judgment of Blackburn, J., in *Heymann* v. *Reg.*, 21 W. R. 357, L. R. 8 Q. B. 102: "Where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then after verdict the defective averment . . . is cured by the verdict."

That is distinctly applicable to the present case, and if any further authority were wanted it would be found in *Hamilton* v. *Reg.*, 9 Q. B. 271.

The distinction between *Reg.* v. *Sowerby* and the present case is that in that case averments were absent which were indispensable to the statement of the offence and which could not be supplied. Had the prisoner been acquitted on that indictment and subsequently prosecuted for the same offence upon a good indictment, there might have been a difficulty in the way of the defence. That decision is no authority in the present case.

Upon the point as to the proof of the defendant's handwriting, I am of opinion that the evidence was clearly admissible.

DAY, J.—I concur in the judgment pronounced by my lord.

VAUGHAN WILLIAMS, J.—I am of the same opinion, and I only desire to say that it seems to me unnecessary to refer to the principle of the correction of an imperfect averment after verdict, because the second count of the indictment, though inartistic, is in my judgment, sufficient.

KENNDY, J.—I concur in the judgment of my lord.

Conviction affirmed.

Solicitors for the prosecution, *Barnard, King, & Sons*, Stourbridge.

Solicitor for the defendant, *J. Whitmore Garratt*, Dudley

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) } July 16; Aug. 11, 1894.

In re HOLLAND.

Ex parte PARKER *v.* YOUNG. (*a.*)

Bankruptcy—Proof—Interest—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 23.

Section 23 *of the Bankruptcy Act,* 1890, *does not affect the principle that, when a debtor does not appropriate his payments either to interest or principal, the creditor has*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

a right to appropriate the first payments to interest, the later ones to principal.

Appeal by Parker against the reduction of his proof by the trustee in the bankruptcy of Holland.

Upon the 17th of October, 1892, Parker discounted a bill for £1,000 for the bankrupt, giving £600 in cash. The bankrupt gave in return two promissory notes, one for £400 at three months, and the other for £600 at six months. The first bill was met on the 10th of February, 1893. A receiving order was made against the bankrupt upon the 6th of March. The second bill matured upon the 17th of April, whereupon Parker tendered a proof for £600.

The trustee refused to admit it for more than £200, with interest at five per cent. from the date of the receiving order (under section 23 of the Bankruptcy Act, 1890), claiming to appropriate the whole of the £400 paid in February to payment off of the principal sum of £600.

Parker appealed.

Montague Shearman, for the appellant.—The law is that when a debtor does not appropriate his payments, either to interest or principal, the creditor has a right to appropriate the first payments to interest, the later ones to principal. This principle is to be found as far back as the Roman law (Cod. Lib. viii., tit. 53, l. 1, cited in Tudor's Leading Cases in Mercantile Law, 3rd ed., at p. 31). In the absence of this bankruptcy the creditor could have appropriated all the £400 paid to interest. He is, however, willing to appropriate £240 of it to principal, and claims to prove now for £360. *In re Fox & Jacobs, Ex parte The Discount Banking Co.*, 42 W. R. 351, 10 Morr. 295, has some bearing on this case.

Whinney, for the respondent.—Under section 23 of the Bankruptcy Act, 1890, the court will not allow a creditor to receive more than his original advance and five per cent. from the date when he advanced it. [VAUGHAN WILLIAMS, J.—If that were so, in the case of a loan at sixty per cent. upon which interest had been paid for several years, the creditor would have to pay something back to the trustee.] £400 of the £1,000 was in fact a bonus given for the advance, the creditor is not entitled to recover any such bonus or pecuniary consideration under section 23. The trustee is, however, willing to appropriate £300 of the £400 to capital, £100 to interest, and to admit a proof for £300, remainder of the capital, with interest at five per cent. from the date of the receiving order.

Shearman, in reply.—It is true that the £400 was a bonus or pecuniary consideration, but the case has been argued as though both notes had fallen due since the bankruptcy, whereas there was in fact a concluded transaction upon the first note before the bankruptcy, which the trustee cannot reopen. [VAUGHAN WILLIAMS, J.—But the parties did not appropriate that £400 to interest or principal when they settled.] I submit that the law appropriates it entirely to interest.

Cur. adv. vult.

Aug. 11.—VAUGHAN WILLIAMS, J. (after stating the facts).—The extent to which Parker's proof must be admitted depends on how mnch of the £600 owing to him is to be taken as principal, how much as interest. In my opinion he was entitled to contend that the £400 paid off consisted wholly of interest, but he did not do so, though that contention would have been more reasonable than the trustee's contention that it consisted wholly of principal. I am, in truth, going to deal favourably with the trustee by treating the £1,000 as a lumped sum of principal and interest. Treating it in that way, the £400 paid off must be taken to have been made up of six-tenths principal and four tenths interest, or £240 capital, £160 interest. Parker's proof must therefore now be admitted for £360, with interest at five per cent. from the 10th of February to the 3rd of March, 1893.

Appeal allowed, with costs.

Solicitor for the appellant, *J. J. Solomon.*

Solicitors for the respondent, *Lawrence, Waldron, & Webster.*

Court of Appeal.

From Chan. Div. (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) — July 25; Aug. 8, 1894.

In re SMITH.

SMITH *v.* LANCASTER. (*a.*)

Settled land—Sale—Several persons constituting one tenant for life—Separate solicitors—Costs—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38, *s.* 2, *sub-section* 6; *s.* 53—*General Order made in pursuance of the Solicitors' Remuneration Act*, 1881 (44 *&* 45 *Vict. c.* 44), *Schedule I., Part I.*

Upon a sale of settled land by twenty-five persons, who together constituted a tenant for life for the purposes of the Settled Land Act, 1882,

Held, that the parties were entitled to employ separate solicitors, and that costs of separate solicitors for perusing and completing the conveyance must be allowed out of the proceeds of sale.

Appeal from a decision of Kekewich, J.

Under the trusts of the will of the above-named testator twenty-five persons entitled as tenants in common, together constituted a tenant for life for the purposes of the Settled Land Act, 1882, by virtue of section 2, sub-section 6.

Upon a sale in lots of the land subject to the settlement in question under the powers of the Act, a solicitor, Mr. Fowle, was by arrangement amongst the parties employed to conduct the sale, and was mentioned in the conditions of sale as the vendors' solicitor. Mr. Fowle conducted the sale and signed the several contracts of sale on behalf of all the twenty-five. Twenty-one of the twenty-five employed no other solicitor to complete the carrying out of the sale on their behalf, and Mr. Fowle perused the several conveyances and completed the matter for them; but the remaining four employed separate solicitors, not to interfere in the sale, but to peruse and approve the conveyances on their behalf, who accordingly, having the several conveyances sent to them by Mr. Fowle, perused them for their clients and obtained the execution of them by them.

In these circumstances the chief clerk was of opinion that there should be only one bill of costs allowed for the vendors, but that it was reasonable that Mr. Fowle should send the several conveyances for execution by such of the vendors as did not instruct him to their separate solicitors, and that each of such separate solicitors should be paid £3 3s. for his trouble in obtaining the execution by his clients; but he did not allow them anything for perusing the conveyances or other charges.

Kekewich, J., saw no reason why some few of a large body of tenants in common for life should indulge in the luxury of separate solicitors at the expense of the *corpus*, and held that the independent solicitors were entitled to no costs at all out of the proceeds of sale, and allowed only one set of costs—*i.e.*, those of Mr. Fowle.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

From that decision the present appeal was brought by the four who employed the separate solicitors.

H. Terrell, for the appellants.—The costs of the separate solicitors for perusing the conveyances ought to be allowed: *Humphreys* v. *Jones*, 34 W. R. 1, 31 Ch. D. 30. That was a partition action, but the same principle is applicable.

G. Williamson, for others of the tenants for life.—The only costs to be allowed are those of the one solicitor who is fixed upon to conduct the sale; a tenant for life exercising any power under the Settled Land Act is to have regard to the interests of all parties concerned, and is in the position, as regards them, of a trustee: Settled Land Act, 1882, s. 53; *Cardigan* v. *Curzon-Howe*, 37 W. R. 521, 41 Ch. D. 375.

Fawcus, for the trustees.

At the conclusion of the arguments the court intimated that they wished to see the correspondence before giving judgment in order to ascertain whether any agreement had been come to between the tenants for life that one solicitor who conducted the sale should peruse the conveyances for all of them.

Cur. adv. vult.

August 8.—Lord HERSCHELL, L.C. (after setting forth the facts).—The question is whether the costs incurred by these four persons, who, together with the other twenty-one, make up the tenant for life, are to be allowed, Kekewich, J., having allowed one set of costs only, those of Mr. Fowle, out of the proceeds of the sale.

It was contended for the appellants that they were entitled to employ their own independent solicitors, if they pleased, to peruse the several conveyances which they would have to execute, and there was nothing to compel them to make use of a common solicitor, and in fact the instructions given to Mr. Fowle did not include any authority to peruse on behalf of the vendors. The General Order made in pursuance of the Solicitors' Remuneration Act, 1881, which was relied on by the respondents, contains a scale of charges fixed for a vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale, and there is a further scale for deducing title to freehold, copyhold, or leasehold property and completing conveyance (including preparation of contract and conditions of sale, if any), and it was said that the fee specified in the scale covered all that was done in the present case for all parties. But it is obvious that if there was any part of the work, any perusing, which was not done by Mr. Fowle, and which he was not authorized to do, he would not be entitled to charge for that, because he would not have done the work.

The question is whether, inasmuch as the appellants did not authorize Mr. Fowle to act for them in perusing the conveyances, there is anything by which they were disentitled from employing their own solicitors for the purpose? I do not think there was. There was no obligation upon them to employ Mr. Fowle more than there was upon the other twenty-one to employ their solicitors. Of course it is desirable that all parties in such a case as this should agree to employ a common solicitor instead of independent ones, but if they do not, there is nothing in the statute to compel a minority to accept the will of the majority. The *onus* is upon those who impeach the appellants' right to employ separate solicitors to show something which prevents their doing so and which disentitles them to costs if they do. The only section of the Act which was referred to is the 53rd, which says that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties," but I do not think that section is at all applicable to the present case. No doubt it is quite right that the person who exercises a right conferred on him by the Act where other persons are concerned should not have regard only to his own interests; but that does not touch the right of those who, taking part in a sale such as the present, and having, as it seems to me, to some extent independent interests, have, I think, an independent right to have the conveyances perused by their own solicitors, and prefer to do so instead of employing someone else's solicitor. I think, therefore, the appeal should be allowed.

LINDLEY, L.J.—I am of the same opinion. When the case was before the court a fortnight ago for argument, I rather gathered, though I had some doubt in my mind upon it, that the four might possibly have agreed to employ Mr. Fowle to complete the conveyance for them, and, if so, it would have been a breach of faith on their part to adopt the course which they have since adopted, and, in order to solve that doubt, I asked to see the correspondence. I have perused it and found there was no ground really for my doubt. That being so, I consider they were entitled to take the course they did, and there was no need for all to employ one solicitor.

DAVEY, L.J.—I agree.

Appeal allowed.

Solicitors, *Andrew, Wood, & Co.*, for *C. Waistell*, Northallerton; *Williamson, Hill, & Co.*, for *Fowle & Horsfall*, Northallerton.

From Chan. Div. (Lindley, Lopes, and Davey, L.JJ.) — Aug. 2, 1894.

NUTTER v. HOLLAND. (*a.*)

Practice—Payment into court—"Money in the hands of trustees"—R. S. C., 1883, *ord.* 55, *r.* 3 (d)—*Palatine Court of Lancaster, ord.* 48, *r.* 3 (d).

Upon motion under ord. 48, *r.* 3 (d), *of the Palatine Court of Lancaster [corresponding with R. S. C.*, 1883, *ord.* 55, *r.* 3 (d)], *the court refused to order a trustee to pay into court trust moneys which had been received by him and for which he was responsible, but which were not shown to be then actually in his hands.*

In re Chapman, 54 *L. T. N. S.* 13, 34 *W. R. Dig.* 90, *disapproved.*

Appeal from an order of the Vice-Chancellor of the Palatine Court of Lancaster.

The defendant Holland, a solicitor, was one of the trustees and executors of the will of Alice Nutter, deceased. The defendant, through his firm of Holland & Callis, proceeded to get in the estate of the testatrix.

On the 8th of September, 1886, the firm sent in an account of the estate to the plaintiffs, who were beneficiaries under the will, showing that they had in hand, after meeting all necessary payments, a disposable balance of £1,239 8s. 9d.

On the 9th of September, 1886, the defendant paid

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

to certain of the beneficiaries their one-fourth share of the said £1,239 8s. 9d., and retained the other shares, amounting to £929 11s. 6d., for investment pursuant to the terms of the will.

On the 31st of May, 1893, the defendant was adjudicated a bankrupt, and subsequently suspended from practice for five years.

The plaintiffs were unable to obtain any information from the defendant as to the investments representing the said £929 11s. 6d., except that £120 was paid into a bank, leaving £809 11s. 6d. unaccounted for. The plaintiffs accordingly served the defendant with notice of an originating motion under ord. 48, r. 3, sub-section (*d*), of the Palatine Court, which rule corresponds with ord. 55, r. 3 (*d*), of the R. S. C., 1883. That rule, which provides that the executors or administrators of a deceased person and any person claiming to be interested in the relief sought, as executor, devisee, legatee, or next of kin, &c., may take out as of course an originating summons returnable in the chambers of a judge of the Chancery Division for "the payment into court of any money in the hands of the executors or administrators or trustees." The notice of motion asked that the defendant might be ordered to pay into court the sum of £809 11s. 6d., with interest, being part of the estate of Alice Nutter, deceased, and in the hands of the defendant in his character of trustee under the said will; that the defendant might be ordered to pay the costs of the application; and that such further or other order might be made as the nature of the case might require.

The motion came before the Vice-Chancellor on the 14th of March, 1894, when the defendant did not appear, and the order was made.

On the 12th of April, however, the defendant moved to discharge the order, and filed an affidavit—to which an account was appended—showing investments to the extent of £811. The plaintiffs disputed this account, but admitted investment to the extent of £250, leaving, as they alleged, £559 11s. uninvested and in the hands of the defendant. The Vice-Chancellor thereupon discharged the order of the 14th of March, without costs, on the ground that, although there was little doubt that the money had once been in the defendant's hands, yet, on a careful consideration of the facts, it did not appear that the money was then actually in his hands as trust money which he was liable to pay into court under the above order, and that the procedure adopted by the plaintiffs was not, therefore, applicable to the case.

The plaintiffs appealed.

Cozens-Hardy, Q.C., and *Whinney*, for the defendant.—We object to the form of these proceedings under ord. 55, r. 3 (*d*). There is a conflict as to facts.

Hopkinson, Q.C., and *Mansfield*, for the appellants.—The appellants are right in proceeding under the rule. In 1886 the defendant rendered an account showing that he had the trust moneys in his hands, and he has not discharged the trust. [They relied on *In re Chapman*, 54 L. T. N. S. 13, 34 W. R. Dig. 90; *Dowse* v. *Gorton*, 40 W. R. 17, [1891] A. C. 190, 39 W. R. Dig. 84; *Hollis* v. *Burton*, 40 W. R. 610, [1892] 3 Ch. 226; and *In re Weall, Andrews* v. *Weall*, 37 W. R. 729, were also referred to.] At any rate, the appellants ought to have an order for the administration of the trust: ord. 55, r. 4 (*c*).

Whinney, at the suggestion of Lindley, L.J., asked for an account to be taken at the defendant's risk, costs to be reserved.

LINDLEY, L.J.—The summons, or rather the notice of motion in the Palatine Court, with which the Vice-Chancellor has dealt, is as follows: [his lordship read the notice, and continued:—] Now, that proceeds upon the assumption that there is money in his hands, and it is evidently based upon the rule which corresponds to ord. 55, r. 3 (*d*), of the Judicature Rules, and upon that rule alone. [His lordship then read the rule shortly, and continued:—] That rule means what it says. It is a provision for the payment into court of money in the hands of executors and trustees, and if the money is not in their hands, although they may be responsible for it, that rule does not apply. I think Kay, J., went too far in *In re Chapman* when he ordered the defendants to pay into a court a sum of £1,000 which was not in their hands. The rule is limited to cases where the money is in their hands. Those cases may be of different kinds. Executors or trustees may have money in their hands and want to get rid of it, and the rule also includes cases where they have got money which is at risk and the *cestuis que trustent* want to secure it. But I do not think it is legitimate under that rule to come into court for an order upon trustees or executors to pay into court money which they have not got. It appears to me that the Vice-Chancellor was right in making no order upon the motion. What I think he might have done, and what I think we ought now to do, is this. This is obviously a case for the administration of the trusts of the will, and one in which the accounts very likely may be waived. If a summons is taken out for the administration of the trusts under ord. 55, r. 4 (*c*), or the corresponding rule in the Palatine Court, the result will be that there will be a finding, not that the trustee has money in his hands, but that he is to be charged with money which he had in his hands and has improperly parted with. It strikes me the right course will be this: to vary the order of the Vice-Chancellor and refer the matter back to the Palatine Court in order that accounts may be taken; make an order for the administration of the trust (not of the estate), and make that order at the request and at the risk of the defendant; and then let the costs of this summons and of this appeal be reserved, to be dealt with by the Vice-Chancellor. If in the result it happens that the appellants are right, and that the defendant has no defence, then the Vice-Chancellor will find that the defendant ought to pay the costs. But I do not say that there may not be more in it than yet appears. I think the defendant is entitled to say that he has come to this court in opposition to the particular summons which was served upon him.

LOPES, L.J.—I am of the same opinion. I think the way suggested by Lindley, L.J., is the right way of dealing with this case. It appears to me impossible to say that there may not be disputed facts in this case, and if so I am clearly of opinion that this is not a matter which can be properly dealt with as the appellants ask. In the case of *In re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 296, 34 W. R. Dig. 108, Lindley, L.J., said "a summons is not the proper way of trying a disputed debt when the dispute turns on questions of fact." There is only one other matter I wish to say a few words about, and that is with regard to the construction to be put on rule 3 (*d*) of order 55. [His lordship read the rule, and continued:—] I entirely agree with what has been said, that this rule means what it says—namely, money actually in the hands of the executors or trustees. In the case of *In re Chapman* Kay, J., seems to have thought that an order might be made for payment into court of money improperly applied by the trustees. I think that was putting a construction on

this rule which it does not properly bear. I am certain that if we regard the interests of all parties the best way of dealing with the case is that which Lindley, L.J., has suggested.

DAVEY, L.J.—I agree. I would only say a few words as to the construction of rule 3 (*d*) of order 55, which I understand is identical with the corresponding rule of the Palatine order upon which this original motion was founded. I agree with what has already been said, that payment into court of moneys means what it says. You must show that they have moneys in their hands applicable to the trust. I am not going to answer any of the riddles Mr. Hopkinson, on behalf of the appellants, has proposed to us, as to when money would be "in the hands" of trustees or executors in the particular cases which he put. These will be dealt with by the court when they arise. But what I do say is this, that it does not mean money which may or may not ultimately be found due from the defendants when the facts have been gone into.

On the other point I agree that the summons, or motion rather, in the form in which it asked for payment into court, was not in the right form. It ought to have asked for administration of the trusts, and then if the *cestuis que trustent* were prepared to waive the account, and the defendant did not insist upon the account, the court might proceed to do what it would do in an ordinary case if that course were taken—viz., direct payment into court by the defendant of the balance found due on taking these accounts. I think the plaintiffs ought to be put in the same position as if they had expressly asked for that order, because they asked for such further order as the nature of the case might require; and the rule would enable us to make such order as we thought the circumstances of the case might require. I understand that the plaintiffs are not only willing, but desirous of waiving any further accounts, and to charge the defendant on the footing of the account already rendered. But the defendant is not willing to acquiesce in that, and he asks to have the account of the trust estate taken. I think he is entitled to that if he asks for it. Mr. Mansfield tried to show us that there was nothing in it, but I think in the few words he addressed to us he made it very clear that there were plenty of facts which were in dispute between the parties.

I agree with the order which has been proposed by Lindley, L.J., that the accounts should be taken at the request and at the risk of the defendant, and that the accounts should be accounts of the trust funds upon the footing of this account—that is to say, starting from the account rendered by the defendant in 1886. If he can show that the money is properly invested, or that any part of the cash balance then in his hands is represented by investments, he may do it; but the account should be taken on the basis of the account of 1886. The costs will be reserved to be dealt with afterwards.

Order varied.

Solicitors for the appellants, *Chester & Co.*, for *James Craven*, Preston.

Solicitors for the defendant, *F. A. K. Doyle*, for *R. J. N. Parker*, Blackburn.

From Chan. Div. (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) — July 9, 1894.

In re MCHENRY.
MCDERMOTT *v.* BOYD.
Ex parte BARKER. (*a*.)

*Statute of Limitations—Creditor holding bonds as security for loan—Agreement to pay—Deficiency on realization of security—Sale of bonds—*21 *Jac.* 1, *c.* 16.

On the occasion of a loan which became repayable in 1883 *certain bonds were deposited with the lender by way of collateral security, and the borrower authorized the lender, in the event of the loan remaining unpaid after it became due, to realize the securities, and undertook to pay any difference between the net proceeds of the securities and the amount due. The bonds were sold in* 1889, *but did not realize sufficient to satisfy the whole of the debt; and in* 1891 *the lender claimed the amount of the deficiency in an action for administration of the estate of the borrower.*

Held (*reversing* North, J., 42 *W. R.* 491), *that the undertaking to pay the deficiency did not create a new obligation distinct from the obligation to pay the original debt, and giving rise to a new cause of action in* 1889 *in respect of the deficiency; and that the creditor's claim to the deficiency was therefore statute barred.*

Appeal from a decision of North, J. (reported 42 W. R. 491).

In this action, which was brought in August, 1891, for the administration of the estate of the late Jas. McHenry, who died in May, 1891, Barker claimed to prove against the estate for the balance remaining due to him after the realization of certain Western Extension Eight per Cent. Bonds of the nominal value of £13,500, which he held as a security for the sum of £13,365 lent by him to the deceased in August, 1882. The money was lent for three months, and on the occasion of the loan the deceased addressed to Barker the following document, which was dated the 25th of August, 1882:—"In consideration of your advancing to me the sum of £13,365, at the rate of 6½ per cent. per annum, repayable with interest on the 30th of November, 1882, I hand you herewith the undermentioned securities, of the nominal value of £13,500, to be held by you as collateral security for the due repayment of the said loan and the interest thereon. In the event of the loan remaining unpaid after it becomes due, I hereby authorize you to realize the securities as you may deem fit for the purpose of repaying yourselves the amount due to you, and I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realization." The loan was by indorsement on the document further renewed for three months, and in February, 1884, £100 was paid on account. No other payment was made in respect of the loan, and Barker in 1889 sold the bonds, but the proceeds of the sale were not sufficient for the repayment of the whole of the amount lent.

The claim for the unpaid balance was resisted by the executors of McHenry's will, on the ground that it was barred by the Statute of Limitations (21 Jac. 1, c. 16), inasmuch as more than six years had elapsed since the expiration of the three months for which the loan was renewed. The chief clerk disallowed the claim on this ground.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

On a summons to vary the chief clerk's certificate, North, J., held that the undertaking by the testator in the latter part of the document of the 25th of August, 1882, to pay the difference between the amount obtained on realization of the securities and the amount due before the sale, created a new and independent obligation, which did not arise until the sale had actually taken place in 1889, and that such obligation was separate and distinct from the obligation to pay the original debt, and consequently that the claim was not barred by the statute of James I.

McHenry's executors appealed.

Cozens-Hardy, Q.C., and *Gregson*, for the appellants.—The Statute of Limitations began to run in February, 1883, for Barker could then have taken proceedings to obtain repayment of the loan. His claim is consequently barred: *Reeves* v. *Butcher*, 39 W. R. 626, [1891] 2 Q. B. 509.

S. Hall, Q.C., and *Herbert Brown*, for the respondent Barker.—There are two causes of action here. In the first place there is the promise on the loan to repay the same, and in the second place there is the separate promise to pay the difference between the loan and the amount realized by the bonds, the sale of which is authorized by the agreement of the 25th of August, 1882. The cause of action in respect of the second contract did not arise until the realization of the bonds, for the difference would only then be ascertained: *Hammond* v. *Smith*, 12 W. R. 328, 33 Beav. 452. In analogy to the case of a surety, the statute did not begin to run until the sale in November, 1889, when the amount payable by McHenry was ascertained: *Ex parte Snowdon, In re Snowdon*, 29 W. R. 654, 17 Ch. D. 44. Barker is, therefore, entitled to prove for the balance of his loan.

A reply was not called for.

Lord HERSCHELL, L.C.—The sole question arising on this appeal is whether a certain claim against the executors of Mr. McHenry is barred by the Statute of Limitations. On the 20th of August, 1882, the sum of £13,365 was advanced by Mr. Barker to Mr. McHenry, and a document was thereupon signed by Mr. McHenry in these terms: [his lordship read the document, and continued]. A memorandum was endorsed upon the document by which the loan was renewed for a further period of three months. It is stated that in 1884 there was a sum of £100 paid on account, but it is obvious that, as regards the debt due in February, 1883, it was, notwithstanding any payment on account, completely barred at the time of the death of the testator McHenry in May, 1891. But it is said that the claim is not barred by reason of the second paragraph of the document which I have read, inasmuch as the securities were not sold until the year 1889. And it is said that until their realization the difference between the net proceeds of the securities and the amount due was not, and could not, be ascertained, and that, therefore, the statute could only run from that date. This view found favour with the learned judge in the court below, but with all deference I am unable to agree with him. The second paragraph of the document was intended to give, and no doubt did give, a power of sale, and the power of sale being so given, the creditor, if he exercised his power of sale, would be bound to set against the debt *pro tanto* the amount realized by the securities, but in determining what amount was realized, the expenses of realization must be taken into account. It is only the net sum realized after allowing the expenses of realization that can be treated as the proceeds of the securities to be set against the creditor on the balance of the creditor's claim. Now that claim could have been made by him quite independently of any express authority conferred by the latter part of this agreement. No doubt it was properly admitted by counsel for the respondent that if the second part of the paragraph of the agreement had been confined to conferring the power of sale, the right of the creditor by virtue of the loan would be precisely what it is if these words had not been so inserted.

It seems to me impossible to say that that conferred a new, separate, and independent cause of action, so that the statute runs from that date. The truth is, the debt was one debt only, and the provision I have referred to did not create a new debt, but only prescribed what was to be done, and the use to be made of the money realized.

The contention of the respondent goes to this length, that under circumstances such as these, although, as I have said, the words used give no right beyond that which the law itself would confer, that because these words are used the operation of the statute is indefinitely postponed, whereas if these words had not been inserted the statute would have run from an earlier date. It appears to me that that is a most impossible contention. For these reasons I think the judgment must be reversed.

LINDLEY, L.J.—I am of the same opinion, but as we are differing from the learned judge, I shall state shortly the grounds for the view I hold. In the first place the action turns on the words of the statute of James (21 Jac. 1, c. 16), which are to the effect that an action of this kind must be brought within six years of the cause of such action, and not after. Now this document has been read.

The first part of it refers to a loan of £13,500, repayable on the 30th of November, 1882, which is enlarged by the memorandum of deposit until February, 1883. Now that part of the document does not in words contain a promise to pay the debt at that time. I put it to counsel for the respondents whether they pushed their arguments so as to say an action could not then have been brought upon the contract of loan. It obviously could have been brought. Now, then, comes the clause which North, J., relied upon as constituting a new promise. That clause appears to me to affect a different matter, and not to create an obligation to pay, but in fact to give a right to the creditor to deal with the securities, and it really amounts to nothing more or less than this. It is a direction to the creditor to realize the securities, with a direction to him as to what he is to do with the proceeds. It does not affect the cause of action. [His lordship read the second paragraph, and continued:—] The promise is this. In the event of the loan remaining unpaid after it becomes due I authorize you to realize the securities, but I undertake to pay you any difference between the net proceeds and the amount of the loan. If the amount is not paid when it is payable you may realize the securities, but you must give credit for the amount of the realization after deducting the costs and expenses incurred in such realization. It does not affect the original obligation to pay the debt.

I think, therefore, the cause of action accrued long before the sale of the bonds.

The appeal must be allowed, with costs.

DAVEY, L.J.—I am of the same opinion and have nothing to add. The summons to vary the chief clerk's certificate will be dismissed, with costs.

Appeal allowed.

Solicitors for the appellants, *Hores & Pattisson.*

Solicitors for the respondents, *G. S. & H. Brandon.*

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) July 4, 1894.

ROYAL BANK OF SCOTLAND v. TOTTENHAM. (a.)

Cheque—Post-dated cheque—Validity of—Holder for value—Banker and customer—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 38—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 13, 73.

A post-dated cheque, bearing a penny stamp, though taken by the holder before its date, is a valid cheque, and an action can be maintained upon it by the holder after its date.

Gatty *v.* Fry, 25 *W. R.* 305, 2 *Ex. D.* 265, *followed.*

Where a customer pays a cheque into his account at his bankers, with the intention that the bankers shall at once credit him with the amount in his account, and the bankers place the amount to his credit accordingly, the bankers become holders of the cheque for value, and can sue upon it.

Appeal from the judgment of Wills, J., in favour of the plaintiffs at the trial of the action without a jury.

The action was to recover £250 upon a cheque drawn by the defendant to the order of Cecil Hambrough. The cheque was drawn upon the 3rd of August, 1893, but was dated the 10th of August, and it was stamped with a penny stamp. It was indorsed in blank on the 7th of August by Hambrough, who then handed it to Mrs. Monson, and she paid it into her account at the plaintiffs' bank on the 8th of August, and the amount thereof was placed to her credit, and she was allowed by the plaintiffs to, and did, draw against it. On the 10th of August the defendant stopped payment of the cheque, and the plaintiffs' manager was informed thereof by telegram. The manager thereupon debited her account with the amount of the cheque, thereby leaving a debit balance against her of £142, and at the date of the action the debit balance was increased to over £250.

The learned judge held that the plaintiffs became holders of the cheque for value when they placed the amount thereof to Mrs. Monson's credit; and, further, that they could maintain the action notwithstanding that the cheque was post-dated. He accordingly gave judgment for the plaintiffs for the amount of the cheque.

Channell, Q.C., and *Montague Lush*, for the defendant.—The cheque being post-dated and taken by the bank before the date upon its face, the bank cannot maintain an action upon it. By section 73 of the Bills of Exchange Act, 1882, a cheque is a bill of exchange drawn on a banker payable on demand. Upon the 8th of August, when the bank took this cheque, the cheque was not payable on demand. By the schedule to the Stamp Act, 1891, a bill of exchange, unless it is payable on demand, requires an *ad valorem* stamp. This cheque was a bill of exchange payable at a future date: *Forster* v. *Mackreth*, 15 W. R. 747, L. R. 2 Ex. 163; and therefore required an *ad valorem* stamp; and by section 38, sub-section 1, of that Act the person who takes a bill of exchange not duly stamped cannot recover upon it or make it available for any purpose whatever. An action could not have been brought upon this instrument on the 8th of August, when the bank took it, and, consequently, it cannot be said to have been payable on demand. Section 13, sub-section 2, of the Bills of Exchange Act, 1882, which provides that a bill is not invalid by reason only that it is post-dated, does not make a cheque valid whenever it is post-dated. It does not affect the provisions of the Stamp Act, which were passed subsequently. Moreover, if section 13 is inconsistent with the part of the Act relating to cheques, then section 73 excludes its operation so far as regards cheques. The court must inquire when the instrument was drawn: *Field* v. *Woods*, 7 A. & E. 114. The decision in *Gatty* v. *Fry*, 25 W. R. 305, 2 Ex. D. 265, was wrong, and ought not to be followed. [They also referred, upon this point, to *Bull* v. *O'Sullivan*, L. R. 6 Q. B. 209, 19 W. R. C. L. Dig. 17; *Clarke* v. *Roche*, 26 W. R. 112, 3 Q. B. D. 170; *Emanuel* v. *Robarts*, 9 B. & S. 121, 16 W. R. C. L. Dig. 7; *Misa* v. *Currie*, 24 W. R. 1049, 1 App. Cas. 554; *Hitchcock* v. *Edwards*, 60 L. T. N. S. 636, 37 W. R. Dig. 22; *Carpenter* v. *Street*, 6 Times L. R. 410.] Secondly, as the bank had notice of the dishonour of the cheque before the full amount of it was drawn against, the bank would recover part as agents for Mrs. Monson, and would have to account to her, and any defence available against her would be *pro tanto* available against the bank: *Thornton* v. *Maynard*, L. R. 10 C. P. 695, 24 W. R. Dig. 40.

In re Palmer, Ex parte Richdale, 30 W. R. 262, 19 Ch. D. 409, was also referred to.

R. M. Bray (*J. F. P. Rawlinson* with him), for the plaintiffs.—When a cheque is handed to a banker to place to the credit of a customer's account, and the banker places it to his credit, the banker becomes a holder of the cheque for value, and can sue upon it: *In re Palmer, Ex parte Richdale.* The plaintiffs, therefore, became holders of this cheque for value. As regards the other point, it is for the judge at the trial to see whether the particular instrument is on its face properly stamped. The instrument alone must be looked at: *Gatty* v. *Fry.* This cheque when produced at the trial was properly stamped, and section 13, sub-section 2, of the Bills of Exchange Act, 1882, says that post-dating shall not make a bill invalid.

Channell, Q.C., replied.

Lord ESHER, M.R.—The first question is whether the plaintiffs gave consideration for this cheque. It has been held that when a customer pays a cheque into his bankers with the intention that the bankers shall at once credit him with the amount in his account, and the bankers accept the cheque upon those terms and place the amount to his credit accordingly, that is giving value for the cheque, and the bankers thereupon become holders of the cheque for value. That was decided by this court in *In re Palmer, Ex parte Richdale.* That being so, the moment the plaintiffs gave credit to Mrs. Monson for the cheque, they became holders of it for value. That contention therefore fails.

It was then said that the cheque was not payable on demand, and was, therefore, not properly stamped. The judge at the trial has merely to look at the instrument, and see whether upon its face it is properly stamped. This cheque, when so looked at, appeared to be payable on demand. It is said that that is not so under the circumstances, inasmuch as the cheque was drawn on the 3rd of August, and indorsed and handed to Mrs. Monson on the 7th of August. It is a post-dated cheque, and it is said that as it was issued and negotiated before its date, it was not a cheque payable on demand, but was an instrument payable at so many days after issue, and, not being duly stamped, by reason of section 38 of the Stamp Act, 1891, it could not be made available for any purpose whatever. But

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

section 13, sub-section 2, of the Bills of Exchange Act, 1882, says that a bill is not invalid by reason only that it is post-dated. Has section 38 of the Stamp Act, 1891, rendered this cheque invalid? If that were so, the Stamp Act would be in conflict with the Bills of Exchange Act. But when one remembers that the Stamp Act is brought into play only at the trial, it is clear that when the Act prescribes a certain stamp and enacts that the instrument is to be invalid unless it is properly stamped, the question as to the sufficiency of the stamp must be determined by the judge upon the form of the instrument, at the trial. If so, the two Acts are consistent, and post-dating does not invalidate a cheque.

As regards the point that the cheque was partly paid when the plaintiffs debited Mrs. Monson's account with the amount of it, the answer is that such a dealing in this case in the account between the bankers and their customer does not amount to payment. All the objections, therefore, fail, and the appeal must be dismissed.

KAY, L.J.—I am of the same opinion. The first question is whether the bank gave value for the cheque. In *Foley* v. *Hill*, 2 H. L. Cas. 28, at p. 36, Lord Cottenham said: "Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it." Applying that principle here, the cheque was handed by Mrs. Monson to her bankers to do what they pleased with it, and in consideration thereof the bankers allowed Mrs. Monson to draw against it, just as if it was cash. That was giving value for the cheque; and in section 27 of the Bills of Exchange Act, 1882, valuable consideration is defined as any consideration sufficient to support a simple contract. Therefore the bank became holders of the cheque for value. The very point was decided by this court in *In re Palmer, Ex parte Richdale.*

It was next said that this cheque was not properly stamped, as it was post-dated. But section 73 of the Bills of Exchange Act, 1882, applies to a cheque the provisions of that Act applicable to a bill of exchange payable on demand. Then by section 13, sub-section 2, a bill is not invalid by reason only that it is post-dated. What does post-dating mean? If a cheque is not issued until its date it is not a post-dated cheque. In the present case the cheque was post-dated because it was issued before the 10th of August. The Bills of Exchange Act, 1882, by section 13, sub-section 2, however, says that a bill is not to be invalid by reason only that it is post-dated. If it was a valid cheque it was right and proper to negotiate it, and to deal with it as such.

It is said that the Stamp Act, 1891, makes the cheque invalid, inasmuch as it is not payable on demand. But I find it laid down in *Gatty* v. *Fry* that that is not the meaning of the Stamp Act, and that that Act does not invalidate a post-dated cheque. That case was followed in *Hitchcock* v. *Edwards* and in *Carpenter* v. *Street*. The judge at the trial must look and see whether the bill on its face is properly stamped. The two Acts are perfectly reconcilable. The matter becomes still more clear when it is remembered that the earlier Stamp Acts were repealed by the Stamp Act, 1870, and that neither in that Act nor in the Stamp Act, 1891, which has superseded it, is there one word about post-dated cheques. This contention, therefore, also fails. Nor can it be said that the bank have paid themselves to some extent by debiting Mrs. Monson's account when the cheque was dishonoured, inasmuch as at the date of the action she owed them more than the amount of the cheque.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Minet, Harvie, Smith, & May.*

Solicitors for the defendant, *P. J. Gordon & Son.*

High Court of Justice.

Chan. Div. North, J. } May 25; Aug. 1, 1894.

In re WILSON AND STEPHENS' CONTRACT (*a*.).

Vendor and purchaser—Interest on purchase-money—Wilful default.

Delay by the vendor in taking steps necessary to complete his title may amount to "wilful default."

There is no jurisdiction upon a vendor and purchaser summons to grant compensation.

Summons under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

The property sold was copyhold. By an indenture dated the 30th of May, 1889, the vendor had conveyed to Rayner, who, by an indenture dated the 31st of May, 1889, had mortgaged the property back to the vendor, who had sold the property to the purchaser under a power contained in the mortgage deed. In the contract for the sale of the property to the purchaser it was provided that interest should be payable on the purchase-money "if from any cause whatever other than wilful default on the part of the vendor" the purchase should not be completed on the 29th of September.

The vendor, who had never been admitted as tenant, took no steps to be admitted until the 10th of October. The steward of the manor then contended that Rayner also ought to be admitted. Ultimately the vendor was admitted on the 14th of December, 1893, and the purchase was completed on the 17th of January, 1894, without prejudice to the question of whether the purchaser was entitled to compensation for the delay in delivery up of possession, or whether the vendor was entitled to interest upon the purchase-money.

Martelli, for the purchaser.—The date for completion was the 29th of September. The vendor took no steps to obtain admission until the 10th of October. That was wilful default, and the vendor is not entitled to interest from the 29th of September till the 17th of January, when the purchase was actually completed. The purchase-money was placed on deposit, and the interest it produced paid to the vendor. On the question whether the purchaser was entitled to compensation he cited *In re Tubbs and the Corporation of London*, 38 SOLICITORS' JOURNAL, 476; *Royal Bristol Building Society* v. *Bomash*, 35 Ch. D. 390, 35 W. R. Dig. 69.

D. Jones, for the vendor.—In *Royal Bristol Building Society* v. *Bomash*, the purchaser was to have taken immediate possession. The tenant there threw up the contract because of the delay. A purchaser must have contracted for vacant possession to be entitled to compensation, on the ground of the possibility of letting. [He cited *In re Young and*

(*a*.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Harston's Contract, 34 W. R. 84, 31 Ch. D. 168; *In re Hetling and Merton's Contract*, 42 W. R. 19, [1893] 3 Ch. 269; Fry on Specific Performance, last edition, p. 627.] The delay was caused by the unreasonable demands of the steward of the manor. It is a little worthy of note that the complaint now is that we ought to have applied for admission as soon as we had a contract. That complaint ought to have been made sooner. It was formerly said that the mortgagor ought to have been admitted, and then to have mortgaged back to the vendor. That is quite unreasonable, for the legal estate was where it ought to be. Why should we spend money for nothing? Surrender and admission in this manor cost £120. Moreover, the purchaser after conveyance is not entitled to compensation. [NORTH, J., referred to *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456, 40 W. R. Dig. 274.] Anyhow, a claim for compensation is not admissible on a vendor and purchaser summons.

Martelli, in reply.—I submit that the question of compensation is one arising out of the contract. [He referred to Fry, pp. 514, 515, s. 1136.] There was wilful default on the part of the vendor. The purchaser made reasonable offers, and the delay was entirely caused by the vendor. Whatever difficulty the vendor had, came to an end on the 14th of December, and the subsequent delay was entirely caused by his conduct.

Cur. adv. vult.

Aug. 1.—NORTH, J., after stating the facts, said: I have to decide two questions—(1) whether the vendor is to receive interest? and (2) whether the purchaser is entitled to compensation for the delay? The purchaser can only escape if there was "wilful default" caused by the vendor, and clearly not due to any fault of her own. She deposited the purchase-money, but the vendor was not ready to complete, and it was not until the 10th of October that the vendor approached the lord of the manor. It is said that there was no requisition on this, but it seems rather a matter of conveyance than anything else.

The vendor, in fact, allowed the matter to sleep. Was this "wilful default"? In my opinion it was. I have considered *Tubbs* v. *Corporation of London*. I do not intend to decide what is "wilful default" in the abstract. *In re Hetling and Merton* is in point. In the present case the vendor knew the material facts, and that the purchase could only be completed by his getting admitted before the date of completion. The delay did not arise from any unforeseen occurrence, and in a sense it amounts to "wilful default."

From what date, then, should interest be paid? It is said from the 10th of October. I think that the purchaser was entitled to three days' notice. I fix the 17th of December as the day from which interest should run. Some delay arose from getting the steward's concurrence, but I cannot fix any dates between which the vendor was not in fault. From the 17th of December the purchaser does not dispute his liability to pay interest, and, indeed, has, in fact, already paid it.

The purchaser also claims compensation for the delay in completion, but this claim for compensation is in reality one for unliquidated damages. If they are to be recovered, an action is necessary. *Royal Bristol Building Society* v. *Bomash* shows that such damages cannot be recovered upon a vendor and purchaser summons.

I dismiss the summons as far as regards the claim for compensation, and give no costs to either party.

Solicitors for purchaser, *Warburton & De Paula.*

Solicitors for vendor, *Nicol, Son, & Jones.*

Q. B. Div. (Mathew and Charles, JJ.) Oct. 29.

REG. v. TAYLOR. (a.)

Criminal law—Form of indictment—False pretences—Receiving goods knowing them to have been obtained by a false pretence—Setting out false pretence in the indictment—24 & 25 Vict. c. 96, s. 95.

In an indictment for receiving goods knowing them to have been obtained by false pretences, it is not necessary to set out the false pretence.

Writ of error directed to George Warry, Esq., the Recorder of the Borough of Portsmouth.

On the 6th of April, 1894, George Taylor was indicted at the quarter sessions of Portsmouth for obtaining goods by false pretences, and for receiving the same goods knowing them to have been obtained by false pretences. There were four counts to the indictment, and the third and fourth counts, which contained the charge of receiving, did not set out the false pretences, but merely contained the averment that he, George Taylor, had received goods unlawfully obtained, and that he, the said George Taylor, at the time when he received the goods, well knew the same to have been unlawfully obtained.

An objection was raised at the trial that the third and fourth counts were bad on the ground that they did not set out the false pretence. The objection was overruled, and a verdict of guilty was brought in by the jury, and the prisoner was sentenced.

Charles Matthews and *Stephenson*, for the prisoner.—It is necessary to set out the false pretence, because otherwise the charge is not set out with reasonable certainty: *R.* v. *Goldsmith*, 21 W. R. 791, L. R. 2 C. C. R. 74; *R.* v. *Rymes*, 3 Car. & Kir. 326. The prisoner is entitled to know that the false pretence alleged is one that is within the statute. There ought to be an averment in the third and fourth counts which will connect them with the first and second.

Temple Cooke and *G. T. Warry*, for the prosecution.—It is not necessary to set out the false pretence in a count for receiving: *R.* v. *Aspinall*, 25 W. R. 283, 46 L. J. M. C. 145; *R.* v. *Hill*, mentioned in Russell on Crimes, 5th ed., vol. 2, p. 482. The court is not bound by the authority of *R.* v. *Goldsmith*, for it is only a *dictum*. *R.* v. *Rymes* is only a decision on circuit, and the point was not properly raised before the court. It is not the practice in conspiracy to set out the pretence: *R.* v. *Gill*, 2 B. & Ald. 204. All that is necessary is to aver the indispensable facts, the false pretence itself is a mere matter of evidence.

Stephenson replied.

MATHEW, J.—Our judgment must be for the Crown. There was an indictment for receiving goods obtained by false pretences. The defendant demurs that it is indispensable that the false pretence should be set out. One thing is clear, that for many years the form of indictment has been similar to the present one. The indictment charges the defendant that he unlawfully received certain goods unlawfully obtained by false pretences, and it is said that there is uncertainty, and that it might cover the case where the false pretence was a promissory one. The answer is that in such a case it would not be unlawful. Our attention has been called to certain *dicta*. The first of these, which is to be found in a note to a case mentioned in Russell on Crimes, was only an opinion of the judges on circuit when consulted on the point

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

by Commissioner Greaves at Gloucester Assizes. The second was a *dictum* of a most guarded kind by Bramwell, B., in the trial of *R.* v. *Goldsmith*. And this is the whole authority on the subject. Now the elementary rule is that all the facts indispensable to prove the gist of the offence have to be clearly set out in the indictment with reasonable certainty. What is the gist of the offence in this case? It is that the goods were received with the knowledge that they had been obtained by some false pretence. So in the case of a conspiracy to obtain goods by false pretences it was laid down by Abbott, C.J., and Holroyd, J., in *R.* v. *Gill* that the gist of the offence is the conspiracy. It is objected that the particular means and devices are not mentioned. But it is conceivable that persons might meet together and determine to defraud someone without settling the means by which they are to do it. The meeting and resolution would nevertheless constitute the offence. The means are a matter of evidence, and it is not necessary to set them out in the indictment.

CHARLES, J.—I agree. I think the counts are both good. They state with reasonable certainty all the ingredients of the offence. If the prisoner had been charged with conspiracy it would not have been necessary to set out the false pretence. The same reasoning is applicable to the present case. The gist of the offence is the receipt of the goods unlawfully, and not that they were obtained by any particular pretence. *R.* v. *Gill* exactly covers the present case. The rule of pleading is that it is necessary to allege all the necessary ingredients of the offence. Here it is averred that goods were received having been obtained by false pretences, and that the prisoner received them knowing them to have been so unlawfully obtained. In *R.* v. *Wilson*, 2 Moo. C. C. 52, the indictment was bad because there was no reference to a false pretence at all. We cannot consider the opinion of the judges at the Gloucestershire Assizes, given in *R.* v. *Hill*, as binding on us. In *R.* v. *Goldsmith* the whole question was whether the indictment was cured by verdict. Besides, in that case the goods were not said to be unlawfully obtained. I decide the case on the broad ground that the indictment contains on its face all the ingredients necessary to constitute the offence.

Judgment for the Crown.

Solicitors for the Crown, *Ford & Ford.*

Solicitors for the defendant, *A. W. Mills*, for *G. H. King.*

Q. B. Div. (Divisional Court) (Mathew and Charles, JJ.) Oct. 26.

LAVER *v.* CHESTERFIELD UNION. (*a.*)

Poor law—Pauper in receipt of outdoor relief—Reimbursement of guardians on death of pauper—Ordinary creditors—Poor Law Act, 1849 (12 & 13 *Vict. c.* 103), *ss.* 16, 17.

A pauper received outdoor relief from the guardians of the union during the last year of her life. She left a will disposing of certain property, and appointing as her executor a creditor. The guardians, after the death of the pauper, claimed the property as preferential creditors under the Poor Law Act, 1849, *s.* 16.

Held, that the guardians were ordinary, not preferential, creditors; that they were not entitled to "take and appropriate" the property of the deceased pauper, but were only entitled to be reimbursed in the same way as other creditors, and that the executor creditor had an equal right to be reimbursed.

(*a.*) Reported by THEOBALD MATHEW, Esq., Barrister-at-Law.

Appeal from the decision of his Honour Judge Ellison, in the County Court of Sheffield.

Sarah Goodall had been in the receipt of outdoor relief from the Guardians of the Chesterfield Union (the defendants), during the year preceding her health, to the amount of £16 18s. Being possessed of some property (furniture) she left a will, appointing as her executor Charles Laver (the plaintiff), a creditor to an amount exceeding £16 18s. The executor instructed a firm of auctioneers to advertise a sale of the furniture, but before the sale the guardians gave notice that they claimed the goods of the deceased, or the proceeds of the sale, to the extent of the amount of relief advanced to her, under the Poor Law Act, 1849 (12 & 13 Vict. c. 103), s. 16, which enacts that "where any pauper shall have in his possession . . . any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them . . . in the relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof . . . ; and in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease."

By section 17 the costs of burying any poor person who dies outside the union or parish, being at the time of his death in the receipt of relief from the guardians, "shall be recoverable in like manner and from the same parties as the cost of any relief (if given to such person when living) would have been recoverable.

An interpleader issue was tried, in which Charles Laver was the plaintiff and the guardians defendants, and the county court judge held that the guardians were preferential and secured creditors; that the words "in manner aforesaid" must be implied in the latter part of section 16; and that the proceeds of the sale must go to the guardians.

The plaintiff appealed.

Brooke Little, for the appellant.—The guardians have no greater rights than ordinary creditors. Section 16 does not authorize them to "take and appropriate" the pauper's property in the event of his death. They may only "reimburse themselves." [MATHEW, J.—Section 17 is important.]

A. Glen, for the respondents.—The Act of 1849 gives the guardians something beyond their common law rights as creditors. Some meaning must be given to the provisions of section 16. The debt owing to the creditor-executor was a voluntary one, while the guardians, in giving relief to the pauper, were performing a statutory duty. The words "take and appropriate" must be read into the second part of section 16. Section 17 refers to a voluntary expense incurred by the guardians, and puts them on the footing of ordinary creditors. But the second part of section 16 gives them priority, or has no meaning at all.

He cited *In re Newbegin*, 36 W. R. 69, 36 Ch. D. 477; *Guardians of West Ham* v. *Ovens*, 21 W. R. 143,

L. R. 8 Ex. 37; Poor Law Act, 1844 (7 & 8 Vict. c. 101), s. 31; Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), s. 104.

MATHEW, J.—I think that this appeal must be allowed. [He stated the facts.] The guardians of the union contend that, under section 16, they have a preferential claim to the proceeds of the sale, and that the executor has lost any right to be satisfied in respect of the debt due to him from the deceased pauper. If this contention is a sound one, I can only say that it is a remarkable and extraordinary result of the Act, and that I can see no justice in such an arrangement. When one turns to the Act one can find nothing which authorizes the guardians to seize a pauper's property in the circumstances of this case, or which places them in a different position to the ordinary body of creditors. The earlier part of section 16 is as follows. [His lordship read the first part of the section.] There is nothing in that part of the Act which treats the guardians as other than ordinary creditors. They are given an alternative remedy. They may "take and appropriate," or "recover the same as a debt." The next part of the section is this: [his lordship read the second part]. No remedy is specified. "In manner aforesaid" is not to be found there. The county court judge said that those words should be read in, and held that the guardians were therefore preferential creditors. But section 17 throws some light on the matter. That section relates to the recovery by the guardians of the costs of burying any poor person, in the receipt of relief, who dies outside the limits of the union or parish, and declares that such costs "shall be recoverable in like manner and from the same parties as the costs of any relief (if given to such person when living) would have been recoverable."

The guardians in this case were mere creditors, entitled to be reimbursed in the same way as other creditors. There is nothing in the Act which takes away from ordinary creditors their share of the proceeds of the sale. The language of the Act is perfectly clear.

CHARLES, J.—I am of the same opinion. The section is difficult to construe, but the county court judge overlooked the alternative remedy supplied by section 16. That section has no intention of dealing with any preferential right of the guardians; it only provides them with a convenient remedy. In the earlier half of the section the alternative remedy is set out. When one looks at the second part of the section one remarks that there are no words embodying the earlier portion. The county court judge omits to notice the fact that there is an alternative remedy, and reads the first part of the section as an absolute power to appropriate the goods of the pauper. He then reads the words "in manner aforesaid" into the latter half of the section. There is no reason for so doing. The effect of the section is to give a convenient remedy during the life of the pauper, and to place the guardians on the same footing as other creditors after the pauper's death. The rights of the ordinary creditor are not taken away by the statute.

Appeal allowed.

Solicitors for the appellant, *Steadman, Van Praagh, Sims, & Co.*, for *A. Muir Wilson*, Sheffield.

Solicitors for the respondents, *Stevens & Parkes*, for *Jones & Middleton*, Chesterfield.

Q. B. Div. (Divisional Court) (Mathew and Charles, JJ.) Oct. 26.

SAUNDERS v. HOLBORN BOARD OF WORKS. (a.)

Metropolis—Sanitary authority—Streets and footways Duty to clean—Penalty—Action for damages by person injured through non-feasance—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 29.

It is the duty of every sanitary authority to clean the streets and footways of their district or incur a penalty of £20 under section 29 of the Public Health Act, 1891.

Held, that a person injured by the neglect of a sanitary authority to clear frozen snow from a footway had no right of action for damages against them.

Municipality of Pictou v. Geldert, 42 W. R. 114, [1893] *A. C.* 524, *and* Cowley v. Newmarket Local Board, [1892] *A. C.* 345, 41 *W. R. Dig.* 85, *followed.**

Appeal by the plaintiff from the decision of his Honour Judge Meadows White in the Clerkenwell County Court.

The plaintiff was injured on the 8th of January, 1894, by falling on frozen snow lying on the footway in Princetown-street, Red Lion-square. The snow had been there for several days.

By the Public Health Act, 1891 (54 & 55 Vict. c. 76), s. 29 (1): "It shall be the duty of every sanitary authority to keep the streets of their district, . . . including the footways, properly swept and cleaned . . . and to collect and remove . . . all street refuse." (2) "If any such street in the district of any sanitary authority, including the footway, is not properly swept and cleansed . . . the sanitary authority shall be liable to a fine not exceeding twenty pounds."

The plaintiff brought an action against the defendants (in whose district Princetown-street was admitted to be), for damages, in the Clerkenwell County Court. The judge nonsuited her, and she appealed.

W. G. Hawtin, for the appellant.—The plaintiff is entitled to recover damages from the defendants. The general principle is that a breach of statutory duty makes the person chargeable with that duty liable to an action at the suit of the person sustaining special damage by reason of the breach. The Act of 1891 takes away the old liability of householders for the non-removal of ice and snow imposed by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 117, and puts it upon the local authority. The duty is an original one, and the plaintiff must have a remedy.

He cited *Couch* v. *Steel*, 2 W. R. 170, 3 E. & B. 402; *Wilson* v. *Merry*, L. R. 1 H. L. (Sc.) 326 (*dictum* of Lord Chelmsford at p. 341); *Reg.* v. *Hall*, [1891] 1 Q. B. 747, 39 W. R. Dig. 67; *Hartnell* v. *Ryde Commissioners*, 11 W. R. 963, 4 B. & S. 361; *Bathurst* v. *McPherson*, 4 App. Cas. 256, 27 W. R. Dig. 139.

H. Courthope Munroe, for the respondents.—The only remedy for the breach of the duty to remove ice and snow is the recovery of the penalty of £20 imposed by section 29 of the Act of 1891. Public corporations to which an obligation to repair has been transferred are not liable to an action for non-feasance unless the Legislature has shown an intention to impose such liability upon them. *Couch* v. *Steel* and *Hartnell* v. *Commissioners of Ryde* have been practically overruled.

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* See also *Oliver* v. *Horsham Local Board*, and *Thompson* v. *Mayor of Brighton*, 42 W. R. 161, [1894] 1 Q. B. 332.

(a.) Reported by THEOBALD MATHEW, Esq., Barrister-at-Law.

He cited *The Municipality of Pictou* v. *Geldert*, 42 W.R. 114, [1893] A.C. 524; *Guardians of Holborn Union* v. *Vestry, &c., of Shoreditch*, 25 W. R. 40, 2 Q. B. D. 145; *Cowley* v. *The Newmarket Local Board*, [1892] A.C. 345, 41 W. R. Dig. 85; *Atkinson* v. *Newcastle Waterworks Co.*, 20 W. R. 35, 25 Ibid. 794, 2 Ex. Div. 441.

Hawtin replied.

MATHEW, J.—I think this appeal must be dismissed. We have had before us the very able and learned judgment of the county court judge, and I entirely agree in the conclusion at which he arrived with so much labour and ability. The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff through the failure of the defendants to discharge their statutory duty to remove snow and ice from the footways over which the plaintiff was passing. It was said that under the Act of 1891 the duty, previously imposed upon householders, of clearing away snow and ice in front of houses had been put upon the defendants. Now the terms of the section are these: [the learned judge read section 29]. Those are the obligations created by the statute in this public body, and it is contended on the authority of *Couch* v. *Steel* and *Hartnell* v. *The Ryde Commissioners*, which are still treated by the learned counsel as having some vitality, that his client is still entitled to maintain this action. Relying upon those cases, he gave little credit to the subsequent decisions, beginning with the well-known case of *Atkinson* v. *The Newcastle Local Board*. That case has been followed by *Cowley* v. *The Newmarket Board* in the House of Lords, and by the more recent case of *The Municipality of Pictou* v. *Geldert*. Those cases condemn in terms both the decision in *Couch* v. *Steel* and that in *Hartnell* v. *The Ryde Commissioners*. The result of these decisions is plain enough with reference to the obligations imposed upon bodies of this kind by Act of Parliament. It is that, unless the intention of the Legislature is clearly expressed that there shall be a liability to an action for default in the performance of a statutory duty, no action shall lie. Upon looking at this statute it is clear that there is no intention that any such liability shall be imposed upon the defendants. I have read the section, and the penalty pointed out is a penalty not to exceed £20, to be recovered in the manner indicated by the Act. That is the sole liability of the defendants. Why should we infer this further liability to an action? By the old statute (18 & 19 Vict. c. 120) the local authority was not bound to clear away snow and ice, and no such action would lie. It is clear, again, that no such action would lie against the inhabitants of the district. Why, then, should it be said that this statute creates the liability? It seems to me that the intention of the Legislature must have effect given to it according to the language used—viz., that this local authority shall be bound to do what the statute says it shall do, and that the consequence to the locality of the local authority neglecting its duty shall be the liability pointed out by the Act, and no other. If we adopted any other construction we should be putting upon the locality an obligation which does not exist at common law, and for which there is no statutory provision.

The learned county court judge refers to the authorities at great length, and I entirely agree in the conclusion at which he has come.

CHARLES, J.—I am of the same opinion. I entirely agree with the observations which my learned brother has made in reference to the judgment of the learned judge of the county court. I agree with that judgment and the reasons given by the learned county court judge. I will, however, state in my own words the reason why I agree with that judgment. It is beyond dispute that the duty imposed upon the sanitary authority is created by section 29 of the Public Health Act of 1891, and until that Act was passed there was no duty cast upon the sanitary authority in reference to the removal of ice and snow. In order to make out a liability on the part of the sanitary authority to an action for failure to perform that duty, we must find in the statute itself some intimation that a failure to perform the duty will make the sanitary authority liable to an action. That is the principle laid down in *Cowley* v. *Newmarket Local Board*, where it was said that the giving to a public authority the duty to repair does not of itself make that authority liable to an action for a failure to perform that duty—in respect of nonfeasance. In order to establish such liability it must be shown that the Legislature intended that such a liability should be imposed. Looking at this section, I fail to see any indication that the Legislature intended to impose this extraordinary liability. On the contrary, the section contains the only remedy for a failure to perform the duty put upon the sanitary authority—viz., a fine not exceeding £20. Now, inasmuch as that penalty is imposed by the same section which creates the duty, there can be no doubt that, upon the same principle which I acted upon in *Reg.* v. *Hall* when I quashed an indictment against an overseer of the poor for failure to perform a duty in connection with a parliamentary election, the sanitary authority could not be indicted. Indeed, it is not contended that it could be. As it could not be indicted, has the Legislature done anything beyond imposing, for the non-performance of the duty, this penalty? I fail to see that anything beyond the liability to the penalty has been imposed. There is nothing in the Act giving a right of action.

We have been referred to the somewhat old cases of *Couch* v. *Steel* and *Hartnell* v. *The Ryde Commissioners*, and although it is perfectly true that those cases have never been formally overruled by the Exchequer Chamber, the Court of Appeal, or the House of Lords, they have been spoken of in the House of Lords, the Court of Appeal, and the Committee of the Privy Council in terms which preclude us from treating them as binding authorities. The first case in which the authority of *Couch* v. *Steel* was seriously shaken was that of *Atkinson* v. *The Newcastle Waterworks*. In delivering the judgment of the Court of Appeal Lord Cairns (the other learned judges agreeing with him) indicates plainly enough that he does not approve of the reading of the statute upon which the decision in *Couch* v. *Steel* was based, and that it is no longer a question of whether a penalty is imposed, or whether it goes to the party aggrieved, or to a common informer. That is no longer a material or cardinal consideration. What is to be looked at is the purview of the statute itself, and the court must consider whether the statute itself indicates that a liability to an action for damages shall exist as well as a liability to a penalty. That case was followed in time by the two cases to which we have been referred: *Cowley* v. *The Newmarket Local Board*, in the House of Lords, and *The Municipality of Pictou* v. *Geldert*, in the Privy Council. It is quite plain, looking at those two cases, that the older cases cannot now be regarded as binding.

Now, what was the state of things before the statute passed? neither the inhabitants of a parish nor an individual would have been liable to an action for such a non-feasance as this. There was no duty on the inhabitants of a parish to remove snow or ice, no indictment would have lain, and no action could have been brought against them. The surveyor of highways could not have been proceeded against.

As pointed out by the learned county court judge, from the time of *Young* v. *Davis*, 11 W. R. 735, 2 H. & C. 197, onwards no action lay against the surveyor of highways. Whether that is based upon the ground that he is a servant and the doctrine of *respondeat superior* applies, or that he is subject to penalties for non-performance of his duty, is immaterial. The fact remains that he cannot be indicted.

So, again, when his duties were transferred to the sanitary authority, and they became surveyors of highways, it was held that they were not liable to an indictment. That was the state of things before the passing of this Act. It is clear that when this Act was passed the Legislature was placing a duty upon the sanitary authority which had never been put upon them before, and for the non-performance of which they could never have been proceeded against either by indictment or action. The statute states the only penalty for non-performance.

I need not point out the serious consequences that might result from a contrary construction of the statute. We are bound to look at the purview of the Act, and it would be an extraordinary thing if we were constrained to hold that anyone who was injured by the failure of a local authority to cleanse the streets in their district was able to bring an action and recover damages from them.

Appeal dismissed.

Solicitor for the appellant (plaintiff), *E. W. Essell.*

Solicitor for the respondents (defendants), *Matthew H. Hale.*

Q. B. Div.
(Mathew and Kennedy, JJ.) } Aug. 3, 1894.

HUFFAM *v.* NORTH STAFFORDSHIRE RAILWAY CO. (*a.*)

Railway company—Bye-law—Validity of—Passenger travelling without a ticket—Fraudulent intent—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 103, 104, 108, 109—*Regulation of Railways Act*, 1889 (52 *&* 53 *Vict. c.* 57), *s.* 5—*Statute Law Revision Act*, 1892 (55 *&* 56 *Vict. c.* 19).

A railway passenger, on the 15*th of March*, 1894, *travelled from Stoke to Macclesfield, and gave up to the ticket collector the return half of a ticket dated the* 28*th of February*, 1894, *which bore upon it the words, "available on the day of issue for one journey only." By a bye-law of the railway company "any passenger using or attempting to use a ticket on any day for which the ticket is not available, or which has already been used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." The passenger was convicted under the bye-law, no intention to defraud being alleged against him.*

Held, that the bye-law was bad, and that the conviction must be quashed.

Dyson *v.* London and North-Western Railway Co., 29 *W. R.* 565, 7 *Q. B. D.* 32, *followed.*

Case stated by justices.

The appellant on the 15th of March, 1894, travelled on the North Staffordshire Railway from Stoke to Macclesfield. At Congleton, an intermediate station where tickets were examined, he gave up the return half of a first-class return ticket dated the 28th of February, and bearing upon it the following words: "Available on the day of issue for one journey only." The full first-class fare for the journey from Stoke to Macclesfield was demanded from the appellant, who refused to pay it and gave his name and address.

The appellant was not charged with having acted with a fraudulent intention.

The justices convicted him under bye-law 2 of the railway company, which was as follows: "Any passenger using or attempting to use a ticket on any day for which the ticket is not available or which has already been used on a previous journey is hereby subjected to a penalty not exceeding 40s."

The justices stated a case.

A. T. Lawrence, for the appellant.—The bye-law is *ultrà vires* and bad. It purports to be made under the provisions of sections 108 and 109 of the 8 & 9 Vict. c. 20. By section 109 a railway company may make bye-laws, "provided that such bye-laws be not repugnant to the laws of . . . the United Kingdom." This bye-law is repugnant to the law, in that it does not introduce a fraudulent intention, which section 103 of the statute requires. A similar bye-law was held to be bad in *Dyson* v. *London and North-Western Railway Co.*, 29 W. R. 565, 7 Q. B. D. 32: see also *London and Brighton Railway Co.* v. *Watson*, 27 W. R. 614, 4 C. P. D. 118. The Regulation of Railways Act, 1889, s. 5, deals with the offence of travelling without paying a fare, and the remedy of the company was under that section.

W. F. Craies, for the respondents.—The bye-law has been held to be good in an unreported case heard in June, 1885, before a divisional court. [MATHEW, J.—We cannot hear any report of a case unless it has been made by a member of the bar.] The bye-law is not repugnant to the existing law. Section 103 of the 8 & 9 Vict. c. 20 was repealed by the Statute Law Revision Act, 1892, and the decisions in *Dyson* v. *London and North-Western Railway Co.* and the other old cases are therefore not applicable. The Regulation of Railways Act, 1889, was passed to remove the doubt and confusion created by the cases of *Saunders* v. *South-Eastern Railway Co.*, 29 W. R. 56, 5 Q. B. D. 456; *Dyson* v. *London and North-Western Railway Co.*; and the observations of Coleridge, C.J., in *London and Brighton Railway Co.* v. *Watson*, 26 W. R. 856, 3 C. P. D. 429. It does not cut down the power of the companies as to the making of bye-laws.

MATHEW, J.—I am clearly of opinion that this conviction must be quashed. It is agreed that the appellant was innocent of any intention to defraud. Having regard to sections 103 and 104 of the 8 & 9 Vict. c. 20 the bye-law is *ultrà vires* and bad. That is the result of the decision in *Dyson* v. *London and North-Western Railway Co.*, which I have no reason for saying was wrongly decided. But, says Mr. Craies, the bye-law, though illegal before, was validated by reason of the repeal of section 103 of the 8 & 9 Vict. c. 20 by the Statute Law Revision Act, 1892. The answer to that is, that before the Statute Law Revision Act was passed there came the Regulation of Railways Act, 1889, which contains an elaborate code dealing with this description of offence. If the appellant could be brought within the terms of section 5, sub-section (3) (*a*), of that Act he might be rightly convicted. But section 5, sub-section (3) (*a*), deals only with the person who "travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof." The appellant, however, had already paid his fare. The conviction was wrong, and must be quashed.

KENNEDY, J., concurred.

Conviction quashed.

Solicitor for the appellant, *Sword*, Hanley.

Solicitors for the respondents, *Chester, Mayhew, Broome, & Griffiths*, for *E. A. Paine*, Hanley.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

Court of Appeal.

From Railway Commissioners. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) June 19-21; July 9, 1894.

DARLASTON LOCAL BOARD *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (*a.*)

Railway—Railway Commission—Jurisdiction—Power to order a railway company to build a new station, or to reopen a station which has been closed—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.

The Railway Commissioners have no jurisdiction under section 2 *of the Railway and Canal Traffic Act,* 1854, *to order a railway company to build a new station or to reopen a station which has been closed and pulled down.*

Appeal from an order of the Railway Commissioners (Wills, J., Sir F. Peel, and Viscount Cobham).

The Darlaston Local Board applied, under section 2 of the Railway and Canal Traffic Act, 1854, for an order upon the London and North-Western Railway Co. to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic on their branch line between Wednesbury and James Bridge Stations, and to reopen Darlaston Station for that purpose.

This branch line, which was formerly part of the South Staffordshire Railway Co.'s system, commenced by a junction with the South Staffordshire Railway near Wednesbury Station and terminated by a junction with the London and North-Western Railway near James Bridge Station. The South Staffordshire Railway became vested in the London and North-Western Railway Co., who erected a passenger station at Darlaston on the branch line, and worked a train service on this branch line until, owing to the construction of a steam tramway between Wednesbury and James Bridge through Darlaston, the traffic on the line was reduced to insignificant dimensions, and in consequence thereof, in October, 1887, the company ceased to run passenger trains upon this branch line and closed and pulled down the station at Darlaston. The company during the ten years from 1877 to 1887 lost many thousands of pounds in working this line as a passenger line. The distance from the market place at Darlaston to James Bridge Station by road was less than a mile, and that to Wednesbury Station less than a mile and a half.

The question raised in the application was whether the commissioners had jurisdiction to make an order in effect requiring a railway company to reopen a passenger station which had been closed, it being admitted that this would be the effect of the order applied for in this case.

Wills, J., delivered the judgment of the Railway Commissioners, holding that they had jurisdiction to make such an order, and an order was accordingly made in the terms of the application.

The London and North-Western Railway Co. appealed.

Sir R. E. Webster, Q.C., Pope, Q.C., and *C. A. Russell,* for the appellants.

Balfour Browne, Q.C., C. A. Cripps, Q.C., and *E. T. Slater,* for the respondents.

Cur. adv. vult.

July 9.—Lord ESHER, M.R.—In this case an application was made to the Railway Commissioners by the Local Board for the district of Darlaston, in the county of Stafford, under section 2 of the Railway and Canal Traffic Act, 1854, for an order requiring the London and North-Western Railway Co. to afford reasonable facilities for the receiving, forwarding, and delivering of passenger traffic on their branch line between Wednesbury and James Bridge Stations, and to reopen Darlaston Station for this purpose. It was frankly admitted here that the application was really for an order to reopen Darlaston Station for the purpose of passenger traffic. The facts, about which there was no dispute, were that at one time there was this Darlaston Station, and that it was used for passenger traffic. That state of things continued for several years, but the directors found that every year it resulted in a loss, and therefore they resolved to close and do away with the station altogether. They accordingly did close the station, and they pulled down the building entirely, and that state of things continued for five years; and then after that, this application is made to the Railway Commissioners. The commissioners have granted the application, and have made an order which it is admitted could only be obeyed by reopening Darlaston Station for the purpose of passenger traffic. This order really is an order to make a new station instead of the old station, and to open it for passenger traffic.

The question depends on the construction of section 2 of 17 & 18 Vict. c. 31, which enacts that "every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by it." If anything is done in violation or contravention of that enactment, an application may be made in a summary way by motion or summons to the Railway Commissioners. Now, by section 1, "The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic." It seems to me a necessary implication therefore that the word "railway" in section 2 does not include a station which is not used for the purposes of public traffic. I am of opinion that that construction was put upon the statute by this court in the case of *South-Eastern Railway Co.* v. *Railway Commissioners,* 6 Q. B. D. 586, 29 W. R. Dig. 108. Wills, J., I observe, says: "In that case the Court of Appeal certainly decided that this court has not jurisdiction to make an order for reasonable facilities which can only be complied with by the opening of a new station. I confess that but for that decision I should have thought much might have been argued against this view of the effect of the section." That seems to me to express a doubt on the part of Wills, J., whether the decision of this court was correct. It is not right for me to consider whether his doubt is a well-founded doubt or not, because I have no authority, and cannot assume to have any authority, to overrule a former decision of this court; but, out of respect to him, I will say this, that I have considered whether, in my opinion, his doubt is well founded, and I do not think it was. I feel just as clearly now as I did when I sat with Lord Selborne that the decision in that case was perfectly right. So that not only should I be unable to overrule it, but if I could I would not, because I think it was right.

If that is so, what does it come to? It comes to this: that when you talk of ordering reasonable facilities, you mean thereby the insisting upon a reasonable use. A facility is a facility in the use of a thing, and that must mean in the use of an existing thing. It follows, therefore, that this summary jurisdiction

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

does not apply to the making of a railway, nor to the building of a station, nor to the giving of facilities in respect of a station not in use. Supposing a railway company had obtained an Act of Parliament which imposed upon them a duty to make a railway, and, that duty being imposed upon them by Act of Parliament, they neglected that duty, does this section give the commissioners power under such circumstances to order the company, in a summary way, to make that railway? It seems to me that the very words show that they could not make such an order, and that, if a railway company thus neglected their Parliamentary duty, the only court which could enforce that duty would be the court which can issue a *mandamus*, that is to say, the High Court of Justice. If a railway company were bound by statute to continue the use of their railway for the benefit of the public, and were purposing to discontinue the use of it as a railway, what would be the remedy? An injunction from the High Court to restrain them from so doing.

Therefore, the question whether a railway is to be made, and the question whether a railway company is bound not to cease working its railway, are questions for the High Court, and not questions for these commissioners to decide in a summary way. Still more must this be so if the Act of Parliament under which the railway is made or the railway company is constituted does not oblige them to open the railway or to keep it open, but merely authorizes them to make the railway and to work it. The commissioners only have power, where the railway is in existence, and is being worked as a railway, to determine the question whether that railway is giving reasonable facilities for the receiving and forwarding and delivering of traffic. Now, although the word "railway" is to include stations, yet a station is for the purposes of this Act treated as a separate thing. It was upon that view that the case of *South-Eastern Railway Co.* v. *Railway Commissioners* was determined. There Lord Selborne said: "With respect to stations there is no obligation to establish them at any particular places or place unless the company thinks fit to do so. The railway, as interpreted by the Act, only includes existing stations used for the purposes of public traffic, but when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it," then the commissioners have jurisdiction to determine whether reasonable facilities are given at that station. That was Lord Selborne's judgment. Lord Coleridge agreed. In my judgment, which followed, I laid down certain propositions and then continued:—"It follows that the defendants," who were the Railway Commissioners, "had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic. This description of the railway and stations—namely, that they are used by the company—confines their jurisdiction"—that is, the jurisdiction of the then defendants—"to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new station." That was a question raised upon a declaration in prohibition. There the suit was for a prohibition to the Railway Commissioners on the ground that they were exceeding their jurisdiction. The case now before us is an appeal from the decision of the Railway Commissioners, but if the state of things shows that they have exceeded their jurisdiction, and might have been prohibited, that, of course, is a fatal objection on an appeal. A state of things which will support prohibition will always support an appeal if an appeal can be brought. Wills, J., in this case, says, "I think that we are justified in laying down the general proposition, that, where a station exists and there is at that station a substantial amount of passenger traffic, for the railway company to close that station without providing an equivalent is a breach of the obligation to give reasonable facilities under the section, the word 'railway,' in which is defined by words of extension as including 'every station of or belonging to such railway used for the purposes of public traffic.'" Now, the extent to which the decision goes may be shown by this; he says that the company "endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic; we think that in doing so they acted illegally." Wills, J., and the commissioners have acted in accordance with a case which they had previously decided: *Winsford Local Board* v. *Cheshire Lines Committee*, 38 W. R. 511, 24 Q. B. D. 456. I think that they have acted contrary to the decision of this court, which held that they have no jurisdiction to do what they did in *Winsford Local Board* v. *Cheshire Lines Committee*, and what they have done in this case. If the application to which they have acceded had been made two months after the company had resolved to do away with Darlaston Station, and had done away with it, in my opinion the Railway Commissioners would have had no jurisdiction to order the company to reinstate it. But when we consider that this station has disappeared, and has not been in existence for five years, it is clear that the order to reinstate it is practically an order to make a new station.

On the authority of *South-Eastern Railway Co.* v. *Railway Commissioners* I am of opinion that such an order cannot be made. I think that the commissioners had no jurisdiction to make the order, and that if the appellants here had applied for a prohibition, that prohibition might have been granted. The decision cannot stand, and must be reversed.

KAY, L.J.—The London and North-Western Railway Co. have a branch line which runs in a curve from their main line at James Bridge Station (formerly called Darlaston passenger station) through Darlaston to Wednesbury. On this branch there was formerly a passenger station at Darlaston. Finding that they were losing money by it, they, about 1887, discontinued the use of this station, and in 1889 they pulled it down. Since then the Darlaston passenger traffic has gone to James Bridge Station, one mile distant by road from Darlaston, or to Wednesbury, about one and a half mile distant. There is another branch from Wednesbury to the main line. There are steam tramways from Darlaston to both Wednesbury and James Bridge.

This is an application by the Darlaston Local Board, under section 2 of the Railway and Canal Traffic Act, 1854, and 36 & 37 Vict. c. 48, for an order requiring the railway company to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic on this branch line, and to reopen Darlaston Station for this purpose. The Railway Commissioners have acceded to this application, and by an order reciting that the company have ceased to use this branch for passenger traffic and have closed the Darlaston Station, the commissioners have required the company, their agents and servants, to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic upon and from the said railway. This order, of course, is intended, though it does not say so in terms, to compel the company to reopen and rebuild the

Darlaston Station. In the judgment of the commissioners, delivered by Wills, J., it is decided that the Act of 1854 imposes upon railway companies an obligation to give reasonable facilities; that this obligation was broken by the discontinuance of passenger traffic on this branch line; that as there was at the time of closing Darlaston Station an amount of passenger traffic at it which, though not large, was still substantial, it was a breach of the obligation to close it without providing an equivalent; and that, as closing the branch for passenger traffic was an illegal act, it was proper to make the present order. I take the facts as they are found by the commissioners. In their printed judgment the circumstances of the case are very explicitly stated in the following words: "It is but too plain that the line must be worked at a loss, and we regret to impose this burden upon the respondents. They endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic." The utmost that the Act of 1854 requires is that railway and canal companies should afford "reasonable facilities" to the public. That must mean reasonable as regards the company as well as the public. This seems to be recognized in the judgment of the commissioners. They say that the service to be established must be reasonable from the point of view of the respondents, the railway company, as well as the applicants. The decision is that it is reasonable to require a railway company to give facilities to the public which involve a heavy loss to themselves after having "endeavoured in good faith for several years" thus to accommodate the public. With deference, this seems to me to disregard the plain language of the Act, and to assume a jurisdiction to compel a railway company to give unreasonable facilities, which is contrary to the terms of the statute, and therefore beyond the jurisdiction of the Railway Commissioners. This consideration alone compels me to the conclusion that the commissioners, upon the facts as found by them, had no jurisdiction to make this order.

But the question argued on this appeal was much larger and more important, and is one which affects railway and canal companies very seriously indeed. It was freely admitted by counsel that no obligation was imposed upon this railway company by any of its special Acts either to make, or, having made, to maintain, this branch railway from Wednesbury to the main line at James Bridge. The language of the statute 18 & 19 Vict. c. clxxv., which empowered the company to make the branch in question, is in the usual form, that "subject to the provisions in this Act contained, the company may make and maintain the railway hereinafter mentioned with all necessary works and conveniences connected therewith." Whatever obligation the company were under in this respect was imposed upon them, it was admitted, by the Railway and Canal Traffic Act, 1854, only. By the definition section (section 1) "railway" as used in the Act includes "every station of or belonging to such railway used for the purposes of public traffic." Section 2 is the section which is supposed to oblige the company to reopen the station in this case. I will read it shortly, introducing the words I have quoted from the definition, "Every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways, including every station of or belonging to such railway used for the purposes of public traffic." Now, no doubt these words are imperative. They were intended to impose upon railway companies an obligation which either did not exist or was imperfect before, and the Act provides a summary mode of enforcing that obligation, a jurisdiction which is now vested in the Railway Commissioners. If the company do not give the reasonable facilities made obligatory by this Act, the Railway Commissioners may require them to do so on a summary application for the purpose. But what are the reasonable facilities intended? If the company never made the branch railway at all, could the commissioners compel them to do so? It was decided in *Reg.* v. *York and North Midland Railway Co.*, 1 W. R. 358, 1 E. & B. 858, that a railway company under such words as are used in the special Act in this case is not under any obligation, contractual or otherwise, to make the line, although, if the words in the special Act are imperative, as in *Rex* v. *Severn and Wye Railway*, 2 B. & Ald. 646, it was held otherwise; and in *Scottish North-Eastern Railway* v. *Stewart*, 7 W. R. 458, 3 Macq. 382, the decision in *Reg.* v. *York and North Midland Railway Co.* was cited and approved by Lord Wensleydale in the House of Lords. This decision was before the Act of 1854; but it can hardly be argued that this statute made it compulsory to make the railway. Then in *Reg.* v. *Great Western Railway Co.* (1893), 62 L. J. Q. B. 572, it was decided that where the special Act contained only the usual permissive words a railway company could not be compelled by *mandamus* to reinstate a part of their line which had been let down and destroyed by working the minerals underneath it. The ground of that decision was that the company was under no obligation to maintain the line, and therefore could not be compelled to reinstate it. Bowen, L.J., said: "It must be admitted, after the decisions in the House of Lords and in the Exchequer Chamber, that there was no obligation on the railway to make the line. The applicants can only get the obligation to reinstate, if at all, out of a supposed obligation to maintain the line after it is once made. They cannot ask for a *mandamus* directing the railway company to maintain the line; but they say that if there is an obligation to maintain it that involves an obligation to reinstate it if it is destroyed. No doubt if there were an obligation to maintain there would be an obligation to reinstate, but in order to get the duty to reinstate one must find the duty to maintain." It was suggested in the argument in the present case that the statute of 1854 was overlooked in that case because no reference to it appears in the judgments. But the statute was referred to in the judgment of the Divisional Court from which the appeal was brought, and if no argument upon it was raised in the Court of Appeal, it must have been because such argument would have been useless.

I am clearly of opinion that if a railway company is not bound by its special Act to make or maintain the railway, no such obligation is imposed upon it by the Act of 1854. But there is another decision of the Court of Appeal which bears still more closely upon the present case, I mean *South-Eastern Railway Co.* v. *Railway Commissioners*. The short effect of that decision is that a railway company cannot be compelled to make a station where there was not one before, nor to direct that imperfections in an existing station shall be remedied by specific alterations prescribed by the commissioners. Lord Selborne, L.C., said, in giving judgment: "A company may carry or not upon its own lines, as it thinks fit; and if it does so, may undertake that business under various conditions and limitations. But if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the 2nd section of the Act. With

respect to stations, there is no obligation to establish them at any particular place or places unless the company thinks fit to do so. The railway, as interpreted by the Act, only includes existing stations used for the purposes of public traffic. But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage, it is, in my opinion, bound by the Act to afford, at that station (to the extent of its powers), all reasonable facilities for receiving, forwarding, and delivering such passengers and goods." His lordship then proceeds to say that a general order to give increased facilities at an existing station would not necessarily be beyond the commissioners' jurisdiction, because it would incidentally be requisite, in order to obey it, to make some structural alterations, but that the commissioners have no authority, by ordering particular works to be done, to control the discretion of the company as to the best means of fulfilling their statutory obligations.

The commissioners seem, from their judgment in the present case, to have been considerably embarrassed by that authority. First, they say that much might be urged against it. Then they distinguish the case of opening a new station from closing one "for which there is an existing public need." But the question before the commissioners was not of closing Darlaston Station. That had been done years before, and an order to reopen it was so very like an order to open a new station that I do not wonder that the case was found difficult to distinguish.

A railway company is a corporation formed for the purpose of carrying on a business for the sake of profit. In consideration of the probable benefit to the public they have extraordinary powers, such as taking the land they require compulsorily. Generally speaking, however, the Legislature has carefully avoided putting them under any obligation which might involve pecuniary loss. They are not bound to make, or having made to maintain, the line of railway. That they will do so whenever there is a reasonable expectation of profit is thought so probable that no legislative obligation is imposed upon them. But then it was necessary to put such companies under some control, and this was done by the Railway and Canal Traffic Act, 1854. That statute does not enact that railway companies shall make the lines they are authorized to make or shall maintain them when made. The purpose of it seems to me to fall far short of these objects. While a railway is in existence and is being worked, questions may arise as to whether reasonable facilities are being afforded for traffic of one kind or another at a particular part of the line, and whether undue advantages are being given to some persons at the expense of others. These questions the commissioners may solve, always bearing in mind that where it is a question of reasonable facilities they must be reasonable as regards the company as well as the public concerned. But it would require very clear and explicit words in the Act to bring me to the conclusion that it was intended to enable the commissioners to determine whether any part of the line was be constructed or maintained, or the spot at which a station was to be built. I find nothing in the statute about any of those matters.

It is not necessary to the present decision to hold that in no possible circumstances could the commissioners have jurisdiction to prevent the closing of an existing station. It is difficult to conceive that any company would do this where there was a chance of profit by keeping it open. But every such case must depend upon its particular circumstances. I am clearly of opinion in the present case that the company were not bound to keep open the Darlaston Station or to run passenger trains over the Darlaston branch at a loss, and that the company did not act illegally under the circumstances in closing that station. The order of the commissioners is intended to compel the railway company to reopen that station, and I am of opinion that it was beyond their jurisdiction to make the order in this case to compel them to do so.

A. L. SMITH, L.J.—Two questions arise upon this appeal, and they undoubtedly are of great importance. The first is, whether a railway company which has built and opened a station upon its line for public traffic can, at its own will and pleasure, close it and pull down; the second is, whether, having done so, the company can be compelled by the Railway Commissioners to rebuild and reopen it.

The short facts are as follows:—For some twenty-four years, prior to October, 1887, the defendant company had run trains over its branch line to and from the Old Darlaston Station thereon. It was found, by reason of tramways being constructed and other alterations in the neighbourhood, that passenger traffic at this station could no longer be worked at a profit, and loss was occasioned thereby, and on the 31st of October, 1887, the company ceased to run passenger trains over this branch, and shut up the station, and in the year 1889 dismantled and pulled it down. The company continued to run through goods trains over the branch. Some five years afterwards application was made to the Railway Commissioners by the Local Board of Darlaston for an order directing the railway company in substance to rebuild the station and run passenger trains in connection therewith. The Railway Commissioners found that passenger traffic to and from the Darlaston Station could only be worked at a loss to the company, but, nevertheless, made an order, which, though in form an order commanding the company to afford reasonable facilities for receiving and forwarding and delivering of passenger traffic upon and from the said railway, was in substance an order to rebuild a station at Darlaston and to reopen it for passenger traffic, for it was only by doing so that the order could be complied with.

The question is, Had the commissioners power to do this? It is clear, apart from the Railway and Canal Traffic Act, 1854 (about which more hereafter) that where the words of an Act of Parliament, by which a railway company is empowered to make a railway, are enabling, as they are in the present case, and not obligatory, no obligation is imposed upon a company to make the contemplated line, or any part of it, or any station connected therewith. At one time it was thought otherwise, but this opinion was controverted, first, by Erle, J., in his judgment in the year 1852 in *Reg.* v. *York and North Midland Railway Co.*, 1 W. R. 35, 1 E. & B. 178, and was finally exploded in the next year in the Exchequer Chamber, which affirmed the judgment of Erle, J., 1 W. R. 358, 1 E. & B. 858. Lord Wensleydale subsequently, in the House of Lords, in *Edinburgh, Perth, and Dundee Railway Co.* v. *Philip*, 5 W. R. 377, 2 Macq. 514, spoke of this case as follows:—"Now it has been very clearly settled, though in the first instance there was some doubt about it, that these enabling Acts are not compulsory. It was solemnly decided by the Court of Error, of which I formed a part, in a case in which the judgment was delivered (and an

excellent judgment it was) by the late Jervis, C.J., that permissive words in an Act of Parliament are not obligatory." Apart, therefore, from the Railway and Canal Traffic Act of 1854, the defendants were under no obligation to keep open the old Darlaston Station in the year 1887.

But the Railway and Canal Traffic Act of 1854 has undoubtedly imposed obligations upon railway companies which had not theretofore existed, and gave the Court of Common Pleas, now represented by the Railway Commissioners, jurisdiction to enforce them, and it becomes necessary to examine this Act to see what these obligations are. This Act of 1854, which is called "An Act for the better Regulation of the Traffic on Railways and Canals," recites that it is expedient to make better provision for regulating the traffic on railways, "traffic" including passengers and their luggage, and goods, animals, and other things conveyed by a railway company, and it then enacts, by section 2, which is the material section in this case, that every railway shall (this is obligatory), according to its powers, firstly, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon its railway, and from every station on its railway used for the purposes of public traffic; and, secondly, it shall not give undue preference in favour of any particular person or description of traffic; and, thirdly, it shall afford all due and reasonable facilities for receiving and forwarding all traffic arriving by any railway which forms part of a continuous line of railway with itself. It also provides, by section 7, that the only conditions the company may impose, as regards the carriage of goods, are such as shall be adjudged to be just and reasonable. I can find nothing in this Act which either imposes an obligation upon a railway to make the whole or any part of its line, which it does not desire to make, or which obliges a company to build any station which it does not desire to build, and I cannot doubt that this Act of 1854 does not impose either of these obligations upon a company, under the obligation to afford all reasonable facilities for receiving and forwarding and delivering of traffic; and that this is the opinion of Lord Selborne and Lord Esher will be seen upon reading their judgments in the case of *South-Eastern Railway Co.* v. *Railway Commissioners.*

But it is said that even if so, where a company has made and uses for public traffic the whole or any part of its line, or has built and uses for such traffic any station thereon, the Act of 1854 has by the words above mentioned imposed the obligation upon the company to maintain and use such line and station so long as such maintenance and user is necessary for affording reasonable facilities, and that if a company does not do this it fails according to its powers to afford the reasonable facilities mentioned in the Act, and this is how it is put by the applicants. It is not denied on the part of the defendant company that so long as a railway company is working its line with the stations used for public traffic upon that line the company is bound to afford the facilities mentioned in this Act, but they deny that there is to be found therein an obligation upon a railway company to continue to maintain and use either the whole or any part of its line, or the whole or any of its stations in order to afford such facilities, if it does not desire to do so. They do not deny jurisdiction in the commissioners to order the proper facilities to be given at the stations which are in public use, but they do deny their jurisdiction to order the company to keep all or any part of its line, or all or any of its stations open for public traffic.

In construing this Act of 1854 it must not be forgotten that just fifteen months prior to its being passed the Exchequer Chamber, by the unanimous judgment of nine judges, had held that, under an Act enabling a company to make a line, the company was under no obligation to make it or any part of it, and it seems to me necessarily to follow from this, as before stated, that under such an Act a railway company is under no obligation to maintain or keep open what it may happen to have constructed. It is, however, said, on behalf of the applicants, that with this decision before it, the Legislature by the language it has used in section 2 of the Act of 1854 has shown that it intended to compel, and has compelled, every railway company thereafter to maintain and keep open any works it may have made and used for public traffic, so long as such works or any of them might be necessary for affording all reasonable facilities for receiving, forwarding, and delivering traffic upon and from its railway.

Now what are the words which are said to have wrought this great change and cast this onerous obligation upon the railway companies? They are these: "Every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of passengers and their luggage, and goods, animals, and other things conveyed by its railway, upon and from its railway and upon and from every station of or belonging to the railway used for the purposes of public traffic." It will be seen that there is not a word in this section about the railway company maintaining or using its railway or stations in whole or in part, or rendering the facilities named for any defined or indeed for any period at all; the period for which the line is to be maintained and used is left precisely where it was before the Act of 1854 became law. The obligation imposed by the Act of 1854 is that "the company shall, according to its powers, afford all reasonable facilities." But for how long? That is the question. The applicants contend that the company must do so for as long as these facilities are required by the public; but where is this to be found in the Act? There are no words to this effect, and indeed the words which are there are opposed to this contention, namely, the words "used for the purposes of public traffic." In my judgment the true answer to be given to the question, For how long? is that a railway company is placed under obligation by the Act of 1854 to afford the reasonable facilities for just so long as, when the Act was passed, it was under obligation to maintain and use its line and stations, and for no longer, which is for so long as it desires to keep open and does keep open its line and stations for public traffic. So long as the company does this it must maintain those parts which it desires to keep open and is keeping open, whether they be the whole or only parts of its undertaking, in such a state as to afford the reasonable facilities mentioned in the Act. This, in my opinion, is what the Act of 1854 enacted, especially when taken in connection, as it may be, with the law as it stood at the time it was passed. If the Legislature was imposing the onerous and novel obligation upon a railway company to maintain its works for some period other than it was then bound to do, some apt words certainly would be found in the Act imposing this obligation, and yet the Act is altogether silent upon the subject, though other words are now said to bear that meaning and are pressed into the service to do duty for those which cannot be found.

I am aware of what has been argued on the respective sides as to the convenience or inconvenience which may arise from one or other construction of the statute. On the one side (*i.e.*, the side of the public) it is said, if this Act of 1854 is not to be read as imposing an obligation upon a railway company

to keep its line and its stations open so long as such keeping open affords a reasonable facility, what a disadvantage it will be to the public, and how unreasonable it is, not to construe the Act in such a way as to oblige the company to keep its works open for the convenience of the public; and, indeed, Sir F. Peel, in the case of *Winsford Local Board* v. *Cheshire Lines Committee*, said that unless section 2 of the Act of 1854 was so read railway companies would be able to make the section practically a nullity. The answer given to this is, that it is not the general habit of railway companies, for the sake of spiting their customers, to discontinue traffic which self-interest prompts them to continue, and it is said that it is unreasonable that they, who are trading companies carrying on business in the interests of their shareholders, should be compelled against their will and against their own interests to go on carrying for the public, especially when the public do not provide the requisite traffic to enable the company to carry on its business otherwise than at a loss. The balance of these conveniences or inconveniences appears to me to be about equal; but be this as it may, they throw no real light upon the true construction of the Act. I can find nothing in the Act of 1854 to lead me to the conclusion that an obligation is thereby cast upon a railway company to maintain and use its lines, or any particular part of its lines, or all or any of its stations, if it does not desire to do so. The case of *Reg.* v. *Great Western Railway Co.* has a material bearing upon the obligation of railway companies to maintain and keep open their railways, and is in accord with what I have above stated, and I must point out that, although the case of *South-Eastern Railway Co.* v. *Railway Commissioners*, which was decided upon the Act of 1854, was cited and dealt with by Lord Coleridge in the court below, neither this Act nor the *South-Eastern case* appears to have been cited in this court, and the learned counsel for the appellant in that case did not then even suggest the construction now sought to be placed upon the Act of 1854. The passage in the judgment of Lindley, L.J., in *Dickson* v. *Great Northern Railway Co.*, 35 W. R. 202, 18 Q. B. D. 176, so much relied upon by the applicants, does not apply to the present case. The Lord Justice points out that the Act of 1854 materially altered the law, in respect of affording reasonable facilities for receiving, forwarding, and delivering traffic, and this undoubtedly is true; and he points out that this duty thus imposed was inconsistent with the company's right to refuse to carry any particular class of goods which they have facilities for carrying, but no question in that case was raised as here, as to whether a railway company could rightly close its lines or stations, or part of its lines or any particular station, to public traffic. What the Lord Justice was dealing with was a company which was using its railway and stations for public traffic, and what he said was that under these circumstances it would not be affording reasonable facilities to refuse to carry any particular class of goods which the company had facilities for carrying. I find a strong expression of opinion by Lord Selborne, when Lord Chancellor, in *South-Eastern Railway Co.* v. *Railway Commissioners*, as to the construction of the Act of 1854. He states: "A company may carry or not upon its own line as it thinks fit; and, if it does so, may undertake that business under various conditions and limitations. But if and so far as it does undertake so to carry either passenger or goods traffic, it comes (in my opinion) under the obligation to afford, for the purposes of that traffic, the facilities required by the first branch of the 2nd section of the Act."

For the reasons above, my opinion is that the Act of 1854 does not compel a railway company to go on maintaining and using its railways or stations either in whole or in part, even though by so doing it would afford reasonable facilities for public traffic, and that the defendant company was within its rights in closing its station as it did in 1887, and in ceasing to carry passengers over its branch line, and in subsequently pulling down the station.

But there is also the second point, which I think equally fatal to the applicants. The passenger traffic was stopped in 1887 to the knowledge of the applicants, and so matters rested till 1892, with the exception that in the meantime the company pulled down its station. The difficulty may be masked by making an application in the precise words of the Act, and by granting an order in that form; but the real case must be looked at, which is that the applicants are asking the railway commissioners to order that the company should rebuild a station on or about the old site, and commence passenger traffic thereto; and, call it what you will, that is the real object sought to be attained. Even if the company could not have shut up its station in 1887, though, as I have stated, I think it could, there is no jurisdiction in the commissioners under the circumstances which exist now, to order a station to be built, which is in reality the order now appealed against, and which must be done if the applicants are to derive any advantage from their application. The case of *South-Eastern Railway Co.* v. *Railway Commissioners* is a conclusive authority that a new station cannot be ordered by the commissioners.

In conclusion, I will say that if the public are to be empowered to impose upon a railway company the obligation to maintain and keep its works open, and if those motives of railway companies "which do not appear upon the surface," that are alluded to by Wills, J., exist, and are to be frustrated, this must be done by an express enactment, and not by an attempt to extract from words such as are in the 2nd section of the Act of 1854 a meaning which in my judgment it is clear, when the Act and its history are understood, they cannot bear.

In my opinion this appeal should be allowed.

Appeal allowed.

Solicitor for the appellants, *C. H. Mason.*

Solicitors for the respondents, *Ullithorne, Currey, & Villiers*, for *J. Corbett*, Darlaston.

From Chan. Div. (Lindley and A. L. Smith, L.JJ.) — Oct. 31.

In re THE GENERAL PHOSPHATE CORPORATION (LIMITED). (*a.*)

Company—Winding up—Public examination—Report of official receiver—Fraud—Companies (Winding-up) Act, 1890, *s.* 8.

The court has no power under the Companies (Winding-up) Act, 1890, *s.* 8, *sub-section* 3, *to order a public examination upon a report which does not show on the face of it that some fraud has, in the opinion of the official receiver, been committed. That opinion, however, need not be stated in express terms.*

In re Laxon & Co. (No. 3), 41 *W. R.* 62, [1893] 1 *Ch.* 210, *and* In re Birkdale Steam Laundry Co., 42 *W. R.* 144, [1893] 2 *Q. B.* 386, *discussed.*

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Appeal from a judgment of Vaughan Williams, J., reported 42 W. R. 602.

The General Phosphate Corporation (Limited) was registered as a limited company in June, 1890. In August, 1893, it was ordered to be wound up. The official receiver made his preliminary report in November, 1893. On February 24, 1894, he made a further report, in which, after stating facts relating to the formation of the company, he said: "The official receiver is of opinion that it is desirable that a public examination should be held, and that the persons named in the schedule hereto should be publicly examined as to the promotion or formation of the company, and as to the conduct of its business." The persons mentioned in the said schedule were directors, promoters, and officers of the company. The report did not state that, in the official receiver's opinion, any fraud had been committed, and it was not contended that the report manifestly showed that such was his opinion. The official receiver applied to the court for an order for the public examination of the persons mentioned in the schedule.

On April 25 Vaugham Williams, J., refused the application, on the ground that, as the official receiver was entitled to bring before the court matters based on information and belief, it was only reasonable, and was convenient in practice, that the expression of his belief in a *primâ facie* case of fraud should be expressed before he could obtain an order.

From this decision the official receiver appealed *ex parte*.

The case turned upon the construction of the Companies (Winding-up) Act, 1890, s. 8, which provides—

Sub-section 1: "Where the court has made an order for winding up a company, the official receiver shall, as soon as practicable . . . submit a preliminary report to the court . . . (c) whether, in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof."

Sub-section 2: "The official receiver may also, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed, and whether, in his opinion, any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which, in his opinion, it is desirable to bring to the notice of the court."

Sub-section 3: "The court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the court . . . and be publicly examined as to the promotion and formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company."

Sir R. T. Reid, A.G., and *Ingle Joyce*, for the official receiver.—We do not contend that the official receiver states in his report that, in his opinion, any fraud has been committed, nor that it is manifest from the report that such is his opinion; but he has stated that in his opinion a public examination should be held. We therefore say we are entitled to an order.

They referred to *In re Great Kruger Gold Mining Co., Ex parte Barnard*, 40 W. R. 625, 641, [1892] 3 Ch. 307; *In re Trust and Investment Corporation of South Africa*, 40 W. R. 689, [1892] 3 Ch. 332; *In re Laxon & Co.* (3), 41 W. R. 62, [1893] 1 Ch. 210; *In re Birkdale Steam Laundry Co.*, 42 W. R. 144, [1893] 2 Q. B. 386; *In re New Zealand Loan and Mercantile Agency Co.*, 38 SOLICITORS' JOURNAL, 339.

LINDLEY, L.J.—I think we must refuse this application; in fact, we cannot do otherwise if we are to be consistent with our previous decisions in *In re Great Kruger Gold Mining Co., Ex parte Barnard*, and *In re Trust and Investment Corporation of South Africa*. It appeared to me then, and it appears to me now, that the construction put by this court on the Act is right—that there is no power to enforce this process of public examination upon a report which does not show on the face of it, not necessarily that a particular person has committed a fraud, but that some fraud has been committed. There is always great danger in going beyond or varying the language of an Act of Parliament, and I adhere to the decision in *Ex parte Barnard* that "any such report" in sub-section 3 means a further report, and not a preliminary report. Now sub-section 2 provides that the official receiver may make a further report stating the manner in which the company was formed, and whether, in his opinion, any fraud has been committed by," &c. This is what he ought to state, in my opinion. The exact language in which he ought to state it is another matter. In the case of *In re Trust and Investment Corporation of South Africa* this court held that it was sufficient if the report clearly showed fraud, and that it was not necessary, when fraud was manifest on the face of the report, to send it back to the official receiver in order that he might state his opinion in express terms. That decision has been interpreted, in the cases of *In re Laxon & Co.* and *In re Birkdale Steam Laundry Co.*, in a way which I think is rather too lax. We did not intend to depart from the requirements of the Act of Parliament, but we have been understood as having said that it would be enough if the report "suggested" fraud. The word "suggested" is very ambiguous; we meant to adhere to the provisions of the Act that circumstances must be stated which showed that the official receiver was of opinion that some fraud had been committed. Although it is not necessary to say that there must be some paragraph expressly stating that opinion, yet when it is said that "suggesting" fraud is sufficient, I think it is time for us to protest and to disclaim having gone that length. I think that Vaughan Williams, J.'s decision in this case was right, because this report, even if it does "suggest" fraud, is perfectly consistent with its absence, nor is it apparent on the face of the report that any fraud has been committed.

If we are wrong, the House of Lords must set us right.

A. L. SMITH, L.J.—I entirely agree. There is a passage in the judgment of Vaughan Williams, J., in this case which I think states the law correctly. He says: [His lordship read from the said judgment from "It seems to me that section 8" to "sub-section 2 of that section" (42 W. R., at p. 603), and continued:—] It seems to me that that lays down exactly what this court has laid down. I agree that this appeal must be dismissed.

Appeal dismissed.

Sir R. T. Reid, A.G., in view of the Supreme Court of Judicature (Procedure) Act, 1894, asked for leave to appeal to the House of Lords.

LINDLEY, L.J.—We give leave, if it is necessary; this is an important matter.

Solicitor, *Solicitor to the Board of Trade.*

From Chan. Div. (Lindley and A. L. Smith, L.JJ.) Oct. 25.

BOYD v. BISCHOFFSHEIM. (a.)

Practice—Appeal—Leave to appeal—Judicature Act, 1873, *s.* 52—*Judicature (Procedure) Act,* 1894, *s.* 1 (b).

The leave of the Court of Appeal or a judge thereof, which is required by section 1, *sub-section* 1 (b), *of the Judicature (Procedure) Act of* 1894, *before an appeal can lie from an interlocutory order made by a judge need not be obtained for an application to vary or discharge an* interim *order made under section* 52 *of the Judicature Act,* 1873.

This was an application by original motion on the part of the defendant to vary the order of the Lord Chief Justice, sitting as Vacation Judge; a motion by the plaintiff to discharge the said order being heard at the same time.

The action in this case as against E. R. McDermott, one of the defendants, was dismissed by North, J., on the 19th of July, 1894, as frivolous and vexatious. The plaintiff entered and gave notice of an appeal from this judgment. The defendant applied to the Lord Chief Justice, sitting in the vacation as judge of the Court of Appeal, to stay the said appeal until the plaintiff should give security for the costs thereof. On the 16th of October the Lord Chief Justice ordered the plaintiff to give security to the amount of £100 within ten days, and directed the plaintiff's appeal against this order to come on with his appeal against North, J.'s order.

The order of the Lord Chief Justice was made under the Supreme Court of Judicature Act, 1873, s. 52, which provides that "in any cause or matter pending before the Court of Appeal any direction incidental thereto not involving the decision of the appeal may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may, at any time during vacation, make any *interim* order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a divisional court thereof." The Supreme Court of Judicature (Procedure) Act, 1894, s. 1, sub-section 1 (*b*), provides that "no appeal shall lie (with certain exceptions not applicable to the present case) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge."

As no leave had been obtained to make the present applications, the question was whether such leave was now necessary.

Turrell, for the plaintiff.

Cozens-Hardy, Q.C., and *Gregson*, for the defendant E. R. M'Dermott.

A. Young and *Pollard*, for two other defendants.

LINDLEY, L.J.—As to the question whether the provisions of the Act of 1894 apply to these motions, I do not think they do. These applications are made under section 52 of the Act of 1873, which section, I think, is not affected by the later Act. In my opinion, therefore, it is not necessary that the leave of the Court of Appeal, or a judge thereof, should have been obtained. The plaintiff's motion must be dismissed, with costs, and his appeal stayed until security has been given.

A. L. SMITH, L.J.—I am of the same opinion. The special legislation of section 52 is not intended to be touched by the provisions of the Act of 1894.

Solicitors, *W. C. Goulding; Hores & Pattisson; J. Holmes & Co.; Freshfields & Williams.*

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

(1895) 1 Ch. 291

From Chan. Div. (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) July 20, 24, 1894.

In re BRIERLEY.

BRIERLEY v. BRIERLEY. (a.)

Will—Construction—Power or trust—Power to wife to appoint fund to such of testator's relatives as she should think proper—Life interest in fund given to wife—Wife appointed residuary legatee—Release by wife of power of appointment—Wife not entitled to the fund absolutely.

Testator gave his residuary personal estate to trustees on trust to invest a sum of £50,000 *and pay the income thereof to his wife for life, and subject thereto the whole of his property was to be for his children equally. The will then proceeded: "If I shall not have any children, then as follows: my wife may bequeath or appoint the* £50,000 . . . *to such of my relatives or next of kin as she shall think proper; the remainder of my property to be divided into forty-three parts." The testator then gave the forty-three parts to certain nephews and nieces, and appointed his wife "to be residuary legatee."*

The testator died, having had no children; his wife survived him, and, having executed a release of her power of appointment over the £50,000, *claimed to be entitled to the absolute interest in that fund.*

Held, that, even assuming that the £50,000 *did not pass under the bequest "the remainder of my property," &c., yet that the wife did not, by releasing the power, become entitled to the* £50,000 *absolutely.*

Birch *v.* Wade, 3 *Ves. & Bea.* 198, *and* Salusbury *v.* Denton, 5 *W. R.* 865, 3 *K. & J.* 529, *followed.*

Bull *v.* Vardy, 1 *Ves. jun.* 270, *explained and distinguished.*

Appeal from Chitty, J.

The testator, Adam Brierley, by his will, after bequeathing his household furniture and effects and a pecuniary legacy to his wife, devised and bequeathed all his real and the residue of his personal estate to trustees on trust to convert the whole into money, to invest £50,000 in the funds or other securities, and to pay the income thereof to his wife for life; subject thereto, the whole of the testator's property to be for his children equally. The will then proceeded as follows:—"If I shall not have any children, then as follows: my wife may bequeath or appoint the £50,000 or the securities representing the same to such of my brothers and sisters and nephews and nieces and other my relatives or next of kin as she shall think proper. The remainder of my property to be divided in forty-three parts." The testator then gave certain portions of these forty-three parts to certain nephews and nieces of his (naming them), the gifts to them being in some cases for life only, with remainder to their children; one of the forty-three parts was given to a nephew of the testator's wife, and two of the forty-three parts were given to another nephew of the testator's wife; and the testator then appointed his wife "to be residuary legatee."

The testator died without having had any children: his wife survived him.

A summons was taken out by the wife calling on

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

the trustees of the will to hand over to her the trust fund of £50,000 for her own use and benefit, absolutely, upon her executing a release of her power of appointment over the said fund.

Chitty, J., dismissed the wife's application, and she appealed.

Byrne, Q.C., and *T. Eustace Smith*, for Mrs. Brierley, the appellant.—The power of appointment given to the wife over the £50,000 is a mere naked power; it is not clothed with a trust, either expressed or implied, on the proper construction of the words of the will. There is clearly a life interest in the £50,000 given to the wife; the power of appointment is only intended to guide the wife as to how she should appoint the *corpus*, if she chose to appoint it at all; if she does not appoint, or releases her power of appointment, the *corpus* goes to her because she has been appointed residuary legatee, and she thus becomes entitled to the £50,000 absolutely. The gift of "the remainder of" the testator's property to the nephews and nieces is clearly, from the context, a specific gift of the testator's property other than or *minus* the £50,000. The *corpus* of the £50,000 on the release of the power of appointment accordingly passes as residue under the residuary gift to the wife: *Kilvington* v. *Parker*, 21 W. R. 121. [DAVEY, L.J.—A residuary gift is not the same thing as a gift in default of appointment; a residuary gift only gives what would otherwise go to the next of kin.] [Lord HERSCHELL, L.C., referred to *Salusbury* v. *Denton*, 5 W. R. 865, 3 K. & J. 529.] That case is distinguishable, because the Vice-Chancellor held that the words of the power there were sufficient to create a trust, but that is not so here. [DAVEY, L.J.—Would it not be a correct statement of the law to say that if there be a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, then the law will imply a gift to those objects in default of appointment?] That is the doctrine stated in Farwell on Powers (2nd ed., at p. 466), but it is subject to certain exceptions; in the present case the appointment of the wife as residuary legatee amounts to a gift over to her of the £50,000 in default of appointment. The cases nearest in principle to the present case are *Brook* v. *Brook*, 3 Sm. & G. 280; *Healy* v. *Donnery* (1853), 3 Ir. Com. L. R. 213, and *Howorth* v. *Dewell*, 9 W. R. 27, 29 Beav. 18, but those were not cases of a gift of a life interest to the donee of the power in the first instance. [*Oswald, Q.C.—Birch* v. *Wade*, 3 Ves. & Bea. 198, is similar in principle to *Salusbury* v. *Denton*, and is in my favour.] In *Birch* v. *Wade* there was held to be a trust created in favour of the class on the face of the will because the testator used the words, "*it is my will and desire* that"—the property in question"—"be left to the disposal of my dear wife among such of her relations as she may think proper"; but in the present case there are no words indicating a desire on the testator's part to give the £50,000 to members of the class among which the wife has power of appointment. Again, in *Birch* v. *Wade* there was no residuary gift to the donee of the power, as there is here. [LINDLEY, L.J.—In *Forbes* v. *Ball*, 3 Mer. 437, there was a residuary gift to the donee of the power.] In that case there was what amounted to a gift of the fund to the class of relations, subject only to a mere power in the wife to designate the members. *Bull* v. *Vardy*, 1 Ves. jun. 270, is a decision in favour of the appellant's contention. But, assuming that the words of the present will are sufficient to create a gift to, and imply a trust for the class indicated in default of appointment, the trust is too vague to be carried out. The words are "such of my brothers and sisters and nephews and nieces and other my relatives or next of kin"; the use of the words "next of kin" as well as "relatives" shows that the latter word means something different from statutory next of kin; and, consequently, the class intended to be designated by the term "relatives" cannot be ascertained. *Brown* v. *Higgs*, 5 Ves. 495, 8 Ves. 561, was also cited.

J. G. Butcher, for the trustee respondents.

Oswald, Q.C., and *A. St. John Clerke*, for other respondents, were not called on.

Lord HERSCHELL, L.C.—The only question which, at the present time, it is necessary to decide in this case is whether the appellant has established that upon releasing the power she is entitled to have the sum of £50,000 handed over to her. It is not necessary to determine the other questions as to the construction of this will which have been raised in the course of the argument. [The Lord Chancellor read the words of the will above set out, and proceeded:—] The argument on behalf of the appellant is that the wife has merely a power or authority conferred upon her to appoint the £50,000, which she may exercise or not as she pleases, but if she determines not to exercise it, and releases that power, then it would pass to her as residuary legatee, and consequently she would have an absolute interest in the whole of the sum, she having a life interest in it expressly given to her in the first part of the clause.

Now, there can be no doubt that where there is a gift to such of a class as the donee of a power may appoint, it has been frequently held to be a gift to that class of which they obtain the benefit, even though the donee of the power does not exercise the power of choice conferred. But it is said in the present case that there is no gift to the relations, that it is a bare power conferred upon the wife; and it is further said that, inasmuch as the wife has the life interest, and as there is bequeathed to her the residuary estate with this provision imposed, she may be treated as a person to whom the absolute interest has been bequeathed, subject only to or with a power superadded.

Now, to deal with that latter point first. It appears to me impossible to put that construction upon the will. She has not an absolute gift made to her of this £50,000. It is impossible to couple together a residuary bequest of the whole of the testator's residue with this specific life interest in the £50,000, and to say that she has an absolute interest conferred in the £50,000, and that such interest cannot be cut down merely because there is a power superadded. That class of cases has really no application to the present case.

But then it is said that this is not a gift to such of a class as the donee of the power may select, but is a mere authority conferred upon the donee of the power, and that no trust can be implied in favour of the class. So long ago as 1814, in the case of *Birch* v. *Wade*, this point was dealt with; the words there were, "It is my will and desire that the other third part of the principal of my estate and effects be left entirely to the disposal of my dear and loving wife among such of her relations as she may think proper after the death of my aforesaid sisters." The Master of the Rolls (Sir William Grant) came to the conclusion that that case did not differ materially from the cases of *Harding* v. *Glyn*, 1 Atk. 469, and *Brown* v. *Higgs*, which were cases of the nature to which I have just referred. He came to the conclusion that as the one-third of principal was to be left, not at the wife's disposal

generally, but at her disposal amongst a particular class, leaving her to select from that class such individuals as she thought proper, it could not be said that all the testator willed and desired was that she should have the disposition of that third, and that it was no part of the desire that her relations should have the benefit of that disposition; and the Master of the Rolls thought that it was the intention of the testator that such of his wife's relations as she should designate should have the benefit of that third. Looking, therefore, at the clause in that will, it will be seen that the words "will and desire" in terms applied only to the disposition by his wife amongst such of her relations as she should think proper. It was not in terms said that it was his will that the property should in any event go to the class amongst whom his wife should appoint. Nevertheless, that latter construction was put upon the clause by the Master of the Rolls.

Now, between that case and this only two distinctions have been suggested. It has been said that in *Birch* v. *Wade* the testator used the words "It is my will and desire," but that in the present case he only said that his wife might appoint in a particular way. But the words of this will are, "If I shall not have any children." Then as follows:—"My wife may bequeath." Now what is the meaning of that? Something has to be inserted to make it read grammatically, and that something obviously must be that "it is my will," or "it is my desire," or "my property shall be disposed of"; whichever you insert, it seems to me that there can be no distinction between this power conferred upon the wife in this case and the power conferred upon the wife in *Birch* v. *Wade*. The truth is that there is no magic about the use of the words "it is my will and desire." Everything that is found in the testator's will indicating what is his intention, is as much indicating his will and desire as if he had in so many words used that language.

The other distinction suggested is that in the present case there was a residuary bequest, and that, therefore, this was not a case of a power given to appoint amongst a class, with no gift over in default of appointment, because there was a gift over by the bequest of the residue. Well, I should be satisfied without any authority that a bequest of residue contained in a will—I make no point of the bequest being found at the end of the will—found anywhere in the will, is something totally different from the gift over of a specific property or sum of money dealt with in the manner I have indicated, by a power being given to appoint it amongst a class. But if there were any substance in the distinction suggested, the point is disposed of by the decision of the Master of the Rolls in the case of *Forbes* v. *Ball*. In that case the testator gave his wife the sum of £500, and these words were added, "and it is my will and desire that my said wife may dispose of the same amongst her relations as she by will may think proper." The will there contained a residuary bequest to the wife. Now between that case and this I think all the ingenuity of Mr. Eustace Smith has failed to suggest any substantial distinction. But that is not all. These cases are as old as eighty years ago nearly; but the same view has been more recently adopted by Lord Hatherley (when Wood, V.C.) in *Salusbury* v. *Denton*. In that case the remainder was to be at the wife's disposal amongst the testator's relatives as she might direct. The Vice-Chancellor held that there was a trust, and that though there was no appointment the class took. There the words were that the remainder was to be at her disposal; here it is that she may appoint the sum of money. Between those two modes of expression I cannot see any distinction sufficient to justify a difference of decision. Mr. Eustace Smith, on behalf of the appellant, relied on the case of *Bull* v. *Vardy*, but that appears to me to have been very different from the present case. There the wife was empowered to give away on her death £1,000; £100 of it to Elizabeth Turner, another £100 to Mrs. Bennett, and the other £800 to be disposed of by her by will. As to the £800, she had an absolute power of disposition not limited to any class. It was not a gift of £100 to Elizabeth Turner and Mrs. Bennett at all events, but the testator said that his wife might dispose of £1,000 as she pleased, but if she did, £100 of it was to go to Elizabeth Turner and £100 to the other. If, therefore, it had been held that it was not a mere power, but a gift to a class, there was nothing left for the wife to do as to these sums of £100, because the two ladies must take, and it would have been perfectly senseless to secure a bequest to those two, through a bequest of the wife, instead of making the bequest to the two directly by the testator's own will. That, coupled with the fact that as to the rest of the £1,000 there was no class amongst whom it was to go, and that the power of disposal was general, made it clear that as regards that £1,000 it was a mere power and nothing else. That case is therefore clearly distinguishable from the present.

Then, lastly, it was said that even if this be a gift to a class, and a trust be implied as regards that class, it was void for uncertainty, because of the impossibility of defining that class in a manner so as to give effect to the bequest. It is not necessary to say how that clause is to be construed. It would be premature to express any opinion upon it. All that it is necessary to say, and which I do say, is this, that in my opinion it is perfectly capable of a construction which would so limit and define it that it would not be void for uncertainty.

For these reasons I think the appeal should be dismissed.

LINDLEY, L.J.—I am of the same opinion. This is a very ingenious attempt on the part of the appellant, the widow, to give effect to her construction of this will. She tries to get at it by a very ingenious reading of the various clauses of the will. The will is so framed that there may be, and probably will be, some difficulty in determining where this £50,000 should go when the widow dies. One possible construction is that the words "the remainder of my property" may include that. I think that is the view which the learned judge below rather favours. It certainly is a possible view, and it is not necessary for us to say whether it is right or wrong. Another possible view, equally adverse to the widow's claim, is that the relatives or next of kin of the testator will take that £50,000 in default of appointment. Now, of course, if the first view is right the case is unarguable; but, supposing the other view is right, the case is equally unarguable. It has, however, been contended for the appellant that she is entitled to the £50,000 in this way; she relies upon this power to appoint the £50,000 amongst the testator's relatives as being simply a power unaccompanied by any trust at all, and she asks us now to read the will as amounting to simply a permissive power to her to appoint this £50,000, and to hold that the £50,000 will, in default of appointment, belong to her as residuary legatee; and that she is now entitled absolutely to it, it being released. Now it appears to me, as regards that view of the case, when you put together the various authorities which have been cited, even if the words "the remainder of my property" do not carry the £50,000, that the contention on the part of the widow cannot succeed. Therefore,

take the case as you will, and abstaining, as I purposely do, from saying what the true construction of this will is—and of course it is obscure—I come to the conclusion that the case is hopeless for the appellant, and I think the appeal ought to be dismissed with costs.

DAVEY, L.J.—In this case all we have to say is whether the learned judge was right in the declaration he made, that the plaintiff (the appellant) does not, on releasing the power vested in her, become absolutely entitled to the legacy of £50,000. Now, against the view that has been presented to us on behalf of the appellant, there are two possible constructions of the will. One is that those who are the objects of the power will, in default of execution of the power, be entitled to take by implication. The other view is that the widow is not residuary legatee in the strict sense of the term, but the persons entitled to the residue are the persons who are entitled under the words to "the remainder of my property." I am not going to say anything which will prejudice the question which must arise and be argued when the court has all the parties who cannot now be ascertained—so far as regards the gift of the remainder of the property—before it.

I am, however, clearly of opinion that the widow is not at present entitled to the £50,000; that either those who constitute the class of objects under the power will be entitled to this £50,000 upon her death, or else—which is the view taken by the learned judge—the persons who take "the remainder of my property" are the persons who are true residuary legatees; and I beg to point out that that question cannot now be determined, because the gifts are gifts to persons for life, and afterwards to their children, and those persons may be living for all we have been told, and if those persons are still living the children who will take under the terms of that gift are not yet ascertained, and cannot be before the court. And even if you strike out the power, I should be prepared to say that the court ought not to decide at the present stage whether, even if there were no power at all, the persons entitled to the gift of "the remainder of my property" or the widow will ultimately be entitled to the £50,000 on the widow's death. For these reasons I think the appeal ought to be dismissed.

Lord HERSCHELL, L.C.—I should like to add that I also do not wish to be understood as expressing any opinion whether the £50,000 would pass if unappointed under the residuary bequest to the widow, or with the remainder under the clause beginning with "the remainder." The whole basis of the argument of the learned counsel for the appellant, of course, was that it passed under the residuary bequest to the widow, and if it did not, there was an end of their case. I have assumed in their favour, for the purpose of my judgment, that it passed under the residuary bequest, and not under the bequest of the "remainder"; of course, not expressing any opinion one way or the other upon it.

Appeal dismissed.

Solicitor for appellant, *Victor Thomasset.*

Solicitor for the respondents, *A. M. Bradley*, for *Berry & Berry*, Huddersfield.

High Court of Justice.

Chan. Div. } Chitty, J. } July 26; Aug. 1, 11, 1894.

KEEN v. DENNY. (a.)

Ecclesiastical law — Advowson — Co-owners—Right of presentation — Turns—Cyclical order—Usurpation—Exchange of livings.

The cyclical order of turns of presentation to a church is not altered by usurpation of a turn, whether by a stranger or by a person privy in title to the person usurped upon. The person usurped upon must wait till his own turn comes round again, and cannot take the usurper's turn by way of retaliation.

A presentation on an exchange of livings counts as a turn.

Special case.

By a deed poll made in August, 1871, by the Bishop of Rochester, Robert Tooth, the patron, and the Rev. Arthur Tooth, the incumbent of St. James's, Hatcham, a parish then recently constituted, it was declared that the perpetual right of patronage of, and of nominating a minister to, the church of that parish be vested in and exercised for the first and second turns by the defendants, and for the third turn by the plaintiffs, and that so on for ever thereafter the said patronage should be exercised alternately as aforesaid—that was to say, every two turns by the defendants, and every third turn by the plaintiffs. In 1871 the defendants nominated the Rev. Edward Wynne to the benefice. In 1878 the Rev. E. Wynne exchanged the benefice for that of St. Mark's Church, Manningham, Bradford, held by the Rev. Robert Gardner Smith, and for the purpose of such exchange resigned the benefice, and the defendants, at the request of the exchanging parties, nominated the Rev. R. G. Smith to the benefice, and he was duly licensed thereto. In 1886 the Rev. R. G. Smith exchanged the benefice for the rectory of Wadingham, then held by the Rev. Walter Lancelot Holland, and the defendants, at the request of the exchanging parties, presented that clergyman to the benefice, and he was instituted and inducted thereto. In 1891 the Rev. W. L. Holland resigned the benefice, and the defendants presented the Rev. John Bousted Mylius, and he was instituted and inducted thereto. The several nominations or presentations of the Rev. E. Wynne, the Rev. R. G. Smith, the Rev. W. L. Holland and the Rev. J. B. Mylius were made without the concurrence or consent or any previous notice to the plaintiffs. On January 11, 1894, the Rev J. B. Mylius died. On March 14, 1894, the plaintiffs presented the Rev. Sydney Powell Townend to the benefice. On March 27, 1894, the defendants presented the Rev. Ernest Scott Fardell to the same benefice. Neither of those two clergymen had yet been instituted or inducted thereto, and the Bishop of Rochester declined to institute or direct the induction of either until it was determined in whom the right of presentation was vested.

The question submitted for the opinion of the court was whether the plaintiffs or the defendants were entitled to nominate or present a minister to the benefice on the present vacancy thereof.

Sir Walter Phillimore and *Alfred Whitaker*, for the plaintiffs.—First, the exchange presentations were not effective turns of patronage, because they were not free. They do not count as turns any more than

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

a prerogative presentation on promotion to a bishopric: *Grocers' Company* v. *Archbishop of Canterbury*, 3 Wils. 221. This turn is, therefore, the third effective turn, and ours. Secondly, if the exchanges count as turns, the defendants have had four, so we are entitled to the next two. There is no rule or principle of law making it necessary for turns to go in cyclical order. Assuming, however, that the cyclical order must be preserved, then the third turn was ours, and the defendants usurped it. We are therefore entitled to take one of their turns in its place. There was no negligence in our not knowing of the vacancy. A patron is bound to know if the living becomes vacant by death or promotion, but in the case of resignation or deprivation the bishop, who is party to the act avoiding the living, must give notice before collating; 3 Comyn's Digest, Tit. Esglise, H. 9; Phillimore, 407, 489; Mallory on Quare Impedit, p. 121, pl. 7. The defendants should have given us notice before usurping.

Errington, for the defendants.—This is the fifth turn, and ours. First, an exchange is a presentation. It involves the license of the ordinary, a conditional agreement to exchange, and a resignation which is usually unconditional. The patron can refuse to present the new clerk: *Rumsey* v. *Nichol*, 25 W. R. 614, 2 C. P. D. 179, 294; *Colt* v. *Bishop of Coventry*, Hob. 140, 152 (the great case of the Commendam). The incoming incumbent is liable to the outgoing for dilapidations: *Downes* v. *Craig*, 9 M. & W. 166. A prerogative presentation differs *in toto*, being an *actus legis*, which, of course, does not count as a turn: Co. Litt. 379a. Again, the *lex talionis* does not apply to cases of usurpation. The law prefers the peace of the Church: 3 Stephen's Commentaries, 448 (11th ed.); see also *Elvis* v. *Archbishop of York*, Hob. 315; Brooke's Abridgment (Presentation al Esglise, pl. 20). As to co-parceners see *Richards* v. *Earl of Macclesfield*, 7 Sim. 257, 17 Vin. Abr. 404 (K. c.), pl. 4, 5; 405, pl. 8, 13; 408 (M. c.), pl. 8 n.; 327 (I. a.), pl. 2, 3; 329 (K. a.), pl. 9. Usurpation destroys the turn, even as against the Crown's prerogative turn: *Bassett* v. *Gee*, 2 Cro. Eliz. 790. So also where the king usurps: *Bishop of London* v. *The Mercers' Company*, Fitzgibbon 247, 2 Strange, 925, 929; and the person usurped upon cannot usurp by way of retaliation: *Birch* v. *Bishop of Lichfield*, 3 Bos. & P. 444. As to notice, see 17 Vin. Abr. 337 (Q. a.), pl. 25; *Leak* v. *Bishop of Coventry*, 2 Cro. Eliz. 811.

Sir W. Phillimore, in reply.—With regard to notice, induction is notice to the world, like livery of seisin; but that notice was too late for us. There was no negligence on our part in not preventing the induction. The passages in Viner only deal with the question whether a person is put to his writ of right of advowson or whether he can sue *in quare impedit* without alleging the last presentation. As to exchanges, no doubt, for purposes of dilapidations, the incoming tenant is a successor. An agreement not to sue for dilapidations is, however, not necessarily simoniacal: *Goldham* v. *Edwards*, 3 W. R. 551, 4 *Ibid.* 550, 16 C. B. 437, 17 *Ibid.* 141.

CHITTY, J.—The deed of 1871 whereby the advowson or perpetual right of patronage stands limited is clear. The first and second turns go to the defendants, the third to the plaintiffs, the fourth and fifth to the defendants, the sixth to the plaintiffs, and so on for ever in this fixed and prescribed order throughout the cycle. Nothing turns on the fact that the persons entitled to the turns are trustees; the question is simply one of common law right, unaffected by any equity as between the contending parties. The facts are not in dispute. [His lordship here stated the facts, and after observing that the exchanges were carried out in the usual way by presentation of the patron, continued:] On these facts it is argued for the plaintiffs that the presentations on the two exchanges ought not to be counted, and consequently that this is the third turn, and that the right of presentation is with the plaintiffs. If the presentations on the exchanges are to be reckoned, this is not the third, but the fifth turn. In my opinion they must be reckoned. It seems to me impossible to sever the form from the substance on an exchange. Each clerk resigns, and the patrons of the two livings present to the respective vacancies. Each patron acts of his own free will in the matter; he is under no obligation to present the new clerk; he has the right to refuse; and if he does so, the exchange cannot take place. No authority was cited nor, so far as I am aware, exists for excluding from the computation of the turns a presentation on an exchange. On an exchange the outgoing and the incoming clerks stand in law in the relation of predecessor and successor. This relation is well illustrated by *Downes* v. *Craig*, where it was decided that on an exchange the incoming clerk as successor was entitled to maintain an action for dilapidations against the outgoing clerk as predecessor, just as in the case of succession on death. The case of an incumbent being promoted to a bishopric was relied on by the plaintiffs' counsel as analogous, but it has no bearing. In that case the right to fill the vacancy falls to the Crown by virtue of the Royal prerogative; and where, as among co-parceners or the like, the right of presentation devolves in turns the exercise of the prerogative right is not counted, and does not disturb the settled order of the turns (see *The Grocers' Company* v. *Archbishop of Canterbury*). The reason is that *actus legis nemini facit injuriam* (see Co. Litt. 379a). The Crown's action being lawful, it is not allowed to operate to the injury of the person entitled to the next turn, and, consequently, it is not reckoned as between private persons entitled in turns.

The result thus far, then, is that the third turn, which of right belonged to the plaintiffs, was exercised by the defendants. This being so, the third presentation by them was wrongful; but it is now too late to recall what was done; the remedy of the plaintiffs was lost after the expiration of the time within which an action in the nature of a *quare impedit* could have been brought. From this it follows that the defendants were, in the language of the old lawyers, usurpers; they usurped the third turn. Now, as between co-parceners entitled to present in turns, it is clear that the effect of the usurpation by a stranger, or one claiming, but wrongfully claiming, under the co-parceners is not to alter the order of the turns, but to deprive the particular co-parcener entitled to the turn of her right to present. For this proposition it is sufficient to cite *Richards* v. *Earl of Macclesfield*, Vin. Abr., Tit. Presentation, Div. Usurpation (K. c.), pl. 4 and 5, where it is stated that if two co-parceners make partition to present by turn, the one may usurp against the other, but such usurpation does not bind her upon whom the usurpation is made at her next turn, but that she may present. The usurpation supplies the turn on the particular avoidance, and leaves the order of the turns otherwise unaffected.

Now, neither on principle nor authority can I find myself justified in drawing any distinction between usurpation by a stranger and usurpation by a person party to a deed, or claiming under a party to a deed, limiting the turns. In both cases alike the usurper must be deemed to know the rights, and that he himself is acting wrongly. The

person wronged, who has lost his only and peculiar remedy (by writ of *quare impedit*) by lapse of time, cannot requite himself by usurping against his wrongdoer by way of retaliation. The point is very neatly and forcibly put by Chambers, J., in *Birch* v. *The Bishop of Lichfield*, 3 Bos. & P. 453, where he says, "If the plaintiff did usurp upon the defendant, still I think we could hardly say that the defendant may now usurp upon the plaintiff by way of retaliation." The decision in that case turned upon the plea, which the court held to be too loose and uncertain, on the point whether the plaintiff had presented to the turn by usurpation or by agreement between him and the person whose turn it was to present. In his judgment Lord Alvanley said that, supposing the plaintiff to have usurped upon the defendant, he did not wish to give any opinion what operation that usurpation had upon the turn then in dispute, though, as then advised, he thought that, inasmuch as it was the defendant's fault for permitting such usurpation, he must suffer for his own negligence. This *dictum* is adverse to the plaintiffs' contention. But, although the old books teem with authorities on the subject of usurpations, the plaintiffs' counsel, whose industry has been indefatigable, have not been able to produce any authority justifying the distinction attempted to be drawn between usurpation by a total stranger and by a person privy in title. On principle I can find no sufficient ground for the distinction.

The presentations of Wynne, Smith, Holland, and Mylius were all made without the concurrence or consent of, or any previous notice to, the trustees now represented by the plaintiffs. The plaintiffs' counsel, whose ingenious argument left no point untouched, relied on this circumstance, and contended that the exchange presentations ought not, as between the plaintiffs and the defendants, to be reckoned, because, as they urged, it was the duty of the defendants to give the plaintiffs notice before the presentations were made. But they were unable to produce any authority for the proposition that as between persons entitled to present in turns there exists any such duty to give notice of the vacancy. They relied on the case of a resignation and the bishop's duty to give notice to the patron before collating. But this case stands on its own footing, and does not supply an analogy which can be acted upon. It was said that there was no negligence because there was no knowledge. But, as I understand the term "negligence" as it occurs in Lord Alvanley's judgment and the other authorities cited at the bar, it means merely omission to present, or, in other words, missing the turn. In Vin. Abr., Tit. Presentation, 329 (K. a.), pl. 7, it is stated that "where one loses his turn by lapse this shall stand for his turn, and at the next avoidance the other shall have his turn again." The induction of the incumbent which follows on presentation, whether on an exchange or otherwise, is an open, notorious, and public act—notice, in fact, to the world, and of which the patron is bound to take cognizance at his own peril: after the expiration of the six months allowed by law for the *quare impedit* the patron is bound, and cannot disturb the incumbent.

I have dealt with the main arguments presented for the plaintiffs. As to the suggestion that some doctrine of estoppel or of equity applies, it is sufficient to say that, in my opinion, there is no room for the application of any such doctrine. It was said that natural justice required that where one had usurped the turn of another the usurper ought to give up his next turn, or that the person against whom the usurpation was made ought to be remitted to the usurper's next turn or allowed to stand in the usurper's shoes. But I am not at liberty to apply any supposed principle of natural justice to a case of real property like an advowson, governed, as it is, by strict technical rules of law.

The action is dismissed. Inasmuch, however, as the defendants or their predecessors were not only usurpers, but the strength of their case depends on their usurpation, I consider that I may properly exercise my discretion by declining to give them costs.

Solicitors, *O. C. T. Eagleton; Nisbet, Daw, & Nisbet.*

Chan. Div. North, J. } July 27, 1894.

MALLESON v. GENERAL MINERALS PATENTS SYNDICATE. (a.)

Company—Company limited by guarantee—Articles, alteration of—Resolution declaring members' interests in shares—Resolution not ultrà vires—*Companies Act,* 1862, *ss.* 8, 9, 14.

A company limited by guarantee, by special resolutions divided the undertaking into "shares or interests," and adopted new articles, which, provided for the transmission of shares, their division into classes, and the election of new members. The plaintiff moved to set aside these resolutions as being ultrà vires.

Held, that the new articles did not in any way alter the constitution of the company and were not ultrà vires.

This was an interlocutory motion on the part of the plaintiff to restrain the defendant company from acting on certain clauses (being clauses 4 to 9) of certain new articles which they had recently adopted. The facts were as follows:—The plaintiff in the action was one of the shareholders in the defendant company, which was incorporated in February, 1894, under the Companies Acts, 1862 to 1890, as a company limited by guarantee, and not having a capital divided into shares. At general meetings held respectively on the 13th of June, 1894, and the 11th of July, 1894, a special resolution was passed to the effect that certain new regulations be adopted as the regulations of the company to the exclusion of and in substitution for the regulations contained in the articles of association. The clauses to which the plaintiff objected were the following:—

4. In order to determine the proportions in which the members for the time being of the company are interested in the company, the undertaking of the company shall be deemed to be divided into a specified number of shares or interests, and the members shall be deemed to be interested in the company in proportion to the number of such shares or interests for the time being registered in their respective names as hereinafter provided, and until otherwise determined by special resolution the undertaking of the company shall be deemed to be divided into 1,400 shares or interests, Nos. 1 to 1,400 inclusive.

5. The members of the company at the time when these regulations shall come into operation shall be deemed to be entitled to the said 1,400 shares or interests in equal proportions.

6. The numbers of shares or interests into which the company may be deemed to be divided may at any time by special resolution be increased to such extent as may seem expedient, and any additional shares or interests resulting from such increase may be appropriated and dealt with in such manner as the directors think expedient. Any preferential,

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

qualified, or special rights, privileges, or conditions may be attached to any such additional shares or interests. The additional shares shall be numbered.

7. Persons may become members of the company by original subscription or by admission or transfer or by succession. The subscribers to the company's memorandum of association are members by original subscription. Any person who hereafter desires to become a member by admission or to increase his holding in the company must apply in writing to the company for admission to membership or for an increased holding, and must state in such application the number of shares or interests, or additional shares or interests, in respect of which he desires to become a member, and if there are any unappropriated shares or interests it shall be for the directors to accept or reject such application, and in the former case to determine the number of shares or interests, or additional shares or interests, in respect of which he desires to become a member, and if there are any unappropriated shares or interests it shall be for the directors to accept or reject such application, and in the former case to determine the number of shares or interests in respect of which such applicant shall be admitted to membership or permitted to increase his holding and the applicant shall become a member interested or additionally interested in accordance with such determination.

8. The register of the members of the company shall, in addition to stating the names, addresses, and occupations, if any, of the members of the company, state the number of shares or interests in the company constituting the interests of such members respectively, and the distinguishing numbers of such shares or interests respectively.

9. Any member may be admitted to the membership or be permitted to increase his holding on the footing that he is to pay to the company in respect of the shares or interests constituting his interest, or any of them, a specified sum per share or interest, either by instalments or when called for by the directors or otherwise, and the registered holder for the time being of any shares or interests in respect of which any money is so made payable shall pay the same as and when the same shall become due, but save as aforesaid and save as provided by the memorandum of association membership shall not impose on the member any liability to pay any calls or contributions.

The plaintiff refused to vote for these resolutions, and issued his writ in the action, claiming thereby a declaration that clauses 4 to 9 of the new regulations were *ultrà vires* and illegal, and an injunction to restrain the defendants from acting on them. The hearing of the motion was, by consent, treated as the trial of the action.

Everitt, Q.C., and *Macnaghten*, for the plaintiff.—This is an attempt to create a share capital without there being any capital subscribed. As such it is plainly *ultrà vires*, and may impose on the plaintiff an additional liability to his liability on his guarantee. [They referred to the Companies Act, 1862, ss. 8, 9, 14.] We contend that what these regulations have done is to make the company into a company divided into shares.

Swinfen Eady, Q.C., and *A. J. Chitty*, for the defendants.—The plaintiff has mistaken the position of the company. No fresh liability is imposed on him by the new articles. The new articles constitute merely an arrangement among the members of the company *inter se* for the purpose of sharing profits; they cannot alter the general object of the company as expressed in its memorandum.

Everitt, Q.C., in reply.

NORTH, J.—In my opinion this motion is founded deliberately upon the belief that the company has done something which it has not done. I do not see that it has either done anything which, according to the Act it should not have done, or abstained from doing anything which, according to the Act, it should have done. The case seems to me to lie in a nutshell. The 8th section of the Companies Act, 1862, provides: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as company limited by shares, the memorandum of association shall contain the following things:—(1) The name of the proposed company, with the addition of the word 'limited' as the last word in such name. (2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate. (3) The objects for which the proposed company is to be established. (4) A declaration that the liability of the members is limited. (5) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount, subject to the following regulations:—(1) That no subscriber shall take less than one share. (2) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes." There is also another form of company contemplated by the Act, a company limited by guarantee, and section 9 says, "Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things (that is to say): (1) The name of the proposed company, with the addition of the word 'limited' as the last word in such name. (2) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate. (3) The objects for which the proposed company is to be established. (4) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount." Therefore there are these two modes in which a company may be formed. Then I do not think I need refer to any other section until we come to the 14th, which says: "The memorandum of association may, in the case of a company limited by shares"—that is, formed under section 8—"and shall, in the case of a company limited by guarantee, be accompanied, when registered, by articles of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." Then, after saying that of the memorandum, it proceeds thus as to the articles: "The articles shall be expressed in separate paragraphs numbered arithmetically; they may adopt all or any of the provisions contained in the table marked A in the first schedule hereto; they shall in the case of a company, whether limited by shares, or by guarantee, or unlimited, that has not a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case

of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered for the purposes of enabling the registrar to determine the fees payable on registration; in a company limited by guarantee or unlimited and having a capital divided into shares each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes." There the phrase is used several times, "having a capital divided into shares," and the argument addressed to me has been in reality that that is the same thing as a capital limited by shares, because such a company either has its capital divided into shares, or it has not, and the whole contention before me is that this company, which clearly was formed in the first instance as a company limited by guarantee, and was not and never intended to be anything but that, and was never intended to cease to be that, has by operation of the resolutions it has passed become something else—become a company which ought to have a fixed capital, and ought to have that fixed capital divided into a certain number of shares. I do not think that is the basis upon which the company has gone at all. I do not think they either mean to have a fixed capital, or to divide that fixed capital into any number of shares. They are attempting, for some reason which I do not thoroughly understand, and which I very much doubt whether they can successfully accomplish, to enable the interests of the members in the assets to be determined and dealt with; and (while keeping themselves a company limited by guarantee) they desire to ascertain in some way to express fractionally the amount of the interests in the company of the several members. As I said, what good will it do them? I do not quite know; but that is a totally different thing from fixing the capital, which is neither fixed nor proposed to be fixed; and in my opinion you cannot have a company with a capital divided into shares within the meaning of the phrase used in the Act of Parliament where you do not have a capital at all—where the company is not under the obligation of having a capital at all, but where it is a company formed upon the basis of limitation by guarantee. A good many of the sections in the Act, no doubt, are somewhat difficult to construe if the phrases "limited by shares" and "having capital divided into shares" really mean the same thing, but in my opinion they do not, and that is the reason why the comments made upon the various subsequent sections upon the footing that they do mean the same thing, really do not have no bearing on the case. In my opinion the plaintiff has mistaken the position of the company, and I must dismiss the motion with costs.

Solicitors, *S. Jacomb Hood; Hilliard, Dale, & Newman.*

Chan. Div. North, J. } May 24, 25, 1894.

In re SHAW.
ROBINSON *v.* SHAW. (*a.*)

Settlement—Issue—Illegitimate child en ventre sa mère.

An unborn illegitimate child cannot take under a limitation in a settlement to children or issue, even if en ventre sa mère *at the date of the deed.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Adjourned summons.

William Shaw, in 1843, went through the ceremony of marriage with Emma Bentley, his aunt of the half-blood. On the 3rd of May, 1844, Emmeline, the eldest child of the union, was born.

On the 9th of April, 1844, a sum of £15,000 was settled upon trust for the parents for life, and subject thereto upon trust for the children, grandchildren, or issue born during the lives of the parents in such manner as Emma should by deed or will appoint, with an ultimate trust for Emma in the event of there being no children of the marriage and her surviving William Shaw.

William Shaw died in 1880, leaving everything to Emma. There were in all ten children.

Emma, by her will, dated the 14th of January, 1892, left her property in trust for six children and one grandchild, four children being then dead. She died in May, 1892.

Strickland, for the plaintiffs, the trustees of the settlement.

Vernon Smith, for Emmeline.—Emmeline was born shortly after the date of the settlement, and was *en ventre sa mère* at the date at which it was made; she is in a different position to the other children, for future-born illegitimate children could not take. But she was *in esse*, and you can identify her as intended to take. [He cited *Occleston* v. *Fullalove*, 22 W. R. 305, L. R. 9 Ch. App. 147; *Pratt* v. *Mathew*, 4 W. R. 418, 22 Beav. 328; *In re Horner, Eagleton* v. *Horner*, 36 W. R. 348, 37 Ch. D. 695.] The case differs from *In re Bolton*, 34 W. R. 325, 31 Ch. D. 542, for in that case the child claiming was not begotten at the date the instrument was made.

H. Fellows and *C. James*, for other defendants, were not called upon.

NORTH, J.—In my opinion this child does not take and that is a fortunate circumstance, for otherwise the intention of the parties would be defeated. The facts are shortly these: Intimacy commenced in 1843 between parties whose relationship was such that they could not marry and have legal issue. On the 9th of April, 1844, William Shaw joined in a settlement on the lady he called his wife. On the 3rd of May, 1844, one of the ten children was born, and nine others were subsequently born. The husband died in 1880, the wife in 1892.

It is said that under the settlement the first child takes the whole: it is conceded that the rest cannot take anything under the limitation in the settlement, inasmuch as it is a provision for illegitimate children who were not even begotten. No doubt it was present to the minds of the parties that one child was likely to be born at an early date. The words "children of the said marriage" are several times used in the settlement, and it was no doubt intended to provide for all illegitimate children who should be born, not only for one who was to be born a month after. It is true that the child was *in esse*, as it was within a month of its birth, and it might have had a settlement made upon it if apt words had been used, such as "the child begotten but not yet born." The only reference, however, is to a class of future illegitimate children.

It is said that "child" meant "reputed child," and that in the lifetime of the father and mother their conduct was such that the children were acknowledged. But that is not enough, for this is the case of a deed, and not a will. The child could not have any reputation as being a child of any particular person at the time of the deed, because it was not born.

By consent solicitor and client costs of all parties were paid out of the trust fund.

Solicitors for the plaintiffs, *J. & R. Gole*, for *Oxley & Coward*, Rotherham.

Solicitors for the defendants, *Stibbard, Gibson, & Co.*, for *C. M. Booth*, Ashton-under-Lyne.

Q. B. Div.
(Mathew and Charles, JJ.) Oct. 29.

VESTRY OF ST. MARY'S, ISLINGTON (APPELLANTS) v. COBBETT AND ANOTHER (RESPONDENTS). (*a.*)

Metropolis—Footway—Apportionment of expense of flagging—Land extra commercium—*Owner under Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 12), *s.* 250—*Metropolis Open Spaces Act*, 1877 (40 *&* 41 *Vict. c.* 35), *s.* 1—*Metropolis Management Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 54), *s.* 1.

A local authority had acquired under the Metropolis Open Spaces Act, 1877, *for the purpose of a public garden, the residue of the lease of a piece of land subject to the covenants of the lease.*

Held, that the local authority were owners within the meaning of the Metropolis Management Acts of 1855 *and* 1890, *and liable to contribute towards the expense of flagging the footways on which the land abutted.*

Special case stated by the justices of Finsbury.

The respondents were owners of certain houses which formed a portion of Barnsbury-square, and they were assessed to contribute towards the expenses of flagging the footpaths in the square in accordance with the Metropolis Management Amendment Act of 1890. The appellants, who were also the authority for the district, had on the 2nd of May, 1891, in pursuance of section 5 of the Metropolitan Open Spaces Act, 1881, acquired the centre portion of Barnsbury-square, which was an open space or garden enclosed by iron railings, and which had hitherto been used as a pleasure ground for the occupiers of the houses in Barnsbury-square. They acquired, not the freehold, but the residue of a term of twenty-six years commencing the 25th of December, 1882. The lease, which was assigned to the appellants by the Right Honourable the Earl of Meath, who held it on behalf of the Public Gardens Association, contained covenants by the lessee, together with a covenant to enable the lessor to re-enter on breach of any of the covenants.

The respondents refused to pay, on the ground that the appellants ought to have contributed to the said expenses.

On the respondents' refusal to pay the abovementioned sums the appellants made a complaint before the justices of Finsbury and a summons was issued against the respondents. The justices dismissed the summons, on the ground that the apportionment was bad, seeing that the appellants were owners of the open space within the meaning of the Metropolis Management Amendment Act of 1890, and ought to have contributed.

A. Glen, for the appellants. — The Metropolis Management Act of 1855, s. 250, defines owner to mean "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, . . . or who would receive the same if such lands or premises were let at a rack rent." Here the vestry are incapable of letting the land at a rack rent. The property is dedicated by statute for a term to the public. It is, therefore, *extra commercium*, and outside the meaning of the Act. At any rate, where the lands have become incapable of being let at a rack rent by statute or common law, they are exempt, though this may not be the case when the incapacity arises through the act of parties, *e.g.*, a church was held to be liable to contribute: *Angell* v. *Vestry of Paddington*, 16 W. R. 1167, L. R. 3 Q. B. 714. In the *Vestry of Camberwell* v. *London Cemetery Co.*, 42 W. R. 446, [1894] 1 Q. B. 699, there was a power to sell the actual soil. In *Bowditch* v. *Wakefield Local Board*, L. R. 6 Q. B. 567, 19 W. R. C. L. Dig. 66, the lord of the manor had a beneficial interest: *Plumstead Board of Works* v. *The British Land Co.*, 23 W. R. 634, L. R. 10 Q. B. 203. It is no answer to say that the dedication in this case is only a temporary one; the effect of the statute is to dedicate the land irrevocably to the public for the time being: *Great Eastern Railway Co.* v. *Hackney Board of Works*, 31 W. R. 769, 8 App. Cas. 693; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379.

R. G. Glenn, for the respondents.—The lease provides for the payment of all assessments and contains other covenants, and there is a covenant to re-assign on the breach of any covenant. According to the appellants' contention the lessor would be deprived of the benefits of these covenants: *Robson* v. *Hyde*, Caldecott's Rep. 310. Land is not exempted by reason of its being *extra commercium* unless it is so in perpetuity: *Bowditch* v. *Wakefield Local Board*; *Meyrick* v. *Attorney-General*, 42 W. R. 614. The land was dedicated by agreement between the parties: *Williams* v. *Wandsworth Local Board*, 32 W. R. 908, 13 Q. B. D. 211; *Vestry of Paddington* v. *North Metropolitan Railway Co.*, 42 W. R. 223, [1894] 1 Q. B. 633; *London School Board* v. *St. Mary's, Islington*, 24 W. R. 137, 1 Q. B. D. 65; *Great Eastern Railway Co.* v. *Hackney Board of Works*.

A. Glen replied.

MATHEW, J.—Our judgment must be for the respondents. It cannot be disputed that the vestry were owners within the meaning of the Metropolis Management Act. The Act contemplates a limited ownership, and an ownership restricted in point of time. We know the history of this property. It had formerly been devoted to the use of certain householders. But there was still some value left in the ownership of it; for somebody was found who was willing to pay £50 for it. The property then found its way to Lord Meath. He was the owner within the Act, and the public body is in exactly the same position as Lord Meath. There is nothing in the Act to restrict the rights of the lessor. The Act does not mean ownership for which a rack rent can be required. If the land is made *extra commercium*, it is true that the Act may not apply. But how is this *extra commercium* when the vestry is held down by a limited term and by the observance of covenants. *Bowditch* v. *Wakefield Local Board* was the case of a school which was held on trust for one purpose, yet it was held to be within the Act. But counsel for the appellants says that the true analogy is to be found in the case of *Angell* v. *Paddington Vestry*, where the land in question was covered by a church of the established religion. But a church is not land of which there can be any ownership whatever, therefore the analogy fails. In my opinion, the decision of the justices was right.

CHARLES, J.—The appellants' contention is that the land is *extra commercium* within *Great Eastern Railway Co.* v. *Hackney Board of Works*. A piece of land dedicated permanently for the use of the public

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

may be *extra commercium*, or a church may be, but not land held on a short lease terminable at any period by a breach of covenant. *Wright* v. *Ingle* obviously applies to a permanent application of land to the public use.

Appeal dismissed.

Solicitor for the appellants, *William Lewis.*

Solicitors for the respondents, *Jordan & Davies.*

Q. B. Div. (Hawkins and Lawrance, JJ.) — Aug. 8-10, 1894.

GUILFORD *v.* LAMBETH. (*a.*)

Practice—County court—Remitted action—Action in High Court—Counter-claim for unliquidated damages—Jurisdiction to remit counter-claim to county court—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

Section 65 *of the County Courts Act,* 1888, *gives the court power to remit to the county court an action of contract brought in the High Court where the claim indorsed on the writ does not exceed* £100.

Held, that, under this section, there is power to remit an action with a counter-claim for unliquidated damages, where the counter-claim is within the jurisdiction of the county court.

After a master had made an order to remit an action to a county court, a counter-claim for unliquidated damages was put in, but such counter-claim was not called to the attention of the judge at chambers who affirmed the master's order, and no objection as to the jurisdiction was taken before the master or judge.

Held, that an objection that there was no jurisdiction to make the order, on the ground that there was a counter-claim for unliquidated damages, ought not to be considered by the court, as it was not before the master or the judge; and, as the master had jurisdiction to make the order at the time he made it, it was a good order.

Appeal from an order made by Mathew, J., at chambers.

A master, on the plaintiff's application, made an order that the action should be remitted under section 65 of the County Courts Act, 1888, to the County Court of Northampton. On appeal the judge at chambers affirmed this order; the defendant appealed.

The action had been brought in the High Court for a sum of £32, the price of a horse sold by the plaintiff to the defendant. On the 29th of June, 1894, the order by the master to remit the action to a county court was made. On the 2nd of July the notice of appeal was given by the defendant. On the 3rd of July the defendant delivered a defence and counter-claim, which set up that the horse was sold with a warranty that it was quiet, and that there was a breach of the warranty, the horse having kicked the defendant's van and harness and caused considerable annoyance and damage to the extent of £22 11s., and the defendant counter-claimed for a sum of £35. On the 4th of July the appeal came on for hearing before the judge at chambers, who dismissed the appeal.

At the time the master had made his order no defence or counter-claim had been delivered, and no objection was taken before the master that there was no jurisdiction to remit the action. When the matter was before the judge, although the counter-claim had then been delivered, the fact that there was such counter-claim was not called to his attention, and no objection to the jurisdiction was taken before him.

The question now was whether there was jurisdiction to remit the action to the county court, there being now a counter-claim for unliquidated damages.

Section 65 of the County Courts Act, 1888, provides: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed £100 . . . it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced . . . and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had originally been commenced therein."

Hume Williams, for the defendant.—The learned judge at chamber had no jurisdiction to make the order by reason of there being a counter-claim for unliquidated damages, and it made no difference that the fact that there was such counter-claim was not called to his attention. Under such circumstances there was no jurisdiction to remit the action, and the present case is really concluded by the case of *Mackay* v. *Bannister*, 34 W. R. 121, 16 Q. B. D. 174, where it was held, upon the construction of section 26 of 19 & 20 Vict. c. 108—a section identical with section 65 of the present Act—that there was no jurisdiction to remit an action to the county court where there was a counter-claim for unliquidated damages. In *Bassett* v. *Tong*, 42 W. R. 668, [1894] 2 Q. B. 332, it was held that a claim for unliquidated damages could not be remitted, and that principle must equally apply to a counter-claim.

Morton Smith, for the plaintiff.—When the master made the order there was jurisdiction to make it, as no counter-claim had then been delivered. It is sufficient if there was jurisdiction to make the order when it was made. No objection to the jurisdiction was taken either before the master or the judge, and it is too late to take the objection now. *Mackay* v. *Bannister* is wholly different from this case, as under the section in that case the issues only were sent down, whereas under the present section the action itself is sent down—that is, the action as it is shown indorsed on the writ. Whatever the plaintiff indorses on his writ decides the question as to whether the action can be remitted: *Percival* v. *Pedley*, 35 W. R. 566, 18 Q. B. D. 635. From the time the master made the order the action became a county court action, and the objection could not be taken after that, but even if the counter-claim had been put in and had been before the master, there would have been jurisdiction to remit such counter-claim under the section.

Cur. adv. vult.

August 10.—The judgment of the COURT (HAWKINS and LAWRANCE, JJ.) was delivered by

HAWKINS, J.—When this order was made by the master no pleading at all had been delivered by the defendant, and no counter-claim had been put in. That being so, there can be no doubt that when the master made the order he had jurisdiction to make it. When the case was before the master the application was opposed, but not on the ground that there was a counter-claim, and no objection of that

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

kind was made. When the case came before Mathew, J., on the 4th of July, his attention was not called to any such objection as is now raised before us, and the result was that he dismissed the defendant's appeal. We are now told that we ought to reverse the master's order and the judge's order, on the ground that after the master's order was made and before the judge's order was made there had been put in a defence containing a counter-claim for damages. It was contended on the authority of *Mackay* v. *Bannister* that there was no power to remit to a county court a case such as this, containing a counter-claim for damages. I thought, and I still think, that we have no right to entertain an appeal upon an objection that was not before the master or the judge. I think this application is not in the nature of a rehearing; but if it is a rehearing, I should have thought it a rehearing only of matters before the master and the judge; but to let the master and judge make an order in absolute ignorance of this objection, and then to take the objection here on this appeal is, I think, irregular, and ought not to be allowed, and we ought not to treat this as a new or fresh application. On the 29th of June, when the master made this order, no counter-claim was in existence, and the order made, therefore, was a good order, as the master had full jurisdiction to make it. There was an appeal against that good order, and on the hearing of the appeal no objection of the kind was taken before the judge. On this simple ground, therefore, I think this appeal ought to be dismissed.

But there is another ground. It was contended that the case of *Mackay* v. *Bannister* was exactly in point. That case was decided in 1885, and upon section 26 of 19 & 20 Vict. c. 108. The question there was whether a counter-claim for unliquidated damages could be sent down for trial under that section, and the court held it could not. That statute was passed in 1856, when there was no power to set up counter-claims, so that that section could not have contemplated the sending down of counter-claims to the county court, as such counter-claims were then unknown to the law. That was the reason of the decision in that case, as we see by the judgment of Pollock, B., for he based his judgment on the fact that the 19 & 20 Vict. c. 108 was passed long before counter-claims were in existence, and that it could not be supposed that the Legislature intended to extend section 26 to counter-claims, which were unknown when the Act was passed. But since that time counter-claims have been recognized in county courts, as we see by sections 89 and 90 of the Judicature Act, 1873, and section 18 of the Judicature Act, 1884. [His lordship referred to and read these sections as well as section 65 of the Act of 1888.] In this case the counter-claim was undoubtedly within the jurisdiction of the county court. So that there was a claim over which the county court had jurisdiction and a counter-claim over which the county court had jurisdiction. What is there to prevent such a case as this being sent to the county court for trial notwithstanding the case of *Mackay* v. *Bannister*? When the Legislature passed section 65 of the Act of 1888 they evidently contemplated that such actions should be remitted with such pleadings as are allowed in the High Court. I cannot myself see any objection to this, and the case of *Mackay* v. *Bannister* does not militate against this view, as that case was decided in 1885, and under a section of an Act which was passed at a time when counter-claims were not allowed. Looking at the reason and sense of the thing, even if both the master and the judge had had the objection raised before them, they would have been justified in making the order, and as both the claim and counter-claim are within the jurisdiction of the county court, I think they would have done what I think they ought to have—namely, they would have sent the whole case down to the county court, including the counter-claim.

It is too late to set up an objection to the order made by the master, which the master made with full jurisdiction. For these reasons I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Pitman & Sons*, for *C. W. Lane*, Kettering.

Solicitor for the defendant, *H. R. Newson*.

Q. B. Div.
(Mathew and Kennedy, JJ.) July 31, 1894.

FRANKLIN v. GODFREY. (*a*.)

Weights and measures—Vehicle carrying coal for sale or delivery—Short weight—Liability—Representation by the seller—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.

A dealer in coal sent out a cart in charge of a carman containing sacks of coal. The sacks were labelled "56lbs." An inspector of weights and measures asked the carman the weight of one of the sacks, and was told it weighed 56lbs. when it left the dealer's premises; the inspector thereupon weighed it, and found it to weigh lese than 56lbs., and the dealer was convicted under section 29, *sub-section* (1), (2), *of the Weights and Measures Act*, 1889.

Held, that the conviction was right, for that the label was a representation by the dealer that the sack contained 56lbs.

Case stated by a metropolitan police magistrate, who had convicted the appellant for an offence under the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 29.

By section 29 (1), "Any inspector of weights and measures or officer appointed for the purpose . . . may . . . enter any building or part of a building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may . . . weigh any load, sack, or other less quantity of coal found in any such place or vehicle, or which is in course of delivery to any purhaser."

By sub-section (2), "If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds."

The appellant, a dealer in coal, sent out a cart, in charge of a carman, with sacks of coal for delivery. Each sack had upon it a metal label stating that the weight was 56lbs. A coal inspector employed by the County Council asked the carman the weight of a particular sack. He replied that it contained 56lbs. when it left the dealer's premises; but on being weighed it was found to contain 49lbs. only.

The dealer (the appellant) was convicted under the above section, and fined.

Channell, Q.C. (*T. Terrell* with him), for the dealer (appellant).—The label was only a representation that the sack, when full, contained 56lbs. If a portion of the coal was removed by the carman

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

the seller is not made responsible by the statute. To make the seller liable the representation must be made by him: *Roberts* v. *Woodward*, 38 W. R. 770, 25 Q. B. D. 412. The carman, the servant of the appellant, ought to have been convicted. The seller had no control over the coals after they left his premises, and, under the Act, the seller is only responsible for his own acts and acts done on his premises. [MATHEW, J.—Could the seller have made any representation which would bind him?]. Yes, by the invoice. Here the servant was "the person in charge of the vehicle," and ought to have been convicted under section 29 (2). The principle that a man is not liable criminally for the acts of his servant underlies the case.

Daldy, for the respondent, was not called upon.

MATHEW, J.—The only question here is whether there was evidence upon which the magistrate could decide that there was a representation on the part of the appellant that the sack in question contained 56lbs. of coal. It has been argued for the appellant that the metal label describing the contents as 56lbs. did not amount to such a representation. We cannot come to that conclusion. The cart was sent out with several sacks of coal, each sack bearing a label in accordance with the bye-laws. It is said for the appellant that when the sacks were dispatched the labels truly represented their contents, and that it ought to be inferred that the driver of the cart removed a part of the coal. But there was abundant evidence to justify the conclusion of the magistrate, and we think he was right.

KENNEDY, J.—I concur. The case cited by Mr. Channell does not bear on the point. In *Roberts* v. *Woodward* it was decided that a representation made by a servant to an inspector was not the representation of the master so as to make him liable under the section. But in this case the representation was made by the master, who stated by means of the labels that the sacks contained what they did not.

Appeal dismissed.

Solicitors for the appellant, *Corsellis, Mossop, & Berney.*

Solicitor for the respondent, *Blaxland.*

Q. B. Div. (Mathew, J.) July 24, 30, 1894.

REID v. WILSON AND WARD.
REID v. WILSON AND KING. (a.)

Lord's day observance—Lectures given on Sundays on entertaining subjects—"House, room, or place opened or used for public entertainment or amusement"—Liability to penalties as "chairman" or "keeper"—21 Geo. 3, c. 49, ss. 1, 2.

A society, formed for the purpose of giving lectures on Sunday evenings on various subjects, gave in a hired hall lectures to which the public was admitted on payment of small sums, but the lectures were not intended for purposes of profit. On two occasions lectures on entertaining subjects were given under circumstances which rendered the hall "a place open and used for public entertainment or amusement." At one of these lectures K. had taken the chair, introduced the lecturer, and had then left the platform; and to W. had been granted the necessary licence for the use of the hall, and he had arranged and sanctioned the terms of the letting of the hall.

Held, that K. was not liable to penalties under section 1 of the Lord's Day Observance Act, 1781, either as "chairman," "master of the ceremonies," or "manager or conductor," and that W. was not liable as "keeper" of the house.

Further consideration by Mathew, J.

The actions were tried with a special jury on the 29th of June, when, upon the finding of the jury, the actions were reserved for further consideration upon the questions of law arising therein. The question was how far the defendants were liable for penalties under section 1 of the Lord's Day Observance Act, 1781 (21 Geo. 3, c. 49). The facts are fully set out in the written judgment of the learned judge. Section 1 of 21 Geo. 3, c. 49 provides "that any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating upon any subject whatsoever, upon any part of the Lord's day, called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of two hundred pounds for every day that such house, room, or place shall be opened or used as aforesaid on the Lord's day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's day, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate on the Lord's day, shall likewise for every such offence forfeit the sum of one hundred pounds; and every door-keeper, servant, or other person who shall collect or receive money or tickets from persons assembling at such house, room, or place on the Lord's day . . . shall forfeit the sum of fifty pounds." Section 2 defines the word "keeper," and says "that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, &c., shall be deemed and taken to be the keeper thereof, and punished as such, although not the real owner."

Sir R. E. Webster, Q.C., and *C. Chapman*, for the plaintiff.

Robson, Q.C., and *Corrie Grant*, for the defendants.

Cur. adv. vult.

July 30.—MATHEW, J., read the following judgment: These were actions to recover penalties for acts alleged to have been done in contravention of 21 Geo. 3, c. 49. The facts that led to the litigation were these: A number of leading citizens at Leeds had formed themselves into a society for the purpose of giving on Sunday evenings lectures on art, science, literature, and sociology. The public was admitted on payment of small sums, but the lectures were not intended for purposes of profit. A hall called the Coliseum was hired by the society, and a number of lectures were given, in respect of two of which the present proceedings were instituted. There was no evidence that any of the lectures before those in question were within the prohibitory clauses of the Act, but it was said that on the 7th and 21st of January of this year the lectures were of a forbidden character, and rendered the defendants liable to the penalties sought to be recovered. On the 7th of January Mr. Villiers gave a lecture on "Chicago Past and Present," with a description of the recent exhibition called "The World's Fair." The lecture

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

was illustrated by limelight representations of the places and persons described. The second lecture, on the 21st of January, was delivered by Mr. Max O'Rell, on the characteristics of the three nations, England, Ireland, and Scotland. The defendant Mr. Ward, who was Mayor of Leeds and president of the society, took the chair at the first lecture. At the second Mr. King was chairman. On each occasion the chairman introduced the lecturer, and then left the platform and took his place amongst the audience. Mr. Wilson, a defendant in both actions, was a solicitor. He had no personal interest in the Coliseum, nor was he shown to have had any knowledge of the character of the lectures proposed to be given. The hall belonged to a limited company in liquidation. Mr. Wilson had been secretary of the company, and afterwards acted as solicitor to the liquidator. It had been necessary to obtain from the local authorities a licence for the use of the hall, and that licence had been granted to Mr. Wilson, and it was admitted that the terms of the licence had not been departed from. A Mr. Watson, who was manager of the hall for the company, had agreed with the society as to the terms on which the hall was let, and Mr. Wilson, on behalf of the liquidator, had sanctioned the arrangement. At the trial of the actions the jury came to the conclusion that the hall upon the occasion in question was "a place open and used for public entertainment or amusement," and upon the evidence given as to the highly diverting means by which any information contained in the lectures was imparted, this conclusion seemed reasonable.

After the verdict the objection was taken by counsel for the defendants that there was no evidence that the defendants had so acted as to bring themselves within the penalty clauses, and the case was reserved for further consideration. On the argument it was urged on the one hand that upon the facts, which were not in controversy, the liability of the defendants was established, and the judgment should be entered for the plaintiff; while on the other hand it was contended that the defendants did not come within the description of those rendered liable to penalties by the Act. The following are the material provisions of the statute: [his lordship read the section]. See also 25 Geo. 2, c. 36, ss. 2 and 5, and 3 Geo. 4, c. 114. It appeared from the statements of claim in each action that Wilson was proceeded against as keeper of a place used for public entertainment or amusement, and it was argued for the plaintiff that the facts that the licence had been granted to him and that he had sanctioned the letting of the hall to the society were conclusive upon the point. But Wilson was only the agent for the liquidator to procure a tenant or tenants for the hall. He had derived no profit from the tenancy, nor had he any responsibility for the use to which the hall was put for purposes of public entertainment so long as the provisions of the licence were observed. He was not within the description of "keeper" contained in section 2. [His lordship read that part of the section.] He was no more the keeper of the hall than the liquidator. A landlord of a house used by others for purposes mentioned in the statute, or a house agent who was employed to find a tenant, could not with any regard to accuracy be called a keeper of the house, and I am of opinion that as against Wilson the actions fail. Then as to the defendants Ward and King, each was sought to be made liable, not as a joint keeper of the room under section 2, but on the following grounds: (1) as chairman; (2) as master of the ceremonies; (3) as the person managing or conducting the entertainment or amusement. As to (1) it is clear from the section that the meeting referred to means a meeting for the purpose of profane debate on the Lord's day. As to (2) neither defendant could be said to be "master of the ceremonies." That description is applicable to amusements of a different character, which are in no respect analogous to the lectures in question. (3) Nor can it be said that either defendant "managed or conducted" the entertainment or amusement. The chairman on each occasion managed, not the entertainment, but the meeting of those present at the lecture. He had no authority but that derived from the consent of the audience. It was not shown that he had anything to do with the selection of the lecturer. He could not control the gentleman who gave the entertainment, who might be amusing or dull as he thought proper. The chairman could not compel him to be either grave or gay, and any interference on his part with the lecturer on the ground that he was too entertaining would probably be resented by the meeting, and would lead to the selection of another chairman. I do not consider that either defendant is shown to have been liable on any of the foregoing grounds.

I am, therefore, of opinion that the defendants Ward and King are not liable, and I give judgment for all the defendants, with costs.

Judgment for the defendants, with costs.

Solicitors for the plaintiff, *Desborough, Son, & Prichard.*

Solicitors for the defendants, *Darley & Cumberland*, for *E. & H. Wilson*, Leeds.

Q. B. Div. (Hawkins and Lawrance, JJ.) — Aug. 7-10, 1894.

LOVEJOY v. COLE. (a.)

Costs—Admitted set-off—Credit given to defendant on writ—Credit not assented to by defendant before action—Reduction of claim by amount of credit—Jurisdiction of county court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 57.

When, in an action of contract brought in the High Court, the plaintiff gives credit on his writ for a sum paid to him by the defendant, such credit, although not assented to by the defendant before action, is an admitted set-off within the meaning of section 57 *of the County Courts Act,* 1888, *and if, in such a case, the plaintiff finally recovers by judgment a sum of* £50, *then* £50 *is the amount recovered in the action; so that the action is one which might have been brought in the county court, and the plaintiff is entitled only to county court costs.*

Appeal by the plaintiff from an order made by Grantham, J., at chambers. The question in the appeal was whether the plaintiff's costs in the action should be taxed on the High Court scale or on the county court scale.

A master had ordered the costs to be taxed on the High Court scale, but the learned judge reversed this order, and directed the master to review the taxation and tax the costs on the county court scale.

The action was for work done as an architect, and indorsed on the writ were these particulars:—

"1890—April 17, to 1891—May 9.—To fees for work done as an architect and surveyor for the defendant at his request between these dates, full particulars whereof have been delivered . . .	£148	1	0
Cr.—By payments on account from time to time, and *contrà* . .	£25	0	0
Amount due . .	£123	1	0."

(a.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

By an order of a master the action was referred to an official referee, who found that the plaintiff was entitled to recover from the defendant in respect of his claim the sum of £50, and he gave judgment for the plaintiff for £50 and costs.

The costs were made up by the plaintiff on the High Court scale, but objection was taken before the master that the plaintiff's costs ought to be taxed on the county court scale only, as the plaintiff had recovered £50 only, and ord. 65, r. 12, deprived him of High Court costs.

The master overruled this objection, and taxed the plaintiff's costs on the High Court scale, and in his report he stated that it was conceded before him that, as £50 had been recovered, the costs ought to be taxed on the county court scale if the action could have been brought in the county court: *Millington* v. *Harwood*, 40 W. R. 481, [1892] 2 Q. B. 166; that by the words "and *contrà*" on the writ the plaintiff meant that the £25 was for goods supplied by the defendant to the plaintiff, and that it was not suggested before the referee that the defendant ever admitted this set-off, although it was contended before him that it must be taken to be an admitted set-off, and he considered himself bound by the cases of *Hubbard* v. *Goodley*, 38 W. R. 639, 25 Q. B. D. 156, and *Goldhill* v. *Clarke*, 68 L. T. N. S. 414, 41 W. R. Dig. 173, to tax the costs on the High Court scale, and he so taxed them.

The learned judge reversed this order, and the plaintiff appealed, the question being whether under the circumstances the action could have been brought in the county court, by reason of the credit of £25 given by the plaintiff on the writ being an admitted set-off within the meaning of section 57 of the County Courts Act, 1888, which provides that "where in any action the debt or demand claimed consists of a balance not exceeding £50, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action."

Ritter, for the plaintiff.—The credit of £25 given by the plaintiff on the writ was not an admitted set-off within the meaning of the section. The amount recovered by the plaintiff here was really £75, apart from the credit of £25, which cannot be taken into account for the purpose of reducing the claim, as it was not admitted by the defendant before action brought. The set-off to be an admitted set-off within the section must be a set-off admitted by both parties before action brought: *Hubbard* v. *Goodley*; *Goldhill* v. *Clarke*; *Hodgson* v. *Bell*, 38 W. R. 325, 24 Q. B. D. 525. The credit of £25 was not admitted by both parties before action, and, therefore, cannot be deducted from the claim. The amount, therefore, recovered by the plaintiff was £75, and consequently the action could not have been brought in a county court. The plaintiff is, therefore, entitled to High Court costs.

Herbert Reed, Q.C., and *E. Clayton*, for the defendant.—The credit of £25 given on the writ was an admitted set-off, as it was admitted by the plaintiff, and that was sufficient. It is not necessary that the set-off should be admitted by both parties before action; it is enough if it be admitted by the plaintiff, and the plaintiff has so admitted it in this case by giving credit for it on his writ. That being so, the case comes precisely within the authority of the case of *Percival* v. *Pedley*, 35 W. R. 566, 18 Q. B. D. 635, decided on section 7 of the County Courts Act, 1867, which contains the very same words as section 57 of the Act of 1888, under which the present case comes. In that case it was held that a credit given by a plaintiff under similar circumstances was an admitted set-off, although not assented to by the defendant before action. The amount recovered here was therefore only the £50, and the plaintiff is entitled only to county court costs.

Ritter replied.

Cur. adv. vult.

Aug. 10.—The judgment of the COURT (HAWKINS and LAWRANCE, JJ.) was delivered by

HAWKINS, J.—The questions which arise here are whether the £50 was the sum recovered, and whether the action could have been brought in a county court. If the action could have been brought in a county court the contention for the plaintiff fails, and there would be no reason why more than county court costs should be allowed. It was said for the plaintiff that, in giving this credit of £25, the plaintiff was doing what he had no right to do, and as the words on the writ "and *contrà*" ought to be construed as a set-off for goods sold and delivered, it was not an agreed set-off within the section, and could not therefore be given credit for.

The question then arises, What is an agreed or admitted set-off? It was argued for the plaintiff that unless a set-off was agreed to by the defendant, it was not an agreed set-off. It would be revolting to common sense if a man could not give credit to the defendant without the assent of the defendant. The old cases on the subject have not been sufficiently understood. One of the oldest of these was the case of *Woodhams* v. *Newman*, 7 C. B. 654. There it was held that the plaintiff had a right to bring his action in the superior court for the total amount of his claim, without any deduction by reason of a set-off claimed by the defendant, because he could not compel the defendant to accept that set-off, or to plead it in that action unless he wished to do so. That was a case of a set-off claimed by the defendant and not admitted by the plaintiff before action, and that case, therefore, does not at all settle the present question, and the same may be said of the other old cases. Is this a matter which can be given credit for? I think it is. I think an admitted set-off means a set-off admitted by the person against whose interest it is. If the plaintiff says to the defendant: "You need not plead set-off; I give you credit for a certain sum which I owe you"; then, unless application is made by the defendant to strike out or alter this credit, he must be taken to have assented to it, though I think his assent is not necessary. That has been settled by the case of *Percival* v. *Pedley*, where the writ was specially indorsed with a claim for £89 for money paid by the plaintiff for the use of the defendant, and credit given for a sum of £51, money received by the plaintiff, leaving a balance of £38. The judgment of Mathew, J., in that case is absolutely in point here, and he there states that to be an admitted set-off it is not necessary for the defendant to admit the set-off for which the plaintiff gives him credit, and that it is not necessary that this set-off should be admitted by both parties before action, but that an admitted set-off in this section means a set-off admitted by the plaintiff before action; and Cave, J., was of the same opinion.

For these reasons I think the set-off may be given as it has been given in this case. It may be against the interest of the defendant in some cases to have the set-off dealt with in the action, but in that case he could apply to have it struck out. He did not do so here, and he had notice of the credit from the time of the service of the writ, and by going on he assents to the credit, though, as I have said, assent is not necessary. I agree with the judgment of Mathew, J., in *Percival* v. *Pedley*, that the assent of both

parties is not necessary in such a case. I may add that I think that *Goldhill* v. *Clarke* has no reference to this case.

Appeal dismissed.

Solicitors for the plaintiff, *Taunton & Dade.*

Solicitors for the defendant, *H. & G. Keith*, for *Camp & Ellis*, Watford.

Court of Appeal.

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Nov. 12.

PLEDGE v. CARR. (*a.*)

Mortgage—Consolidation.

Banks during the years 1863 *to* 1866 *mortgaged several properties to different mortgagees to secure distinct sums, and in* 1868 *gave a second mortgage upon all the properties to Brockman and Harrison. All the first mortgages except one were, prior to* 1877, *transferred to Brockman: Brockman died in* 1877. *In* 1885 *Harrison transferred the second mortgage to the plaintiff. In* 1890 *the remaining first mortgage was transferred to the defendants, the executors of Brockman.*

The plaintiff claimed to redeem some only of the properties on paying the amounts due under the first mortgages of these properties only.

Held, that the defendants were entitled to consolidate all the first mortgages.

Vint *v.* Padget, 6 *W. R.* 641, 2 *De G. & J.* 611, *followed.*

Decision of Romer, J., 42 *W. R.* 620, *affirmed.*

Appeal by the plaintiff in this action from a decision of Romer, J., reported 42 W. R. 620.

By two indentures of mortgage, dated the 29th of August, 1863, James Banks conveyed Nos. 5 and 6, Shakespeare-terrace, Folkestone, to one John Banks to secure two sums of £500 and interest, and by another, of the 11th of May, 1863, he conveyed to the same mortgagee No. 34, Bouverie-square to secure £450 and interest. By other mortgages, ranging over the years 1863 to 1866, James Banks mortgaged other properties to various and different persons.

On the 20th of August, 1868, James Banks mortgaged all the properties included in the above-mentioned deeds to R. T. Brockman and W. G. S. Harrison by way of second mortgage. The first mortgages were, with the exception of one only, transferred to R. T. Brockman, who died in 1877, leaving W. G. S. Harrison surviving.

W. G. S. Harrison, on the 1st of April, 1885, transferred the second mortgage of the 20th of August, 1868, to James Pledge.

On the 27th of December, 1890, the defendants, the executors of R. T. Brockman, acquired the remaining first mortgage.

Pledge brought this action to redeem Nos. 5 and 6, Shakespeare-terrace, and No. 34, Bouverie-square, on payment of the first mortgages thereon. To this the defendants set up that they were entitled to consolidate all the first mortgages, and it was held by Romer, J., that the defendants were so entitled.

The plaintiff appealed.

Bramwell Davis, for the plaintiff, admitted that the facts of the case could not be distinguished from those in *Vint* v. *Padget*, 6 W. R. 641, 2 De G. & J. 611, but submitted that that case was wrongly decided.

Edwin Ward, for the defendants.

Lord HERSCHELL, L.C.—I do not see how we can in this court decide contrary to *Vint* v. *Padget*—a case decided by a court of jurisdiction co-ordinate with the jurisdiction of this court.

LINDLEY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors, *A. R. & H. Steele*, for *J. Minter*, Folkestone; *Talbot & Tasker.*

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Rigby, L.J.) — Nov. 7.

RENDELL v. GRUNDY. (*a.*)

Practice—Evidence—Judgment debtor—Examination as to means—Allowance for expenses—Ord. 37, *r.* 9—*Attachment—Service of copy of affidavits—Ord.* 52, *r.* 4.

A judgment debtor attending before a master for examination under ord. 42, *r.* 32, *is not, by virtue of ord.* 37, *r.* 9, *entitled to payment of his expenses in accordance with the scale of allowances applicable to witnesses, but is only entitled to such sum for his expenses as the master may consider reasonable.*

Where, on an application for a writ of attachment, the party showing cause took the objection that he had not been served, under ord. 52, *r.* 4, *with a copy of the affidavits to be used in the application, and the judge allowed an adjournment to enable the party to answer them, and on the adjourned hearing ordered a writ of attachment to issue, the* Court of Appeal *refused to set aside the writ for non-compliance with ord.* 52, *r.* 4.

Appeal from an order of Wright, J., for a writ of attachment.

The plaintiff having recovered judgment against the defendant for £78, the amount of a solicitor's bill of costs, obtained an order for the examination of the judgment debtor as to his means of satisfying the judgment under ord. 42, r. 32.

The debtor, who was a surveyor, appeared before a master in chambers for examination, but refused to answer the questions proposed to be put to him unless he was paid the sum of one guinea for conduct money. The master, having ascertained that the debtor's fare by railway and omnibus from his home to the court and back was 1s. 4d., held that he was only entitled to payment of that amount.

By ord. 37, r. 9, "Any person required to attend for the purpose of being examined or of producing any document shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court."

By the scale of allowances to witnesses in the "Directions to the Masters" of Hilary Term, 1853, the sum allowed to such persons as labourers or journeymen is 5s., and the allowance for a surveyor is one guinea.

The plaintiff took out a summons for a writ of attachment against the judgment debtor for having refused to answer the questions put to him before the master. The summons was served upon the debtor, but he was not served with a copy of the affidavits on which the application was founded.

By ord. 52, r. 4, "Every notice of motion . . . for attachment . . . shall state in general terms

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the ground of the application, and where any such motion is founded on evidence by affidavit a copy of any affidavit intended to be used shall be served with the notice of motion."

On the hearing of the summons before Wright, J., the debtor took the objection that he had not been served with the affidavits. The learned judge granted an adjournment to enable the debtor to read and answer the affidavits. At the adjourned hearing the debtor stated that he could not answer them. Wright, J., thereupon made an order for a writ of attachment.

The judgment debtor appealed.

George Wallace, for the appellant.—A debtor summoned for examination under ord. 42, r. 32, is entitled to his expenses under ord. 37, r. 9, according to the prescribed scale; and if the proper amount is not offered to him he cannot be attached for non-compliance: *Protector Endowment Co.* v. *Whitlam*, 36 L. T. 467, 25 W. R. Dig. 185; see also *In re Working Men's Mutual Society*, 30 W. R. 938, 21 Ch. D. 831. Secondly, failure to serve a copy of the affidavits is a fatal objection to an application for attachment: *Taylor* v. *Roe*, 68 L. T. 213, 41 W. R. Dig. 171. Wright, J., held that ord. 52, r. 4, only applied to motions in court, and not to applications at chambers. Such a distinction cannot be maintained, especially where the liberty of the subject is concerned.

Crawford, for the respondent.

Lord ESHER, M.R. — In this case a judgment debtor for £78 was summoned, under ord. 42, r. 32, to appear and be examined for the purpose of giving information to his creditor. When he attended before the master at chambers he demanded payment of conduct money, and insisted that, being a surveyor, he was entitled to the sum of a guinea. On the other side it was said that he was only entitled to a reasonable sum. The master adopted this view, and held that a reasonable sum would be his cost of coming to the court and going home again. He accordingly allowed him the sum of 1s. 4d., that being the amount of his fare by railway and omnibus.

The first point taken on this appeal is that the amount to which the judgment debtor was entitled does not depend on what was reasonable, but is expressly provided for by ord. 37, r. 9. I am of opinion that that contention is wrong. Ord 37, r. 9, applies to witnesses only, and not to a debtor summoned under ord. 42, r. 32. The question of amount, therefore, depends on what is reasonable, and that was a question to be dealt with by the master.

Then it is said that he was entitled to have the affidavits served upon him with the notice of motion. But for what purpose? In order that he might be able to answer them. He took the objection before Wright, J., that he had not been served with them, and the learned judge granted an adjournment in order that he might read them and answer them. It is clear that no injury was done to him. Assuming that ord. 52, r. 4, applied, and that he was under that rule entitled to have the affidavits served upon him, he had what was equivalent thereto, and cannot now say that on that ground he ought not to be attached.

The appeal must therefore be dismissed, but the writ of attachment will be kept back for three days in order to give the appellant another opportunity of being examined.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the appellant, *H. S. Bridge.*

Solicitors for the respondent, *Church, Bendell, Todd, & Co.*

From Chan. Div. (Lindley and Davey, L.JJ.) — June 6, 1894.

BUDGETT v. BUDGETT. (a.)

Practice— Time for appealing—Special leave—R. S. C., 1883, ord. 58, r. 15—R. S. C., 1893, r. 27.

Ord. 58, r. 15, of November, 1893, which limits the time for appealing to three months, does not apply to a judgment passed and entered before the rule came into operation.

On May 23, 1893, Kekewich, J., delivered judgment in this action. The judgment was passed and entered on August 24, 1893. On June 2, 1894, E. E. Meakin, one of the defendants in the action, gave notice of application to the Court of Appeal for special leave to appeal from the said judgment, thinking that he might be too late to appeal without leave.

R. S. C., 1883, ord. 58, r. 15, provides that "no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year."

The R. S. C. of November, 1893, which came into operation on January 1, 1894, by rule 27 substitute "fourteen" for "twenty-one" days and "three months" for "one year."

The defendant E. E. Meakin, in person, submitted that under the circumstances of the case leave should be given.

Ingle Joyce, for the plaintiff.—As soon as the rules of November, 1893, came into operation they applied to judgments before that date as well as after it. As more than three months have elapsed, the defendant must apply for special leave, but he is not entitled, under the circumstances, to obtain it.

Bunting and *Chaster*, for other parties.

LINDLEY, L.J.—I do not think that this question has been decided in this court or in the other branch of the Court of Appeal. We both agree that, as to this judgment, the new rule does not apply to it, and that therefore no leave to appeal is necessary. The applicant has a right to appeal at any time before August 24, 1894. His present application must therefore be refused as unnecessary.

DAVEY, L.J., concurred.

Solicitors, *Ingle, Cooper, & Holmes; Foss & Ledsam.*

High Court of Justice.

Chan. Div. North, J. — Aug. 11, 1894.

In re KIDD.
BLOOMER v. WITHALL. (b.)

Administration—Exoneration—Charge—Locke King's Acts (17 & 18 *Vict. c.* 118—30 & 31 *Vict. c.* 69).

A contract to buy improved ground-rents from her lessee by a reversioner was carried out after her death.

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

(b.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Held, that the purchase-money was a charge, within Locke King's Acts, on the improved ground-rents so purchased.

By an agreement dated the 16th of April, 1883, and made between Mrs. B. G. P. Kidd of the one part and William Hodson of the other part, certain land was leased to Hodson for ninety-nine years at the rent of £180, which was to be secured upon the ground-rents of houses which Hodson agreed to build thereon, and the document proceeded:—

"Provided always that if and when the lessee has taken leases of a sufficient number of houses to secure by the ground-rents thereby reserved the said total ultimate annual rent of £180, then the lessor will either convey to the lessee in fee simple in consideration of the due performance of this agreement and of £50 to be paid to the lessor, all such parts of the said land as shall not have been included in any lease, or, at the option of the lessor, the lessee shall sell to the lessor the ground-rents to be created out of the lands not then already leased when the same shall have been created at the price of twenty-two years' purchase of the amount of such ground-rents . . . not being in any case more than one-sixth of the actual rack rent."

In July, 1888, after Hodson had built and taken leases of houses sufficient to secure ground-rents to the mount of £180, Mrs. Kidd elected to buy thea ground-rents of seven houses built on land which remained unleased. The price was fixed at £1,298, the ground-rents being reckoned as £59.

Mrs. Kidd died on the 7th of December, 1890, having made a will by which she specifically devised her real estate, but intestate as to residuary estate.

On the 23rd of January, 1892, an order for the administration of her estate was made. The chief clerk's certificate was made on the 20th of July, 1894, and the action now came on for further consideration. The main question was whether the £1,298, which remained unpaid at Mrs. Kidd's death, was a charge on the land subject to the agreement, or was payable out of the personal estate.

T. Gent and *J. M. Lightwood*, for the next of kin.—A lien on the land for unpaid purchase-money would constitute a charge under Locke King's Acts.

Cozens-Hardy, Q.C., and *S. Leeke*, for the specific devisee of the land.—The deceased had two interests in the land—(*a*) the right to the reversion at the expiration of the term, and (*b*) the right to receive the rent during the lease. It was the latter right that she purchased, and the purchase-money is not a charge under Locke King's Acts.

NORTH, J.—Although Locke King's Act did require a great deal of correction of what admittedly were considerable blunders, I cannot say that one can blame the draftsman because he did not express it in terms that exactly meet the present case; but I think that this case is within the spirit and meaning of the Act at any rate. It is shortly this: A lessor agrees to let land on building leases. There are several leases made, the result of which is that the rents reserved cover the total amount of the ground-rent that is to be reserved upon the whole, and some land is left with respect to which, under the agreement as it stands, the lessee is not bound to pay any rent. In the present case there is this curious provision made that requires a good deal of understanding. As regards the surplus land, as I will call it, the lessee is entitled to have that conveyed to him without paying any rent for it, but inasmuch as he is getting an interest in fee instead of a leasehold interest there is a stipulation that he should pay £50. Then, on the other hand, there is another alternative very dimly shadowed forth in the agreement, although I think one can get by degrees to understand what is meant. There is no rent to be reserved upon that under the original agreement, and, therefore, the lessee would be entitled to have it without rent unless the lessor exercises an option given to her of saying, "I will charge a rent upon that also, but I must take that rent off your hands by paying an agreed price for it." I do not see how it could be worked out at all under the original agreement, for there is nothing whatever to show who is to fix the rent or how it would be assured, but in the lifetime of the lessor that rent appears to have been agreed upon. There is quite enough memorandum in writing to get over any difficulty about the statute. The arrangement made was that in respect of this surplus land it was to be made the subject of several leases in respect of which different rents were agreed upon, amounting in the whole to £59. To get at the real relation between the lessor and the lessee as to this land, the first thing is to arrive at the rent, then at the divisions into lots, and then at the rent to be paid in respect of each; and finally, to work out their relations, you have to apply to that state of things the bargain contained in the building agreement as regards the surplus land; and then you find that the reversioner, the lessor, is to have those leases reserved in her favour created in consideration of her paying the agreed price ascertained by the amount of rack rent. That is substantially the agreement entered into between the parties; and, in my opinion, the result is this: that the lessor has two interests in the land. I do not at all dissent from Mr. Hardy's way of putting it, it is one interest altogether, but it may be divided into two. It consists of this, the right in reversion to the land pending the lease, the only beneficial result being the receipt of the rent, and the right of the reversioner to go into possession when the lease has expired. In respect of the right to receive £59 during the currency of the lease there is an express bargain that a given price is to be paid for it. As regards the right to take possession upon the determination of the lease, that is settled by the original agreement, and nothing is to be paid in respect of that.

But the right to receive the rent during the currency of the lease is a stipulation for an interest in land. It would not otherwise have been got but for that bargain and it will not be got under that excepting under the terms fixed contemporaneously, of the price being paid by the lessor to the lessee to entitle the lessor to have that interest conferred upon her. Under those words it seems to me that when the notice had been given when the division into separate lots had been agreed upon and the rents had been fixed, then the bargain between the parties was complete, and all that remained was to work it out. When the bargain was complete, but not yet worked out, I think the lessee was in a position to say, "I am entitled in respect of allowing this lady to be the reversioner of the land at £8 a year from the first. I am entitled to be paid the purchase-money for it." It seems to me he would be entitled to say he would not be party to an arrangement under which that rent was reserved to her unless he got his money paid. That is a lien for unpaid purchase-money which, under the second of the three Acts called Locke King's Act, is a burthen upon the land. And I must say it would be very hard if it was not, but I am not dealing with the hardship. I must consider what the law is; but it would have been very hard if the devisees of the land were to have, not a reversion only, but an immediate rent of £59 a year during the continuance of the leases, and the price to be paid for that rent to them was to come out of the

personal estate. It is quite clear that that is within the scope of the cases which Locke King's Acts were intended to deal with. Whether it actually has hit them or not may be another question, but I think that it is within the Act.

Solicitors, *J. J. Chapman; Ellis & Sawyer; W. H. Withall & Co.*

Chan. Div. North, J. } June 15, 22, 23; Aug. 9, 1894.

In re MARTINDALE. (*a.*)

Contempt of court—Hearing in camera—*Publication of proceedings.*

It is a contempt of court to give the public information of what the judge has decided ought not to be disclosed by determining to hear the case in private; and the contempt is the same whether the report is accurate or not.

Six motions were made to commit the printer and publisher of the *Star*, *Morning*, *Pall Mall Gazette*, *People*, Mr. Perris, and Mr. Hueffer for contempt of court.

On the 6th of June an application with respect to an infant ward of court was heard by North, J., in private.

The *Star* of the same day published the following paragraph:—

"A POET'S LOVE AFFAIR.—A Chancery Court Chapter of the Queen who Flew.—In Chancery Court No. 2 to-day a rarely romantic story was unrolled before Mr. Justice North, who sat in private to hear the action innocently set down as *In re Martindale*. The action was one to forbid a Miss Martindale, said to be a ward in Chancery, from perpetrating matrimony, the danger arising in connection with the attentions of a young poet and novelist who has already achieved a certain amount of distinction. . . . The proceedings to-day might have been comparatively tame but for the fact that it turned out that there was no longer any Miss Martindale to protect. That lady became Mrs. Hueffer three weeks ago. The case stands adjourned for the present."

On the 7th of June the *Morning* published the following account of the matter:—

"A YOUNG NOVELIST'S ROMANCE.—A romance which has excited much interest in certain literary and artistic circles in London became more widely known yesterday as forming the subject of an action in Chancery Court No. 2, before Mr. Justice North. The cause was *In re Martindale*, and the action taken to prevent the marriage of a Miss Martindale, a minor and a ward in Chancery. When the case came on it was found out that there was no longer a Miss Martindale to be protected, and an adjournment had to be made. In fact the lady had three weeks before been married to the lover whom it sought to bar—Mr. Ford Madox Hueffer."

The *Pall Mall Gazette* of the 7th of June and the *People* of the 8th of June reproduced the paragraph in the *Morning*.

It appeared from the evidence that the paragraph in the *Star* had been contributed by Mr. Perris, upon information given to him by Mr. Hueffer.

Swinfen Eady, Q.C., and *George Henderson*, for the next friend, in support of the motions to commit.

S. Hall, Q.C., and *G. Lawrence*, for the *Morning*.—There was nothing to show that the proceedings were heard *in camera*. The article was obtained from a correspondent in the usual way, and inserted without any knowledge that the proceedings did not take place in open court.

S. Hall, Q.C., and *Vernon Smith*, for the *Pall Mall Gazette*, and

Butcher, for the *People*, adopted the same line of argument.

Boome, V. de S. Fowke, and *Bradford*, for the *Star*, Mr. Perris, and Mr. Hueffer.—The paragraph did not interfere with the course of justice. There was no publication of any matter which ought to be concealed, and an accurate account of what took place in a court of justice cannot be a contempt of court. Certainly no contempt was intended, and if one has been inadvertently committed we apologize.

Aug. 9.—NORTH, J., said that he had to deal with six motions for committal for contempt of court. A very short statement of the facts would suffice. The parents of a young lady having thought fit to forbid communications between her and Hueffer, she left her home suddenly. Having reasons for believing that Hueffer was privy to this, the father's solicitors informed Hueffer by letter on the following day that the young lady had been made a ward of court, and on the same day he acknowledged in writing the receipt of that letter. The statement that she had been made a ward was not accurate; though proceedings had then been commenced for the purpose, she did not actually become a ward until the 11th of April.

The matter was not brought to his lordship's notice until the 1st of June, when he made an order restraining all communication between the young lady and Hueffer, and requiring Hueffer to attend personally in court on the 6th of June. He did so. To avoid the inconvenience of clearing the court and turning the audience into the adjoining passage, his lordship took the parties into his private room; but that was precisely the same thing as hearing them in court after the public had left. On that occasion an affidavit by Hueffer was produced, in which he stated that he did not know, and had no reason to believe, that the young lady was a ward of court, the falsity of which statement was proved by his letter already mentioned. His solicitor also said that the parties had been married two or three weeks before; and his lordship stated that if proper evidence of the marriage were produced, the operation of his order would be stayed. The certificate, when produced, showed that the lady had been represented as over twenty-one years of age, but being satisfied that the false statements did not affect the validity of the marriage, although Hueffer had laid himself open to criminal proceedings, his lordship stayed the operation of the order.

In the meantime, on the evening on the 6th of June, the advertisement which is the subject of the motions against Hueffer, Perris, and the *Star* was published in the *Star*. The material parts of the paragraph might be condensed into this, that on the day in question a rarely romantic story was unrolled before a judge in chancery, sitting in private, with reference to a female ward; which proceedings might have been comparatively tame but for the fact that it turned out that the lady had been married to the respondent three weeks before. It had been contended that the publication did not interfere with or tend to obstruct the course of justice. In that he agreed, but that did not conclude the question whether there was a contempt or not. Articles had often been held to be a contempt of court on the ground above-mentioned,

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

because published while litigation was pending, which would not have been such if only published after the litigation was closed. But there might be publications amounting to contempt of court, although not interfering with the course of justice, when all proceedings were at an end, *e.g.*, matters occurring with respect to a ward which could not be published without contempt while the ward was an infant, could not be published with impunity so soon as the ward had attained twenty-one years.

It had also been contended that the proceedings in a court of justice ought to be public, and that there could not be any contempt in publishing what took place in court, but in that he did not agree. The general rule was an excellent one, that legal proceedings should be in public, and if it were departed from, the great weight which legal decisions carried with them would be deservedly diminished. But certain exceptions were proper and necessary. One ground of exception was that a public hearing would have the effect of disclosing what it was the whole object of the action to keep concealed, as in *Andrew* v. *Raeburn*, 22 W. R. 564, L. R. 9 Ch. App. 522, and *Mellor* v. *Thompson*, 31 Ch. D. 55, 34 W. R. Dig. 140, or of making known to the world a secret process, as in the *Aniline cases*, 31 W. R. 913, 24 Ch. D. 156. The hearing in private wholly or in part of cases in which public decency and morality require it to be done are also familiar, not only in the divorce courts, but also in the ordinary criminal and civil courts—*e.g.*, *Malan* v. *Young*, 6 Times L. R. 38—so also cases relating to lunatics were constantly heard in private, as were cases as to wards, *Ogle* v. *Brandling*, 2 Russ. & M. 688, in order that the lunatic or ward might not be prejudiced; and he could not conceive a clearer contempt of court than that a party concerned or any person should proceed forthwith to make known to the world the very matter which the court had deliberately, in the exercise of its discretion, decided ought not to be published. It was said *Lawrence* v. *Ambery*, 91 L. T. 230, was a decision to the contrary. In that case proceedings for a divorce on the grounds of nullity had been heard *in camera*, and a newspaper published the result only that a decree had been pronounced It was decided that such publication was not a contempt.

In the present case he did not believe that any contempt was intended, though this was no excuse for contempt actually committed. The paragraph in the *Star* was inserted without premeditation, having been concocted and handed in by Hueffer and his friend Perris merely as an advertisement of the former. Its vulgarity and bad taste were enhanced by the references to the Court of Chancery and the sitting being in private, references obviously made, without any regard to the credit of the lady, for the purpose of attracting the attention of readers to a puff which, if not thus embellished, would have been passed by unnoticed. The paragraph was intended to appear to be and would be understood as a concise statement of what took place in his private room, and the disclosure was held out as an inducement to the public to read the whole paragraph. It was said that as the statement that the marriage had taken place was quite true, it could not be a contempt to state that; but if the question of contempt depended upon the truth or untruth of the matter published, the result would be that there would be no contempt in an accurate disclosure of what passed *in camera*, although there would be if the account was a fictitious one, which was absurd. If the element of untruth were necessary, it might be found in the statement that a rarely romantic story was involved. The story was a sad and very common-place one, and on the day referred to was not opened or gone into at all. There was no contempt in announcing the fact that the ward had become the wife of Hueffer, the contempt was in purporting to give the public information, though meagre, of what the judge had decided ought not to be disclosed by determining to hear the case in private, and excluding the public. He did not regard the contempt as a serious one, but it was not mitigated by the line of defence which counsel adopted, the boldness of which could not be appreciated by any one who did not hear it. At the same time, a proper apology had been expressed if the court should be of opinion that a contempt had been committed.

Looking at all the circumstances, he thought that justice would be met by ordering the printer of the *Star* to pay the costs of the motion to commit him. Hueffer, who went from court to his journalist friend and instigated him to write the paragraph in question and procure its insertion, was equally responsible for the publication, and he also must pay the costs of the motion against him.

With regard to the other motions, his lordship was much surprised that they had been made at all. He considered them vexatious, and an abuse of the process of the court. Motions to commit where there was no real ground for committing were mere waste of time, and ought to be discouraged: see *Plating Co.* v. *Farquharson*, 29 W. R. 510, 17 Ch. D. 49; *Hunt* v. *Clarke*, 37 W. R. 724. As regards Perris, the part he took might have rendered him liable to committal if the contempt had been a flagrant one. But if action was necessary, the proceeding against the *Star* and Hueffer would have answered every purpose, and it was not only unnecessary but vexatious to proceed against Perris the writer. He dismissed the motion against Perris with costs. The other three motions were against the publishers of the *Morning*, *Pall Mall Gazette*, and the *People*. The article of the *Morning* of the 7th of June does not show, and the publisher swore that he did not know, that the proceedings were not in open court. The article in the *Pall Mall Gazette* of the same day stated on its face that it was; and that in the *People* of the 10th of June was also simply copied from the *Morning*. He dismissed these motions with costs. He had hesitated somewhat about the costs, because of the line of defence adopted by the respondents, but he thought costs should follow the result. He might add, however, that if they had really done what their counsel asserted their right to do with impunity, he should have committed every one of them.

Solicitors for the applicant, *Wilson & Son.*

Solicitors for the *Pall Mall Gazette*, *Sutton, Ommanney, & Co.*

Solicitors for the *Morning*, *Lewis & Lewis.*

Solicitors for the *Star*, *Harrison & Davies.*

Solicitors for the *People*, *Rollit & Sons.*

Solicitors for Hueffer, *Shaen, Roscoe, & Co.*

Chan. Div. Stirling, J. } Nov. 8.

DEBNEY v. ECKETT. (*a.*)

*Will—Bequest of residue of leasehold property to trustees upon certain trusts—Repairs—Income—*Corpus.

A testator gave all the residue of his leasehold and

(*a.*) Reported by F. ARTHUR MORTON, Esq., Barrister-at-Law.

other property to trustees upon trust to receive the rents and profits thereof, and, in the first place, to pay thereout all the costs, charges, and expenses of the trust, and out of the balance thereafter remaining to pay certain legacies and annuities, which latter were to abate pro rata *in case of the said balance being insufficient to pay all in full.*

The trustees, after notice from the lessors, repaired part of the said leasehold estate at an expense greater than the value of the remainder of the term of the lease.

Held, that the cost of these repairs was payable out of income, and not out of corpus.

Adjourned Summons.

The testator, Thomas Debney, by his will, dated the 5th of January, 1841, bequeathed (*inter alia*) all the residue of his leasehold houses and property, whatsoever and wheresoever, to his trustees upon trust to receive the rents and profits thereof, and to pay thereout certain legacies and annuities, and he directed his trustees, before making any payments on account of the said annuities, to discharge and pay out of the said rents and profits "all the costs, charges, and expenses incurred by my said trustees in the performance of the trusts of this my will," and in case there should not remain, after such payments as last mentioned, a sufficient balance to pay all the annuities in full, he further directed that the said annuities should abate proportionately and be paid *pro rata*, and after the death of all the annuitants he, the testator, gave the *corpus* of the said residue over.

The testator died in 1841, leaving leasehold property of considerable value, and in 1850 a suit was commenced in the Court of Chancery to administer the estate. From time to time portions of the leasehold property were sold by order of the court, and the proceeds of the sale paid into court.

In 1892 the lessors of the S. property, part of the testator's residuary leasehold estate, and as yet unsold, gave notice to the trustees to put the said property into repair, in accordance with the covenants in the lease under which it was held. The trustees complied with the notice, and in so doing spent a large sum of money, greater, in fact, than the value of the residue of the term of the lease then unexpired.

There was an intestacy as to the gift over, and the next of kin were consequently entitled in remainder, the testator having left no real estate.

This was a summons in the administration suit aforesaid, taken out by the plaintiff, Margaret Debney, on behalf of herself and all annuitants under the will of the testator other than the trustees thereof, for an order (*inter alia*) that the cost of the repairs above mentioned should be paid out of the fund in court, the proceeds of the sale of the leasehold estate of the testator.

Grosvenor Woods, Q.C., and *Methold*, for the plaintiff and other annuitants.—These expenses should come out of *corpus*. They are extraordinary expenses. The expression "costs, charges, and expenses, &c.," refers only to the ordinary periodical expenses of carrying out the trust. The cost of these repairs was greater than the value of the residue of the lease, and hence it would be unfair to throw so heavy a burden upon the income: *In re Courtier, Cole* v. *Courtier*, 35 W. R. 85, 34 Ch. D. 136; *In re Baring, Jeune* v. *Baring*, 41 W. R. 87, [1893] 1 Ch. 61.

Arthur Morton, for the next of kin.—These charges must be borne by income. They are ordinary expenses arising under the covenants to repair in the lease. *In re Courtier* and *In re Baring* are to be distinguished from the present case. In both these cases the gift of the leaseholds was to the trustees upon trust for the respective tenants for life without more. Here the gift is charged with the payment of costs, charges, and expenses, as was also the case in *In re Baring* in respect of the residue, and that part of Kekewich, J.'s judgment dealing with the residue is in my favour.

Graham Hastings, Q.C., and *Fooks*, for the trustees.

STIRLING, J.—I think these expenses are payable out of income. It was the duty of the trustees to keep the property in good repair from time to time, paying for such repairs out of rents and profits, the annuities abating if necessary. The fact that the repairs have all been done at one and the same time does not affect the question as to what fund ought to bear them. If the property had been in a dilapidated state at the death of the testator that might have made a difference, bearing in mind the decision in *In re Courtier*, but there is nothing to show that this was the case.

Under these circumstances I think that this case falls within Kekewich, J.'s judgment in *In re Baring* (see [1893] 1 Ch., p. 65) that the expression "costs, charges, and expenses of the trust" includes the cost of repairs of this nature; and consequently I shall make no order on this part of the summons.

Summons dismissed.

Solicitors, *Johnson & Masters; Hughes & Sons.*

Chan. Div.
Stirling, J. } June 8, 9, 28, 1894.

In re OWEN (DECEASED). (*a*.)

Limitations, Statute of—Contingent interest in land—Charge created by will—Remedy of person entitled—Sale or mortgage, not foreclosure—"Present right to receive" moneys charged—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 74), *ss.* 1, 2, 8.

The remedy of a person entitled to a charge created by will on real estate is sale or mortgage, not foreclosure.

A testator, who died in 1854, *by his will, made in October*, 1853, *gave his wife absolutely certain personal estate exonerated from his debts, which he charged on his real estate. He devised his real estate, and also a contingent interest in real estate to which he was entitled, to his wife for life, and after her decease he charged the same with the payment of certain sums of money which he bequeathed to his children. He appointed his wife executrix, but there was no residuary bequest of personal estate. She died in February*, 1880. *The testator's contingent interest fell into possession in February*, 1893, *it not having been previously realized.*

Held, that the "present right to receive" the sums charged on the testator's real estate accrued on the death of the testator's widow in 1880, *when they might have been raised by sale or mortgage, but not by foreclosure, and that therefore the right to recover the same was barred by section* 8 *of the Real Property Limitation Act*, 1874.

Adjourned summons.

David Owen, who died in 1823, devised his real estate upon certain trusts for the benefit of Mary Hannah Postlethwaite during her life, and after her death, in the event which happened of her not leaving issue, upon trust for the four children of his brother Edward Owen in equal shares as tenants in common in fee simple.

Mary Hannah Postlethwaite died on the 28th of February, 1893, and thereupon the devise in favour of the children of Edward Owen took effect in

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

possession. One of these children was Edward Owen, the younger, who died on the 29th of March, 1854, having made his will, dated the 31st of October, 1853, whereby he gave to his wife, Mary Owen, absolutely certain personal estate exonerated from payment of his debts, which he charged on his real estate. He devised all his real estate, and also his contingent interest under the will of David Owen, to his wife, Mary Owen, for her life, and after her decease he charged the same with the sum of £8,000, which he bequeathed as follows:—£2,000 to his son Edward Owen, £2,000 to his daughter Dorothy, £2,000 to his daughter May, and £2,000 to his daughter Ellinor, and, subject and charged as aforesaid, he devised all his said real estate and contingent interest aforesaid unto his son Edward Owen, his heirs, executors, administrators, and assigns. After directing each legacy so given to his daughters to be settled, he further declared that in case his real estate and the contingent reversionary interest aforesaid should not, if sold, and after payment of debts, realize the sum of £8,000, each such legacy to his daughters should abate so that his son should have an amount and share equal with his sisters in the amount that, under the circumstances, might be realized therefrom. He appointed his widow executrix, but his will contained no disposition of his residuary personal estate. Mary Owen, the widow of Edward Owen, died on the 10th of February, 1880, in the lifetime of Mary Hannah Postlethwaite.

A deed, dated the 22nd of November, 1880, was executed by, amongst others, the son and three daughters of the testator Edward Owen, from which it appeared that the whole of the real estate of which the testator was in actual possession had been sold at the date of the deed, and that each of them had received out of the proceeds a sum of £1,844 in part discharge of the legacy of £2,000, "leaving" (in the words of the recital) "each of them still entitled to receive a sum of £156 each from the unrealized estate of the testator as the balance of the said legacy of £8,000."

No steps were taken to realize the testator's interest under the will of David Owen during the lifetime of Mary Hannah Postlethwaite; no further payment was made in respect of the sum of £8,000 charged by the testator's will on his real estate. Part of the real estate of David Owen having been sold, and the proceeds paid into court under the Lands Clauses Consolidation Acts, the question arose whether the claims in respect of the £8,000 were not barred by the statutes of limitations.

Graham Hastings, Q.C., and *Gaselee*, for the summons.—The present right to receive the legacies accrued on the death of Mrs. Owen, the tenant for life, and from that time the statute began to run. No exception is introduced by section 2 of the Real Property Limitation Act, for that section deals with realty. The legatees could not foreclose, but could only sue in equity. The rule is the same in the case of equitable charges created by deed: *Humble* v. *Humble*, 24 Beav. 535, 6 W. R. Ch. Dig. 44. The statute does not make any difference between estates in possession and reversion for this purpose. It was perfectly open to all the legatees as soon as the tenant for life died to take proceedings to have their legacies raised out of the reversion by sale or mortgage. The case of *Hornsey Local Board* v. *Monarch Benefit Building Society*, 38 W. R. 85, 24 Q. B. D. 1, is a direct decision on the new statute. *In re Blachford, Blachford* v. *Worley*, 33 W. R. 11, 27 Ch. D. 676, turned upon a trust. There is no trust or trustee here, but simply a devise of Blackacre to B., subject to a charge to A. *In re Johnson, Sly* v. *Blake*, 33 W. R. 502, 29 Ch. D. 964, which was a decision on the statute 23 & 24 Vict. c. 38, decided that the present right to receive under a will or on an intestacy does not arise until the executor or administrator has assets. In that case there was also a trustee. [STIRLING, J., referred to *In re Davis, Evans* v. *Moore*, 39 W. R. 627, [1891] 3 Ch. 119.] There has been no acknowledgment or payment, and the claim is barred by the statute.

Warrington, for the legatees.—The court is not bound by statute to do an injustice in this case, and prevent these legatees recovering. It ought to be inferred that Edward Owen, who was entitled to the residue agreed to postpone the sale: *Hugill* v. *Wilkinson*, 36 W. R. 633, 38 Ch. D. 480. [STIRLING, J.—In *James* v. *James*, 21 W. R. 522, L. R. 16 Eq. 153, it was decided, following a previous decision of the Court of Appeal, *Pryce* v. *Bury*, which, unfortunately had not been reported, that, whether there was an agreement for foreclosure or not, the remedy was foreclosure. If you can once make out that this was not a proceeding to recover a legacy, but to recover land, then, no doubt, that would help you very much.] I am not aware of any case of a person entitled to a charge created by will being entitled to foreclosure, but I submit the principle is the same: *London and County Banking Co.* v. *Dover*, 27 W. R. 749, 11 Ch. D. 204. The principle was applied by Malins, V.C., in *Backhouse* v. *Charlton*, 26 W. R. 504, 8 Ch. D. 444, and in the recent case of *Sadler* v. *Worley*, 42 W. R. 476, [1894] 2 Ch. 170, Kekewich, J., held that a general charge entitled debenture-holders to foreclose. [STIRLING, J.—Still, that all arises out of contract.] Yes. This is, in fact, a legacy, and is, therefore, protected by section 4 of the Act, so time did not begin to run until there were assets. A charge, whether by will or by deed, is an assignment of so much of the land as will entitle the legatee to bring an action to recover the land, or so much as may be necessary to satisfy the charge. If this is a legacy it is payable out of the residuary personal estate, on the principle of *Earle* v. *Bellingham*, 6 W. R. 45, 24 Beav. 448. Throughout the will the testator speaks of the gifts as legacies, and although, no doubt, they were primarily payable out of the real estate, they were payable out of the personal estate if the real estate was insufficient. To recover the legacy, proceedings to which the executor was a party ought to have been taken. If this had been a reversionary interest in personal estate, which had come to the hands of the executor, there could be no question about the right to recover: *Smith* v. *Hill*, 26 W. R. 878, 9 Ch. D. 143. The question, therefore, is whether an equitable charge by will is in the same position as such a charge by contract or by memorandum of deposit. [STIRLING, J.—There ought to be some authority on that point.] All the cases are as to the right of the person entitled to the equitable charge to foreclose: Fisher on Mortgages, 4th ed., p. 834. The statement there is not, however, quite accurate since North, J.'s decision in *Hugill* v. *Wilkinson*. The cases referred to there are cases of mere liens, and have nothing to do with wills: *Tipping* v. *Power*, 1 Hare, 405, and *Tennant* v. *Trenchard*, L. R. 4 Ch. App. 537, 17 W. R. Ch. Dig. 172, are inconsistent with the more recent decisions. [STIRLING, J.—*Tennant* v. *Trenchard* turned on the doctrine that the trustee must not do anything to the prejudice of the estate.] There is really no distinction between a charge by will and a charge by deed, and although there is no authority, your lordship would only be acting on principle in so holding.

Graham Hastings, Q.C., in reply.—Mortgages stand on the footing of a bargain. *York Union Banking Co.* v. *Artley*, 27 W. R. 704, 11 Ch. D. 205, decided that an equitable mortgagee was entitled to either sale or foreclosure. There is no bargain under a will, and it has never been suggested that the chargee in such a case has a right to get the estate by foreclosure. He can only take proceedings to recover the sum of money. The fact that the legacies were only charged on the real estate, and were to abate if it was insufficient, disposes of the argument founded on *Earle* v. *Bellingham* and the other cases relied on. *Tennant* v. *Trenchard* merely went on the duty of the trustee.

Cur. adv. vult.

June 28.—STIRLING, J., after stating the facts, continued:—The question has arisen whether all claims in respect of the £8,000 were not barred by the Statute of Limitations. It was contended in opposition to this view that the recitals in the deed of the 22nd of November, 1880, were evidence of an agreement that the payment of the balance of the £8,000 should be postponed to the death of Mary Hannah Postlethwaite. I am unable to come to that conclusion. There appears to be nothing in the deed which could prevent any of the legatees from requiring at any time that the interest of the testator under the will of David Owen should be sold, and the proceeds applied in satisfaction of the unpaid balance.

I am also of opinion that this sum of £8,000 was not a legacy payable out of the personal estate of the testator, but constituted simply a charge on his real estate and on his interest under the will of David Owen. I have not, therefore, to consider the case of a legacy payable by a legal personal representative to whose hands assets sufficient to answer the legacy came for the first time on the death of Mary Hannah Postlethwaite, and, consequently, the decision is not governed by such cases as *Adams* v. *Barry*, 2 Coll. 285, 290, 294; *In re Johnson, Sly* v. *Blake*; and *In re Davis, Evans* v. *Moore*, or the principles there laid down.

It is enacted by the Real Property Limitation Act, 1874, s. 8, that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." The words "present right to receive" are to be read according to their ordinary meaning in the English language: *Hornsey Local Board* v. *Monarch Investment Building Society*. Now a present right to receive the sum of £8,000 accrued in 1880, in fact part was then received by each of the persons to whom it was payable, and the balance might have been raised by a sale or mortgage of the interest of the testator under the will of David Owen. In my opinion, the right to recover the balance is barred by this enactment.

In opposition to this conclusion there was cited the case of *Hugill* v. *Wilkinson*, where it was held that an equitable mortgagee of a reversionary interest in land is not debarred from asserting his claim against the land until the expiration of twelve years from the time when the reversionary interest fell into possession. When the grounds of that decision are examined they are found to be these: first, that an equitable mortgagee has a remedy against the land by way of foreclosure; secondly, that an action for foreclosure is not an action to recover money charged on land, but to recover land itself: *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345, 30 W. R. 553, 7 App. Cas. 235; and thirdly, that the time within which an action for the recovery of land may be brought is regulated, not by section 8, but by sections 1 and 2 of the Real Property Limitation Act, 1874.

The question then arises whether any such reasoning applies to the present case, and it appears to me that it does not apply, unless the persons entitled to the benefit of these charges on the land have in respect of them a right of foreclosure. No case has been cited in which the owner of a charge on land created by will has been held entitled to foreclose. The grounds on which the court grants foreclosure are explained by Wigram, V.C., in *Sampson* v. *Pattison*, 1 Hare, 533. There was there a conveyance of the estate to A. in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with power of sale by A. upon non-payment after notice. And it was held that A. was not entitled to foreclose, but that with the aid of the court he could effect a sale. The Vice-Chancellor says: "Where a charge is created by mortgage, the condition of which is that if the money be not paid at a certain day the estate of the mortgagee shall be absolute at law, this court says that the failure in payment at the day shall not work a forfeiture, notwithstanding the express words of the contract, and upon the bill of the mortgagee a further time for payment is appointed; if the money be not then paid the court refuses again to interfere, and leaves the parties to their legal rights. The frame of the instrument under which the parties claim in this case does not bring them in any respect within the principle that the decree of foreclosure proceeds upon." *Jenkin* v. *Row*, 5 De G. & S. 107, is a similar decision. It is settled that the relief to which an equitable mortgagee of real estate by deposit of the title deeds is entitled is foreclosure, and not sale: *James* v. *James*. The reason appears to be that the court treats the deposit as evidence of an agreement to execute a legal mortgage: see the judgments of Lord Cottenham in *Parker* v. *Housefield*, 2 My. & K. 419, and of Sir G. Jessel in *Carter* v. *Wake*, 4 Ch. D. 605, 25 W. R. Dig. 161. It appears also to be the better opinion that under the statute 1 & 2 Vict. c. 110, s. 13, a judgment creditor was (prior to the passing of the statute 27 & 28 Vict. c. 112) entitled to foreclosure, on the ground that the former statute places the judgment creditor in the same position as regards remedies in equity as if the judgment debtor had, by writing under his hand, agreed to charge the hereditaments against which the judgment is sought to be enforced: see the judgment of Turner, L.J., in *Ex parte Boyle*, 3 De G. M. & G. 515, 530.

In *Tennant* v. *Trenchard* Lord Hatherley, L.C., says: "Although some of the authorities appear to conflict with each other, it seems, on the whole, to be settled that if there is a charge *simpliciter*, and not a mortgage or an agreement for a mortgage that the right of the parties having such a charge is sale, and not foreclosure." Possibly a testator might so express himself as to show that he intended the owner of a charge created by his will to have the like remedies as are conferred by statute on the judgment creditor, but I do not think, having regard to the authorities to which I have referred, that such an intention can be inferred from the language of the will of the testator.

I think, therefore, that the remedy in the present case is to have the sum mentioned raised by sale or mortgage, and not by way of foreclosure, and, consequently, that the period of limitation is defined by

section 8, and not by sections 1 and 2, of the Real Property Limitation Act, 1874.

Solicitors, *Kingsford, Dorman, & Co.*, for *Arnold & Son*, Birmingham; *Paterson, Snow, Bloxam, & Kinder*, for *Longueville & Co.*, Oswestry.

Chan. Div. Kekewich, J. March 1, 1894.

In re NEWEN.
NEWEN *v.* BARNES. (*a.*)

Settlement—Settled estate—Equitable tenant for life—Right to possession—Title deeds—Mortgage—Form of application—New trustees.

An equitable tenant for life is usually entitled to possession of the estate, but, if he has charged his life estate, not to the custody of the title deeds; and an application therefor may be by originating summons.

It is improper for the donee of a power of appointing new trustees to appoint himself.

The testator by his will appointed three trustees and executors, and bequeathed to them certain leasehold messuages upon trust, after the decease of his wife, out of the rents to pay any moneys payable in respect thereof, and an annuity (which had lapsed) and to divide the surplus rents in the events which happened into two equal parts, which were to be held by the trustees for the benefit of two nieces and their children, with remainders over, and under which the two nieces were tenants for life.

One of the trustees predeceased the testator, and on the death of the survivor of the two who proved the will, administration to the last survivor was granted to the two tenants for life.

By an indenture dated in 1887 the two tenants for life appointed one of themselves, and John Bowley, and H. E. Barnes trustees of the will. In 1891 the two tenants for life had mortgaged their life interests in he property.

The tenants for life took out a summons against the trustees, asking to be let into possession and receipt of the rents and profits of the leasehold premises, and for delivery of the muniments of title relating thereto.

The mortgagee also applied by summons for leave to attend the proceedings.

Warmington, Q.C., and *Vernon R. Smith*, for the plaintiffs, cited *In re Wythes, West* v. *Wythes*, 41 W. R. 375, [1893] 2 Ch. 369; *In re Bagot's Settlement, Bagot* v. *Kittoe*, 42 W. R. 170, [1894] 1 Ch. 177.

Marcy, for the defendant J. Bowley.

W. F. Hamilton, for the defendant H. E. Barnes.

A. D. Maclaren, for a reversioner, cited *In re Peake's Settled Estates*, 42 W. R. 125, [1893] 3 Ch. 430; *In re Skeats' Settlement, Skeats* v. *Evans*, 37 W. R. 778, 42 Ch. D. 522.

A. F. Peterson, for the mortgagee of the life estates.

Warmington, Q.C., replied.

KEKEWICH, J.—I must not be understood as laying down any rule in this case that equitable tenants for life are, as a matter of course, entitled to be let into possession. It is probable that hereafter some rules respecting the circumstances which justify such an application, and the safeguards necessary for the protection of others interested, may be settled. Now, can this application be made by originating summons? It was so done in *In re Bagot's Settlement*, and Chitty, J., took no objection, and I see no reason why it should not.

A further question arises, Who should appear on such an application? Necessarily the tenant for life and the trustees. The court expects from the latter all the assistance and information that they can afford. If, as in the present case, one of the trustees is also a beneficiary, the other trustee should be separately represented as trustee only. Persons who are interested in the property, but are not affected, need not be served, and need not appear. As regards reversioners who are interested, in my opinion, although the tenant for life ought not to make the reversioner, under ordinary circumstances, a respondent to the summons, the reversioner is entitled, if he thinks fit, to appear. If the tenant for life has mortgaged his interest, I think the mortgagee ought to be a party. The tenant for life is seeking to alter the position of the mortgagee, and it would be the duty of the trustees, if the mortgagee is not before the court, to inform the court of his existence.

The trustees have in this case powers of sale and management. Ought this to prevent the court from giving possession to the tenants for life? I see no reason to the contrary. They ought to be fully protected against all liability; they ought to have such undertakings as will enable them to satisfy themselves from time to time that the trust estate is being preserved. The applicants must pay their costs of this application.

The mortgagee says that the tenants for life ask for the title deeds as well as possession. If they receive them he is entitled to have them handed to him. I think this is sufficient to prevent the trustees handing over the title deeds. Possession in this case cannot carry the custody of the deeds. It appears that all the trustees appointed by the will are dead, and the tenants for life are the administratrixes of the last surviving trustee, and, having power to appoint new trustees, appointed one of themselves and two gentlemen. That is wrong on principle. No trustee having a fiduciary power to appoint new trustees can exercise that power by appointing himself alone or with any other person, and the lady must retire.

The applicants must pay the costs of the trustees. The mortgagee is entitled to his costs, which he can add to his security, or, if he asks for them, the applicants must pay them. The reversioners must pay their own costs.

Solicitors, *King, Wigg, & Co.; A. G. Ellis; Troutbeck & Co.; Harold Smith & Gorringe; L. Saunt.*

Q. B. Div. (Mathew and Charles, JJ.) Nov. 1.

MAY *v.* LANE. (*a.*)

Assignment—Equitable assignment—Building agreement—Contract by landowner to advance money by instalments to builder—Assignment of instalment by builder—Right of assignee to sue—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

An agreement by a building owner to advance money by instalments to a builder, to be employed in the erection of buildings on his land, is not a mere agreement to make a loan, but stands on the same footing as an

(*a.*) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

agreement to pay for services rendered, and money become due under such an agreement can be effectually assigned in equity.

Brice *v.* Bannister, 26 *W. R.* 670, 3 *Q. B. D.* 569, *followed.*

Western Wagon and Property Co. *v.* West, 40 *W. R.* 182, [1892] 1 *Ch.* 271, *distinguished.*

Appeal by the plaintiff from the decision of his Honour Judge Hooper in the county court at Bournemouth, who decided that the plaintiff had no cause of action.

The defendant, Lane, was owner of some land, which was being let out for building purposes, and some of the plots were taken by Wiltshire & Co., who began erecting houses thereon under a building agreement, whereby Lane agreed to grant them a lease when the houses were finished. Wiltshire & Co. required money to finish the houses, and applied for an advance to Lane, who verbally agreed to lend £250, to be paid by draws of £50 a week as per progress. Wiltshire & Co. obtained materials from the plaintiff, and gave in consideration an order upon the defendant, Lane, for payment to the plaintiff of the sum of £50 by a letter in the following terms:—"We do hereby authorize, order, and request you to pay to Messrs. May & Hassell the sum of £50 out of the moneys due or to become due from you to us on the buildings we are erecting on plot 16, and their receipt for the same shall be a good discharge."

Brooke Little, for the appellant.—This is not a mere agreement to make future advances—to lend money. It is the ordinary contract between a landowner and builder to advance money by instalments to be expended on houses to be erected on his property, and such instalments can be assigned in equity: *Brice* v. *Bannister*, 26 W. R. 670, 3 Q. B. D. 569.

Daldy, for the respondent.—Equity will not enforce specific performance of such an agreement, which falls within the same class of cases as *Western Wagon and Property Co.* v. *West*, 40 W. R. 182, [1892] 1 Ch. 271—namely, an agreement to lend money; and, therefore, the letter purporting to be an assignment does not operate as an assignment in equity.

MATHEW, J.—The judgment of the county court judge must be reversed, and judgment entered for the appellant for the amount sued for, with costs. The contract was made under circumstances that often arise in the building trade, and the question is one of great importance to builders all over the country. After the principal contract was concluded, there was a distinct and collateral agreement made, that the landowner should advance £250 to enable the building operations to be gone on with, and this advance was to be paid by weekly draws of £50 each. Wiltshire & Co. agreed "for due consideration" to assign one of these draws to the appellant. The building operations were not satisfactorily carried on, and Lane was asked by the appellant for the money. Lane never repudiated the verbal agreement, but asked that the matter might stand over for a time. The counsel for the appellant, I think rightly, treated the advances as sums to be paid by the owner of the land on the surveyor's certificate that the work had been done, and there is no doubt that there was an assignment of £50 in favour of the appellant. In my opinion the case of *Brice* v. *Bannister* is precisely in point, and the decision given there must govern this case. For the respondent it was argued that this was a mere contract for a loan, and that such a contract could not be assigned, or at any rate was not such a contract as would in all cases, and under all circumstances, enable the assignee to sue; and no doubt in many cases the damages for breach of an agreement to advance money would be only nominal. The case of *Western Wagon Property Co.* v. *West* does not apply. In the present case the money is agreed to be lent to enable the builders to go on with the buildings, and is not merely an agreement to make a loan.

CHARLES, J.—I am of the same opinion. The agreement was not a verbal agreement to make a loan merely, for in this case the money agreed to be advanced was to be paid by weekly draws for work as it was done. The defendant, Lane, did not in any way repudiate his liability under the agreement, but declined to pay until the work was executed. When the work was done, then the £50 to be advanced became a debt due from him to Wiltshire & Co., and could be assigned by them.

Appeal allowed.

Solicitors, *Peacock & Goddard*, for *Trevanion, Curtis, & Ridley*, Bournemouth; *Prior, Church, & Adams*, for *H. S. Dickinson*, Poole.

Q. B. Div.
(Mathew and Charles, JJ.) Oct. 30.

THE QUEEN *v.* JUSTICES OF TORQUAY. (*a.*)

Justices—Summary conviction—Penalty—Civil debt—Refusal to pay cab fare—Criminal offence—Town Police Clauses Act, 1847 (10 *&* 11 *Vict. c.* 89), *s.* 66—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 6, 35—*Summary Jurisdiction Act*, 1884 (47 *&* 48 *Vict. c.* 43), *s.* 4.

A cab fare recoverable under the Town Police Clauses Act, 1847, *is a civil debt within the meaning of section* 6 *of the Summary Jurisdiction Act*, 1879, *and refusal to pay a cab fare is not a criminal offence whereby the person refusing is liable to a conviction and a term of imprisonment.*

The words "and not on information" in section 6 *are only intended to exclude cases where an information on oath is required by statute.*

Rule *nisi* for a *certiorari* to quash a conviction of the justices of Torquay.

A. De Castro, having refused to pay to a cabman the fare authorized by the bye-laws of the borough, was summoned by an information to appear before the magistrates, who, after hearing the application, directed a conviction to be drawn up adjudging De Castro to forfeit the sum of nine shillings, being the amount of the fare, and costs, and further that if that sum be not paid forthwith a distress should be levied on his goods, and that in default of sufficient distress he should be imprisoned for seven days or until he shall have sooner paid the penalty.

De Castro applied for, and obtained, a rule *nisi* to have the conviction quashed, on the ground that the sum claimed was a civil debt and not a penalty, and that the magistrates had no power to convict or to order a term of imprisonment in default of payment.

The proceedings against De Castro were taken under the Town Police Clauses Act, 1847, s. 66, which is as follows:—"If any person refuse to pay on demand to any proprietor or driver of any hackney carriage the fare allowed by this or the special Act, or any bye-law made thereunder, such fare may, together with costs, be recovered before one justice as a penalty." Section 73 of the same Act provides that the clauses of the

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Railways Clauses Consolidation Act, 1845, shall apply in respect of the recovery of penalties. These clauses are sections 145, 146, and 147. Section 145 provides that penalties should be recovered on complaint before two justices, section 146 that if the penalty be not forthwith paid distress may be levied on the offender's goods, and section 147 gives the magistrate power to detain the offender pending the execution of the distress, and if no sufficient distress should be found to commit him to gaol for a period not exceeding three months or until the penalty be sooner paid.

The Summary Jurisdiction Act of 1884 repealed all these sections except the first part of section 145—that is to say, so far as it provides for the recovery before two justices. The same Act further provides in section 5, "And for the further removal of doubts it is hereby declared that where by virtue of the repeal enacted by this Act or otherwise any statute authorizing the infliction by any justice or justices of a penalty or fine, either as a sole punishment or as an alternative punishment for imprisonment, provides no method for the recovery of such penalty or fine, sections 19 and 21 of the Summary Jurisdiction Act, 1848, as amended by section 21 of the Summary Jurisdiction Act, 1879, shall apply to the recovery of such penalty or fine."

Sections 19 and 21 provide that where a conviction adjudges a pecuniary penalty to be paid or an order requires the payment of a sum of money, and the statute authorizing such conviction or order provides that in default of payment it is to be levied by distress, it shall be lawful for the justices to issue their warrant of distress, and in default of distress it shall be lawful for the justice by his warrant to commit the defendant to prison.

Section 6 of the Summary Jurisdiction Act, 1879, enacts that "where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt and not otherwise, and section 35 enacts as follows: "Any sum declared by this Act or by any future Act to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for the payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts, provided as follows." And then follows a proviso that the defendant shall not be liable to be apprehended for failing to appear to the complaint, and a proviso that he shall not be imprisoned in default of distress unless it be proved to the satisfaction of the court that he has the means to pay.

Section 5 of the same Act provides a scale of imprisonment for non-payment of any sum of money adjudged to be paid by conviction.

A. B. Shaw, showed cause.—Under the Town Police Clauses Act the fare was to be recovered and to be considered as a penalty. And being a penalty it came under, and should be dealt with under, section 5 of the Act of 1879, and not under section 6. Section 6 only applies to the recovery of fixed sums of money, but here the costs were to be recoverable with the fine as part of the penalty, and though the fare itself was a fixed amount yet the fare, plus costs, was not. Moreover, another bye-law of the borough provides that a penalty not exceeding £5 may be inflicted for the breach of any bye-law; and where a statute or a bye-law imposes a duty and provides a punishment a breach of that duty is a criminal offence: *Bancroft* v. *Mitchell*, 15 W. R. 1132, L. R. 2 Q. B. 549; *Mellor* v. *Denham*, 27 W. R. 505, 5 Q. B. D. 467; *R.* v. *Whitchurch*, 29 W. R. 922, 7 Q. B. D. 534. The test is whether the fine has been inflicted by way of punishment for disobedience to a bye-law: *Cattell* v. *Ireson*, 6 W. R. 469, 27 L. J. M. C. 167. As for section 35 of the Act of 1879, it does not do more than prohibit the enforcement of the fine by imprisonment unless means are shown. And, finally, this cab fare, being recoverable as a penalty under Jervis's Act, is recoverable on information and not on complaint, and is, therefore, outside the meaning of section 6.

Sington, in support of the rule.—The question is whether we come under section 5 or section 6 of the Act of 1879. If we are not within section 6 we are clearly wrong. The Act of 1847 says that the fare is to be recoverable as a penalty—that means, not that it is a penalty, but that it is to be recovered in the same way as if it were a penalty: *R.* v. *Master*, 17 W. R. 442, L. R. 4 Q. B. 285. The words "not on information" in section 6 are not legally exact, and cannot be said to cover a debt in all other respects a civil debt.

A. B. Shaw, in reply, cited *R.* v. *Justices of Tynemouth*, 16 Q. B. D. 647, 34 W. R. Dig. 93, and argued that the words "not on information" were intended to except sums recoverable on information, although they were civil debts—that is to say, civil debts to which a criminal jurisdiction was applicable.

MATHEW, J.—The rule must be made absolute. There was a formal order in which the defendant was treated as if he had committed a criminal offence, and I am of opinion it must be quashed. The defendant was charged with not paying his cab fare. To this he had no defence. Whereupon an order was made in which he was alternatively subjected to a term of imprisonment. Against this order he protests. We have been compelled to grope our way through a maze of statutes, and I can only hope we have done it successfully, for, indeed, they seem more calculated to conceal than to convey what was intended. Section 66 of the Town Police Clauses Act enacts as follows: [His lordship read the section]. This clearly deals with a civil debt. A driver or proprietor is entitled to recover his fare, on the refusal of anyone to pay it, before a magistrate; but beyond the fare and costs nothing else is to be recovered. And though it is to be recovered as a penalty, the use of that expression does not alter the character of the debt. The Act further provides that penalties are to be recovered under the Railways Clauses Act, 1845, and here it is noticeable that the words "upon information" are not used, but "upon complaint." The Summary Jurisdiction Act, 1879, s. 5, applies to fines recoverable under conviction, but section 6 is clearly applicable to the present case.

By the words "and not on information" it is intended to exclude those cases where information on oath is required by statute. In my judgment, the order has been drawn up in an improper form.

CHARLES, J.—I am of the same opinion. The money recoverable under the Town Police Clauses Act, s. 66, is really a civil debt, and, although the section says it may be recovered as a civil debt, that does not alter the nature of the debt. The Railways Clauses Act directs how it is to be recovered. It is to be recovered on complaint, and penalties are to be

enforced by distress and by imprisonment. Section 5 of the Summary Jurisdiction Act, 1879, is directed to criminal cases, and section 6 to the non-payment of money due. This sum comes within section 6. A difficulty arises in the construction of the words "not on information." For in this case the proceedings were begun by information. On reflection, however, it is not difficult to fix a meaning to the words. It has been suggested that the words information and complaint connote each other; but I think the words were really inserted so as to emphasize the fact that section 6 is not to apply to criminal matters.

Another difficulty has been removed by the Summary Jurisdiction Act, 1884, for that Act has repealed so much of the Railways Clauses Consolidation Act as has reference to imprisonment and distress, leaving only the first part of section 145. The next clause of the Act of 1884 refers back, in cases not otherwise provided for, to the procedure provided by Jervis's Act, whereby the magistrate may inflict a term of imprisonment. But that does not apply in the present case. The Act of 1879 provides the method of recovery, while the Act of 1884 has removed the difficulty raised by the Railways Clauses Act by repealing sections 146 and 147. The rule must be made absolute.

Rule made absolute, and conviction quashed.

Solicitors for the defendant, *Rye & Eyre.*

Solicitors for the justices, *Brownlow & Howe.*

Q. B. Div. (Mathew and Kennedy, JJ.) } Aug. 2, 1894.

DYER *v.* TULLY. (*a.*)

Inland Revenue—Justices—Prosecution by information—Proof that commissioners have ordered information—Allegation in information—"Letter or instructions"—7 & 8 Geo. 4, *c.* 53, *s.* 71—*Inland Revenue Regulation Act,* 1890 (53 *&* 54 *Vict. c.* 21), *ss.* 21 (1), 24, 27.

An officer of the Inland Revenue took proceedings by information to recover an excise penalty. The information alleged that he prosecuted for her Majesty by order of the Commissioners of Inland Revenue.

Held, that the allegation in the information was sufficient proof that the commissioners had ordered the prosecution, and that the 7 *&* 8 *Geo.* 4, *c.* 53, *s.* 71, *was not repealed by the Inland Revenue Regulation Act,* 1890 (53 *&* 54 *Vict. c.* 21), *ss.* 21 (1) *and* 24 (2).

Case stated by justices of Devon, sitting at petty sessions.

On the 17th of January, 1894, Gilbert Tully, the respondent, was prosecuted by W. H. Dyer, the appellant, one of the officers of Inland Revenue, the charge in the information being that Tully "did take and kill and pursue certain game, to wit, a pheasant, without having in force . . . a licence . . . contrary to the form of the statutes. . . ."

At the hearing before the justices one H. F. D. West claimed the right to conduct the proceedings as an advocate, producing his commission as a supervisor of Inland Revenue, but no other authority. The appellant was in court at the hearing. The justices refused to hear West, on the ground that he had no right to conduct the proceedings under the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 27. West declined to allow Dyer to conduct the case, and no evidence being tendered the information was dismissed.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

On the 2nd of February, 1894, the Court of Queen's Bench ordered the justices to hear and determine the information, on the ground that West had a right to conduct the proceedings.

The justices reheard the case on the 11th of April, 1894. It was then proved that the respondent killed a pheasant on the 2nd of December, 1893, and the respondent did not prove that he had a licence to kill game.

No order of the Commissioners of Inland Revenue authorizing the information was produced.

The justices held that under section 27 of the Inland Revenue Act, 1890, West had no right to conduct the proceedings on the 17th of January, 1894, he not being authorized by the commissioners to do so, and that, no evidence having then been offered in support of the information, they had no jurisdiction to further hear the information on the 11th of April, 1894.

They also held that the statement in the information of the appellant, that he prosecuted by order of the Commissioners of Inland Revenue, was not sufficient evidence that an order for the commencement of the proceedings as required by section 21 (1) of the Inland Revenue Act, 1890, had been obtained; that such an order was necessary; and that the proper evidence of such an order having been made was the production of the letter or instructions under which the appellant had acted, as prescribed by section 24 (2) of the Inland Revenue Act, 1890.

By the 7 & 8 Geo. 4, c. 53, s. 71:—"Where, in any information for the recovery of any penalty . . . under this Act or any other Act or Acts of Parliament relating to the revenue of excise or customs, any allegation or averment shall be made that such information was exhibited, or that the Commissioners of Excise or Customs . . . had ordered such information to be exhibited . . . such allegation and averment shall be . . . deemed and taken to be sufficient proof of such facts so alleged or averred respectively, without any other or further evidence thereof."

By the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21 (1): "It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture under any Act relating to Inland Revenue . . . except by order of the commissioners, and in the name of an officer, or, in England, in the name of the Attorney-General for England. . . ."

By section 24 (2): "In any proceedings the letter or instructions under which a collector or officer or person employed in relation to Inland Revenue has acted shall be sufficient evidence of any order issued by the Treasury or by the commissioners, and mentioned or referred to therein."

By section 27: "Any officer or person employed or authorized by the commissioners or solicitor of Inland Revenue in that behalf may, although he is not a solicitor, advocate, or writer to the signet, prosecute, conduct, or defend any information, complaint, or other proceeding to be heard or determined by any justice of the peace of the United Kingdom . . . where the proceeding relates to Inland Revenue, or to any fine, penalty, or other matter under the care and management of the commissioners."

Sir John Rigby, A.G. (*Danckwerts* and *Loehnis* with him), for the appellant.—The 7 & 8 Geo. 4, c. 53, s. 71, is not repealed by sections 21 (1) and 24 (2) of the Inland Revenue Act, 1890. The statement in the information that the appellant was prosecuting by order of the Commissioners of Inland Revenue was sufficient evidence of an order authorizing the commencement of the proceedings.

He cited *Hargreaves* v. *Hilliam,* 58 J. P. 364 (30th May, 1894).

No counsel appeared for the respondent.

MATHEW, J.—I am of opinion that the justices were wrong. They ought to have obeyed the order of the court. Their excuse is, that they did not understand what the order was. That is an excuse which I am always willing to accept from justices. It is clear that they might have come to a conclusion in this case, either upon the statement in the information that the appellant prosecuted by order of the commissioners under 7 & 8 Geo. 4, c. 53, s. 71, or upon having produced to them the letter or instructions referred to in the Inland Revenue Act of 1890.

They came to the conclusion however, guided, no doubt, by the advice which often misleads justices, that the provisions of the later statute repealed those of the earlier one. There is no reason for coming to any such conclusion. We can reconcile the two enactments with perfect ease. The case must go back to the magistrates, with a direction to convict the respondent. The justices have taken the matter into their own hands, and have given a wrong decision; and we cannot make the respondent responsible for any costs in respect of these proceedings.

KENNEDY, J., concurred.

Case sent back to justices with direction to convict.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Q. B. Div. (Wills and Vaughan Williams, JJ.) July 13, 1894.

ROBINSON, KING, & CO. *v.* LYNES. (*a.*)

Married woman—Contract before marriage—Personal liability—Judgment—Order 14.

Judgment can be entered against a married woman personally in respect of a liability upon a contract made by her before marriage, such liability not being taken away by the Married Women's Property Act, 1882.

Appeal from chambers.

The action was brought against the defendant, a married woman, to recover £21 upon a bill of exchange accepted by her before marriage.

An application for judgment under order 14 was made by the plaintiffs, and the defendant thereupon, by way of defence, alleged that since the date of the acceptance of the bill she had married. The master thereupon gave unconditional leave to defend, and upon appeal the judge at chambers referred the case to the court.

Turrell (*Kisch* with him), for the plaintiff.—The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), does not affect the legal liability of a married woman upon contracts entered into by her before coverture. A husband and wife were at common law liable in respect of the wife's ante-nuptial contracts, and where at common law a married woman was liable to be taken under a *ca. sa.*, she can now be summoned and dealt with under section 5 of the Debtors Act, 1869 (*per* Lord Esher, M.R., in *Scott* v. *Morley*, 36 W. R., at p. 68, 20 Q. B. D., at p. 125). The plaintiffs are therefore entitled to a judgment against the defendant personally. In any event the plaintiffs are entitled to judgment against the separate estate in the form given in *Scott* v. *Morley*, but although in that case it was held that there was no power to commit a married woman to prison for default in satisfying a judgment recovered against her by virtue of the Married Women's Property Act, 1882, that judgment was expressly confined to judgments recovered under that Act, and did not apply to judgments which were recoverable at common law. There is no ground for refusing to give the plaintiff judgment against the defendant personally under order 14. She cannot now plead the non-joinder of the husband in abatement, and the court would not exercise its discretionary power of ordering him to be joined unless he took property through his wife.

No counsel appeared for the defendant.

WILLS, J.—I think it is clear that in this case the plaintiffs are entitled to the right which they claim, of a personal judgment against the defendant, a married woman, at common law. Formerly the wife would have been entitled to plead in abatement that her husband should have been added. There is no such right now, and an application by her to the court to exercise its discretionary power to compel the plaintiff to join the husband would not succeed unless good ground was shown, such, for instance, as that he had benefited, either properly or improperly, by the transaction. But there are no such facts here, and under the circumstances of this case at common law judgment could properly have been given against the defendant alone. Therefore, unless the Married Women's Property Act, 1882, has altered, the common law in this respect, the plaintiff is still entitled to such a judgment.

But has that Act done so? I think not. If the plaintiff were obliged to resort to sub-section 2 of section 1 of that Act to get their remedy, as was the case in *Scott* v. *Morley*, they might be confined to judgment in the form given there against the defendant's separate estate. But that is not the case here, and I am clearly of opinion that the plaintiff has a right to the judgment for which he contends.

VAUGHAN WILLIAMS, J.—I concur.

Solicitors for the plaintiff, *Kisch & Wake.*

(*a.*) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. April 10-13; May 8; Aug. 8, 1894.

"THE ENGLISHMAN." (*a.*)

Shipping—Damage—Tug and tow in collision with third ship — Admiralty rule of division of damage — No contribution amongst tortfeasors.

The common law doctrine of contributory negligence has no application in an admiralty action of damage, where the damage proceeded for arises out of a collision between ships.

Accordingly, where the owners of a ship damaged in a collision with a steam-tug—at the time of the collision towing a ship—proceeded in this court against both the tow and the tug, the latter of which counter-claimed against the plaintiffs, and it appeared that each of the three vessels was to blame for the collision, although the vessel towed was not in collision with the plaintiffs' vessel, the court condemned the owners of the steam-tug and the owners of the vessel towed in a moiety of the damage sustained by the plaintiffs' vessel, and the owners of the plaintiffs' vessel in a moiety of the damage sustained by the steam-tug.

The Avon and Thomas Joliffe, 39 *W. R.* 176, [1891] *P.* 7, *followed.*

This was an action of damage *in rem* instituted on

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

behalf of the owners of the steamship *Ada* against the steam-tug *Englishman* and the barque *Australia*, to recover the damage sustained by *The Ada* in a collision between her and *The Englishman* on the 22nd of February last, in the North Sea, when *The Australia* was in tow of *The Englishman*.

The action was heard on the 10th, 11th, 12th, and 13th of April last, before the President, assisted by two of the Elder Brethren, of the Trinity House, and the court decided that *The Englishman*, *The Australia*, and *The Ada* were all to blame for the collision, but adjourned the case in order that the question of law whether, on these findings, the owners of *The Australia*, that vessel not having been herself in collision with *The Ada*, were liable in damages to the owners of *The Ada* either at all, or, if liable to any extent, to what extent she was so liable.

April 30.—The reserved question of law was argued.

Sir W. Phillimore and *Nelson*, for the plaintiffs, referred to *The Sarah*, Lush. 549; *The Batavia*, 1 Spks. 378; *The Industrie*, 19 W. R. 728, L. R. 3 A. & E. 303; *The Nightwatch*, 11 W. R. 189, Lush. 542; *The Robert Pow*, Br. & L. 99, 11 W. R. Adm. Dig. 24; *The Sisters*, 24 W. R. 412, 1 P. D. 117; *The Sinquasi*, 5 P. D. 241, 29 W. R. Dig. 199; *The Laconia*, 12 W. R. 90, Br. & L. 117; *The Energy*, 18 W. R. 1009, L. R. 3 A. & E. 48; *The Milan*, Lush. 388, 10 W. R. Adm. Dig. 26; *The Bushire*, 5 Asp. Mar. Law Cas. N. S. 416, 33 W. R. Dig. 71; *The American and Syria*, 22 W. R. 927, L. R. 6 P. C. 127; *The Vera Cruz*, 32 W. R. 783, 9 P. D. 88; and contended that the admiralty rule as to the division of damage where there was a common fault applied to the present as to other actions of damage *in rem*.

Aspinall, Q.C., and *Butler Aspinall*, for the defendants, the owners of *The Englishman*.

Pyke, Q.C., and *Scrutton*, for the owners of *The Australia*.—The rule as to there being no contribution between tortfeasors does not apply to the present case, *The Australia* not having been in fact a tortfeasor, but only liable by inference of law: *Pearson* v. *Skelton*, 1 M. & W. 504; *Merryweather* v. *Nixan*, 8 T. R. 186. Moreover, having regard to the provisions of the Merchant Shipping Act, 1862, as to the measure of limitation of the liability of the tug, *The Australia* ought not to be held liable beyond the amount to which the tug's liability is so limited. But the real point is that as *The Australia* is only liable in damages under the common law doctrine of the master and crew of the tug being the servants of the owners of *The Australia*, the case is not one in which the admiralty rule of division of damages is to be applied; but, the plaintiffs having been guilty of contributory negligence, the court ought to hold that the common law rule applies, and that no damages are recoverable from the owners of *The Australia*.

They referred to *The Cleadon*, 14 Moo. P. C. C. 92, 9 W. R. H. L Dig. 15; *The Niobe*, [1891] A. C. 401, 40 W. R. Dig. 101; *The Mary*, 28 W. R. 95, 5 P. D. 14; *The Quickstep*, 15 P. D. 196, 39 W. R Dig. 214; *The Avon and Thomas Joliffe*, 39 W. R. 176, [1891] P. 7; *The Chartered Bank of India* v. *The Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521; *The Bernina*, 35 W. R. 314, 12 P. D. 58; *The Energy*; *The Max Morris*, U. S. Rep. 137 (Davis).

May 8.—The PRESIDENT.—In this case *The Ada*, a steam vessel, brought an action against a tug, *The Englishman*, and her tow, a barque, *The Australia*, in respect of a collision between herself and *The Englishman*, occurring in the North Sea, off Seaham. I found that both *The Ada* and *The Englishman* were to blame for their excessive speed, and that *The Australia* could and should have restrained, but did not restrain, the speed of *The Englishman*. Several points of law are now raised on behalf of *The Australia*.

The first and main point is that *The Ada* was guilty of contributory negligence, and, therefore, cannot recover — in other words, that the common law rule, and not the admiralty rule as to the division of damages, applies. The argument, as I understand it, is that, inasmuch as the collision was not between *The Ada* and *The Australia*, but between *The Ada* and *The Englishman*, and as, therefore, in order to make *The Australia* liable to *The Ada*, the principle of the liability of a master for the negligence of his servant is introduced, that this ousts the Admiralty doctrine that, when in a collision two ships are to blame, the delinquent ship can recover only a part of her loss fixed by admiralty practice in this country at half the damage, and substitutes the common law doctrine that in an action of negligence neither of two wrongdoers can recover.

It is apparently true that the precise set of facts in this case has hitherto not arisen for adjudication because in the two cases nearest to it there is a difference. Neither in *The Niobe*, 36 W. R. 812, 13 P. D. 55, where a vessel was held entitled to recover both against a tug with whom she came into collision and a tow who was held responsible for the tug, nor in *The American and The Syria*, when, where a collision occurred under similar circumstances, a vessel was held entitled to recover against the tug alone, was the plaintiff vessel to blame. In the latter case, had the plaintiff vessel been to blame, the ordinary rule of admiralty law would, no doubt, have been followed.

But, although there is no authority in point, the case seems to me to be clear on principle, and, indeed, to be free from the difficulties which occur in several cases similar in some respects to the present. This is a case of maritime tort arising out of a collision between ships, and in which both the plaintiffs and the defendants appear in the action as the owners of ships, and in that capacity are to blame in respect of the collision.

It is a case of a maritime tort. Therefore it is a case within the admiralty jurisdiction (see *The Sarah*, Lush. 549), and a case to which decisions given in cases of contract, such as *The Energy*, are not applicable. It is a case arising out of a collision between ships. Therefore we need not concern ourselves with such extensions of admiralty law as appear to have been made in America. I was referred in argument to the case of *The MacMorris*, in which the Supreme Court of the United States held that a man who fell from the bridge to the deck, partly by his own fault, partly by the fault of the officers of the vessel, was entitled to recover part of his damages. But it is sufficient for the present purpose to accept the limitation of the admiralty rule to collisions between ships as suggested by Lord Herschell and Lord Macnaghten in the case of *The Zeta*, [1893] A. C., pp. 487, 491, in the House of Lords,

It is a case where both the plaintiffs and the defendants appear in the action as owners of ships, and are both in that capacity to blame in respect of the collision. Therefore the question is not the same as in the case of *The Milan*, where the owners of the cargo in one ship in default brought an action against the owners of the other ship, and it was held that the defendants were liable to pay only half of the damage, and it is not necessary to consider how far the authority of *The Milan*, recognized by the Court of Appeal in the case of the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, is shaken by the observa-

tions made by the same judges in the subsequent case of *The Bernina*, nor to point out the distinction between the case of *The Milan* and that of *The Bushire;* nor is it necessary to consider the view taken by Butt, J., in the case of *The Vera Cruz*, that the admiralty rule applies not only in actions between ships, but in an action by the (I omit the consideration of the action in that case being by the representative of the master) master of one ship against the owners of the other when both ships are to blame, and thus the captain himself in default.

The one fact which introduces a new element for consideration is that in the present case, though one of the two ships in collision was the ship of the plaintiffs, the other ship in collision was not the ship of the present defendants. But it appears to me to be immaterial when once it is established that the defendants are liable in respect of the collision, and that their liability rests on a principle forming part of the law maritime. This case is not like those of *The Vera Cruz* and *The Bernina*, in which the House of Lords in the one case and the Court of Appeal in the other held that, as the action was brought under Lord Campbell's Act, the actions were not within the jurisdiction of the Admiralty Court and not cases to which section 25, sub-section 9, of the Judicature Act of 1873 applied. It is clear from the cases of *The Sinquasi* and *The Niobe* that when a vessel comes into collision with a tug by reason of some negligence of the tug, which the tow could have prevented, the tow is liable to the vessel so coming into collision with the tug, and that solely by force of the law maritime. I am by no means sure that this case may not be said to fall within the principle of the tow and tug, being, in contemplation of law, identified as one ship. That principle clearly applies for the purposes of the navigation rules: *The Cleadon*, Lush. 158, 14 Moo. P. C. C. 92; and in the case of *The Niobe* it was held in the House of Lords that the tow and tug were one ship in contemplation of law for all purposes of their joint navigation, and that that principle applied so as to make the underwriters under a policy, which in terms dealt with the insured ship coming into collision, liable in respect of a collision between her tug and another vessel. Nor does it appear to me that the decision in *The Mary* nor the view taken by the Privy Council in *The American and The Syria* conflict with either of these authorities. In the case of *The Mary* the tow and tug were *in pari delicto*, but the tow was relieved from the consequence of her fault by the presence of a pilot, an advantage which the tug could not claim. It was indeed said in the case of *The American and The Syria* that the principle of the tug and tow being one ship did not in that case apply to make the tow liable, but that was because not only the sole motive power but also the sole control was in the tug. But for the purposes of this case it is sufficient to adopt the language of the Privy Council in *The American and The Syria:* "The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her." And inasmuch as such liability of a master for his servant is as much part of admiralty law as of the common law, and this case, therefore, falls certainly within admiralty jurisdiction, I cannot see why the admiralty rule of law, that a delinquent ship in collision can recover part of her damages, is to be excluded. I will only add that in the case of *The Sisters*, which was referred to before me as an instance of an action in which the plaintiff and defendant ship were not in collision with each other, I think that the phrase of James, L.J., "To disentitle *The Alfreda* to her right of recovery there must have been contributory negligence," must be understood to mean that such contributory negligence would disentitle *The Alfreda* to her right of recovery of her full damages. There is nothing to show that the learned judge intended to suggest, much less to decide, that *The Alfreda*, if negligent, would have failed altogether in her action.

The second point made in this case was that the judgment should be drawn up so as to make *The Englishman* and *The Australia* primarily liable for a moiety of the sum recoverable, with a remedy over against each in default of the other. This point seems to me to be concluded by the judgment in *The Avon and The Thomas Joliffe*. It is also urged that the liability under the decree would be for the balance of the moiety of *The Ada's* damage over the moiety of *The Englishman's* damage. This was conceded by counsel on behalf of *The Ada*.

Lastly, it was suggested, but not, I think, pressed, that the tonnage of the tug limited the total liability of the tug and tow. I can see no authority in the words of the 54th section of the Merchant Shipping Act of 1862 for this contention.

The decree in the action drawn up in the registry was, so far as material, in terms as follows:—

May 8, 1894.— . . . "The President pronounced the collision to have been occasioned by the fault or default of the owners, masters, and crews of the respective vessels *Englishman*, *Australia*, and *Ada*, and he condemned the owners of the steam-tug *Englishman* and their bail, and the owners of the barque *Australia* and their bail, in a moiety of the plaintiffs' claim in respect of the said damage; and also comdemned the owners of the steamship *Ada* and their bail in a moiety of the counter-claim of the owners of the said steam-tug *Englishman* in respect of the said damage . . . and he referred the said damage to the registrar, assisted by merchants, to report the amount thereof, but made no order as to costs."

The owners of *The Ada* and the owners of *The Englishman* brought in their claims before the registrar, and attended the reference in support of such claims. The reference was also attended by counsel on behalf of the owners of *The Australia*. The registrar, after assessing the damages which the owners of *The Ada* and the owners of *The Englishman* had sustained by reason of the collision, recommended in his report that the owners of *The Ada* and the owners of *The Englishman* should respectively have the costs of proving their respective claims before him, and that the owners of *The Australia* should have the costs they had incurred in protecting their interest at the reference.

Aug. 8.—*Nelson*, on behalf of the owners of *The Ada*, now moved, in objection to the registrar's report, that the above recommendation as to how the costs of the reference should be borne, should be varied so far as it condemned the owners of *The Ada* in any costs incurred by the owners of *The Australia* on the reference.

No doubt the ordinary practice in the registry where two ships, each having brought in a claim, are to blame for a collision is for each party to have the costs of proving his claim; and the registrar seems to have thought he was not departing from this practice in giving the owners of *The Australia* costs in the way he has done, although she had no claim before him; but the result is unfair to the owners of *The Ada*, as the costs the owners of *The Australia* would recover under the recommendation were, to a great extent, incurred in protecting their interests against the owners of *The Englishman*. In fact, under the recommendation the owners of *The Ada* would have to pay practically two sets of costs.

Scrutton, for the owners of *The Australia*.

The PRESIDENT.—I think the proper order for me to make, will be that the recommendation of the registrar as to costs should be varied to this extent, that the owners of *The Australia* should only have the costs incurred by them at the reference in attending to protect their interest against the claim of *The Ada*; the owners of *The Ada* being relieved from paying whatever costs were incurred by the owners of *The Australia* in and about attending the reference so far as it related to the claim of *The Englishman*.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the owners of *The Englishman*, *Pritchard & Sons*.

Solicitors for the owners of *The Australia*, *Cooper & Co.*

Court of Appeal.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov 8.

"THE DELANO."

NEPTUNE STEAM NAVIGATION CO. *v.* SCLATER & PROCTER. (*a.*)

County court—Admiralty—Appeal—Practice—Jurisdiction—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

Sections 26 *and* 31 *of the County Courts Admiralty Jurisdiction Act*, 1868, *are impliedly repealed by section* 120 *of the County Courts Act*, 1888, *so far as relates to appeals on questions of law. An appeal, therefore, lies on a question of law from a judgment of a county court in an admiralty action, though the amount of the judgment is less than* £50, *and though no security for costs has been given.*

Appeal from a decision of a divisional court of the Probate, Divorce, and Admiralty Division, sitting in Admiralty.

The action was brought in the county court of Sunderland, on the admiralty side. The plaintiffs, the owners of the ship *Delano*, sued the defendants, the consignees of a bill of lading, to recover £49 damages for one day's detention of the ship at the port of discharge. The county court judge held that the plaintiffs were entitled to judgment.

The defendants appealed to the Admiralty Division of the High Court, under section 120 of the County Courts Act, 1888, on a question as to the construction of one of the clauses in the bill of lading. The defendants did not give any security for the costs of the appeal. The Divisional Court (Sir Francis Jeune and Barnes, J.) allowed the appeal, and gave judgment for the defendants.

The plaintiffs appealed.

T. Willes Chitty and *F. Newbolt*, for the plaintiffs.—The first ground of appeal is that the Divisional Court had no jurisdiction to entertain the appeal from the county court, the amount recovered being less than £50, and the defendants not having given security for costs. The County Courts Admiralty Jurisdiction Act, 1868, as amended by the County Courts Admiralty Jurisdiction Act, 1869, conferred upon county courts for the first time jurisdiction over admiralty causes. Sections 26-31 of the Act of 1868 constitute a code relating to appeals from the county court in admiralty causes to the High Court of Admiralty, now represented by the Admiralty Division. Section 26 says, "An appeal may be made to the High Court of Admiralty of England from a final decree or order of a county court in an admiralty cause, and, by permission of the judge of the county court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as General Orders shall direct." Section 31 says, "No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds." A judgment for over £50, and the giving of security for costs, are still conditions precedent to the right of appeal. The Divisional Court, following the case of *The Eden*, 40 W. R. 415, [1892] P. 67, thought that these sections had been impliedly repealed by section 120 of the County Courts Act, 1888, which allows an appeal to be brought to the High Court from any county court judgment or order on a point of law or equity or upon the admission or rejection of any evidence, subject to such conditions as may be prescribed by rules of the Supreme Court, provided that there shall be no appeal in any action of contract or tort where the debt or damage claimed does not exceed £20. But in passing the County Courts Act, 1888, the Legislature were dealing primarily with the county court jurisdiction in common law and equity; section 125 is the only section which mentions admiralty matters. No rules have ever been made under this Act regulating the procedure in admiralty appeals. This Act repeals all the earlier County Courts Acts which dealt with the jurisdiction in common law and equity; but it does not repeal the County Courts Admiralty Jurisdiction Acts. The County Courts Act, 1875, expressly repealed section 29 of the County Courts Admiralty Jurisdiction Act, 1868; it therefore left the other sections of that Act unrepealed. And the County Courts Act, 1888, is a re-enactment of the Act of 1875 and the other Acts which were to be read together with it. *The Eden*, and the previous case of the *The Hero*, 40 W. R. 143, [1891] P. 294, are not binding on this court, and ought to be overruled.

They cited the following cases:—*The Forest Queen*, 19 W. R. 167, L. R. 3 A. & E. 299; *The Falcon*, 26 W. R. 696, 3 P. D. 100; *The Cashmere*, 38 W. R. 623, 15 P. D. 121; *The Humber*, 32 W. R. 663, 9 P. D. 12; *The Dart*, 41 W. R. 153, [1893] P. 33; *The Alne Holme*, 41 W. R. 572, [1893] P. 173.

Hugh Boyd (*Simey* with him), for the defendants.—It is not necessary to contend that sections 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868, have been repealed by section 120 of the County Courts Act, 1888. They may well stand together with the later enactment. The Act of 1868 gave a full right of appeal, *i.e.*, a right of appeal on questions of law or fact, subject to certain conditions. The Act of 1888 gives a new right of appeal on questions of law only. The result is that, if the amount in dispute is over £50, an appeal may be brought, under the Act of 1868, either on law or on fact, provided that security be given; but if the amount in dispute is less than £50, and it is desired to appeal on a point of law, it is necessary to proceed under the Act of 1888, and in that case security need not be given. The defendants' appeal to the Admiralty Division was, therefore, properly brought.

Lord ESHER, M.R.—The words of section 120 of the County Courts Act, 1888, are in themselves large enough to be applicable to all county court actions, including, of course, actions on the admiralty side of a county court. It would seem, therefore, that if

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

any party to any admiralty action in a county court shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, he may appeal therefrom to the High Court, without any restriction as to giving security for costs; provided only that there shall be no appeal in any action of contract or tort unless the amount claimed exceeds £20, or unless the judge gives leave to appeal. According to the ordinary rule of construction, we are bound to give to the words of an Act of Parliament expressed in large terms their full meaning, unless we are prevented by something from doing so. But then we have to consider the County Courts Admiralty Jurisdiction Act, 1868, which also is expressed in large terms. Section 26 says that an appeal may be brought from a final decree or order of a county court in an admiralty cause on security for costs being first given. The largeness of these words is afterwards limited by section 31, which says that no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of £50. Under that statute, therefore, there is no appeal if the amount recovered is under £50, and, where there is an appeal, security for costs must be given.

Now if section 120 of the County Courts Act, 1888, can apply at all to the same subject-matter as sections 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868, it is clear that it does not apply to the whole of it, but only to part—viz., to those cases in which an appeal is brought on a point of law. If the Act of 1888 were inconsistent with the whole of those sections of the Act of 1868, then it would by implication repeal them. But if it is inconsistent with only part of them, then it repeals so much of them as is inconsistent with it, but not the rest. If it is only inconsistent with so much of those sections as relates to appeals on questions of law, then it repeals so much of them, but leaves that part of them which deals with appeals on questions of fact unrepealed. The result would be that where a party to an action on the admiralty side of a county court is dissatisfied with the judgment on a point of law, he may appeal without any condition or restriction, except only those prescribed by section 120 of the County Courts Act, 1888; but where he desires to appeal on a question of fact, the case remains under the County Courts Admiralty Jurisdiction Act, 1868, and it is therefore necessary for him to give security for costs, while, if the amount of the judgment is less than £50, he will not be entitled to appeal at all.

Are, then, the general words in section 120 of the County Courts Act, 1888, applicable to admiralty actions? Reasons have been urged before us for saying that they are not. But in my opinion the words are sufficiently large, and there is nothing to prevent us holding that section 120 applies to admiralty actions as well as to others. Therefore, in an admiralty action in a county court, an appeal lies on a question of law, without any condition as to giving security, whether the amount of the judgment be over or under £50. But where the party seeks to appeal on a question of fact, he is confined to the restricted right of appeal given by the Act of 1868, *i.e.*, if the amount of the judgment is under £50 he has no appeal at all, and if the amount is over £50, then he must give security.

I am of opinion that section 120 of the Act of 1888 has repealed sections 26 and 31 of the Act of 1868 so far as they applied to appeals on a question of law.

LOPES, L.J.—I think that the conclusion at which the Master of the Rolls has arrived is a salutary one, and I do not differ from his judgment. But I feel the force of certain difficulties which have been presented to us, and it is only with some hesitation that I concur.

RIGBY, L.J., concurred with the Master of the Rolls.

The COURT then heard argument for the appellants on other grounds, and ultimately dismissed the appeal.

Appeal dismissed.

Solicitors for the plaintiffs, *Downing, Holman, & Co.*, for *Pinkney & Bolam*, Sunderland.

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Cooper & Goodger*, Newcastle-upon-Tyne.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 1.

WEGG-PROSSER *v.* EVANS. (*a*.)

*Contract—Joint contract—Joint guarantee—Cheque given by one joint guarantor—Unsatisfied judgment on cheque—Action against other guarantor on guarantee—*Res judicata.

An unsatisfied judgment on a cheque given by one joint contractor in respect of the joint debt is no bar to an action against the other joint contractor on the original debt.

Two persons jointly guaranteed the payment by a tenant of his rent to the plaintiff. The tenant having made default in payment of the rent, one of the joint guarantors gave the plaintiff his cheque for the amount. The cheque being dishonoured, the plaintiff sued upon it and recovered judgment, which was not satisfied. The plaintiff then sued the other joint guarantor upon the guarantee.

Held, that, as the causes of action were different, the judgment on the cheque was no bar to the action on the guarantee.

Drake *v.* Mitchell, 3 *East*, 251, *followed.*

Cambefort *v.* Chapman, 35 *W. R.* 838, 19 *Q. B. D.* 229, *overruled.*

Judgment of Wills, J. (42 *W. R.* 639, [1894] 2 *Q. B.* 101, *affirmed.*

Appeal from the judgment of Wills, J., in favour of the plaintiff at the trial of the action without a jury; reported 42 W. R. 639, [1894] 2 Q. B. 101.

The plaintiff, in January, 1890, let a certain farm to a tenant at an annual rent of £385, and the defendant and one Thomas jointly guaranteed the due payment of the rent by the tenant. Default having been made in the payment of a half-year's rent, application was made to Thomas, and he gave the plaintiff his cheque for the amount. The cheque having been dishonoured, the plaintiff brought an action upon it against Thomas, and recovered judgment, and issued execution, but the execution proved fruitless and the judgment remained unsatisfied. The plaintiff then brought this action against the defendant upon the guarantee.

Wills, J., held that the judgment recovered against Thomas upon his cheque was no bar to an action against the defendant upon the guarantee, and gave judgment for the plaintiff.

The defendant appealed.

J. E. Bankes (*A. E. Mackintosh* with him), for the defendant.—The cases of *King* v. *Hoare*, 13 M. & W. 494, and *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas. 504, show that joint contractors ought to be

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

sued jointly, and that, as the plaintiff has recovered judgment against one joint contractor, and has thereby disabled himself from joining him as a defendant in an action against the other joint contractor, the latter is discharged. The plaintiff, by recovering judgment upon the cheque against Thomas, disabled himself from joining Thomas as a defendant in this action, and therefore the judgment recovered against Thomas is a bar to an action on the guarantee against the present defendant. The test is, not whether the cause of action, in its strict technical sense, is the same, but whether judgment has already been recovered against one joint contractor in respect of the original debt. The judgment on the cheque was in respect of the original debt. The case of *Cambefort* v. *Chapman*, 35 W. R. 838, 19 Q. B. D. 229, is directly in point. In *Drake* v. *Mitchell*, 3 East, 251, the demurrer was to a plea that did not state the facts precisely. Moreover, in that case the joint debt was a specialty debt, and the giving of a bill of exchange could not suspend the remedy on the covenant, which was a security of a higher nature. A man cannot be sued for the same thing twice, and this rule would be violated if Thomas could have been sued in this action. Byles on Bills, 15th ed., p. 311, shows that judgment recovered on a bill or note is an extinguishment of the original debt as between the plaintiff and the defendant.

He also referred to *In re Hodgson, Beckett* v. *Ramsdale*, 34 W. R. 127, 31 Ch. D. 177.

A. T. Lawrence, for the plaintiff.—The question is whether the cause of action in the second action is the same as in the first. There can be no merger by judgment except in respect of the same cause of action. The cause of action on the cheque is different from that on the guarantee. The parties would be different, and the pleas would be different. If Thomas were sued on the guarantee, he could not plead judgment recovered. The defendant might have taken out a summons to have Thomas added as a defendant, the plea in abatement being now abolished, and not having done so he cannot now complain. The passage in Byles on Bills means that the bill, not the original debt, is extinguished. If it meant the original debt, the passage is wrong, for otherwise, if the action on the cheque failed for want of parties, the debt would be gone. The decision in *Drake* v. *Mitchell* is in point, and should be followed in preference to *Cambefort* v. *Chapman*.

J. E. Bankes, in reply.—If the second action is in respect of the same subject-matter—in this case the same debt—the judgment in the first action is a bar to the second action: *Phillips* v. *Berryman*, 3 Doug. 286; *Routledge* v. *Hislop*, 8 W. R. 363, 29 L. J. M. C. 90; *Brunsden* v. *Humphrey*, 32 W. R., at p. 945, 14 Q. B. D., at p. 148.

Lord ESHER, M.R.—In this case the guarantee was joint, and not joint and several. When the tenant did not pay the rent, the plaintiff had a right to bring an action upon the guarantee against the two joint contractors. Under the old law, if one joint contractor were sued alone, the one sued might have put in a plea in abatement, and thus have compelled the plaintiff to join the other joint contractor. Now, since the Judicature Act the same result may be brought about by the one sued taking out a summons to have his co-contractor joined as a defendant with him. The plaintiff here took a cheque for the amount of the rent from Thomas, one of the joint guarantors. The taking of that cheque was not a satisfaction of the debt, but only conditional payment. If the cheque were paid, the debt would have been satisfied, and the present defendant could not have been sued by the plaintiff. The defendant would only have been liable to a claim by Thomas for contribution. The defendant's position was not altered in the smallest degree by the plaintiff taking Thomas' cheque. The cheque being dishonoured, the plaintiff sued Thomas upon it, and recovered judgment. The cause of action was the breach by Thomas of his promise on the cheque to pay the amount on demand. If the full fruits of that judgment were obtained by execution, the debt would have been satisfied, and the present defendant could not have been sued, though he would have been liable to Thomas for contribution, but not for contribution towards the costs of that action. The judgment, however, was fruitless. It was argued that the judgment recovered against Thomas is a bar to the present action. The rule of law relied upon is a mere technicality, and unless we are bound to apply it to this case, I shall not do so. If the plaintiff had recovered judgment against Thomas on the guarantee, then the rule of law laid down in *King* v. *Hoare* and *Kendall* v. *Hamilton* would have prevented him from suing the present defendant upon the guarantee. The plaintiff, however, did not sue Thomas upon the guarantee, but upon his cheque. Is there any authority which says that the rule of law applies in such a case? There is a case directly to the contrary—*Drake* v. *Mitchell*—decided by very great lawyers. Lord Ellenborough said: "I have always understood the principle of transit *in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before." That is clear authority that the cause of action must be the same as that upon which the judgment was obtained. If that case is correct, there has been no judgment recovered against Thomas in respect of the particular cause of action upon which this action is brought. The cause of action now sued on is the breach of the guarantee. The case of *Cambefort* v. *Chapman* was relied upon by the defendant, and I do not deny that that case is directly to the contrary. We must, therefore, consider which of the two cases we ought to act upon. *Drake* v. *Mitchell* was decided in 1803, and has never been doubted until *Cambefort* v. *Chapman* in 1887. In my opinion the former case is right, and should be followed. It has not been overruled or touched in any way by *Kendall* v. *Hamilton*. In my opinion, therefore, the decision in *Cambefort* v. *Chapman* was wrong, and must be overruled. The result is that the defendant, who has not been injured in any way by the plaintiff taking Thomas' cheque, is not relieved from liability on the guarantee. It is objected that the defendant had a right to insist upon his joint contractor being joined as a defendant in the action, and that he was deprived of that right by judgment being obtained against the joint contractor on the cheque, and that, therefore, the action against him was barred. But the assumption upon which that objection is based is not true. This action is on the joint contract. The defendant had a right to insist upon Thomas being joined as defendant, and the plaintiff would have been bound to do so and could have done so. The defendant did not take that step, and cannot now complain. The appeal, therefore, must be dismissed.

LOPES, L.J.—I am of the same opinion. If it were not that we are differing from *Cambefort* v. *Chapman* I should not add anything to what the Master of the Rolls has said. The contention of the defendant is that judgment recovered on a cheque given by one joint contractor for the amount of the debt is a bar to an action upon the joint debt against the other joint contractor. I would agree with that contention if the action were in respect of the same cause of action; I do

not agree with it if the action is not in respect of the same cause of action. In my opinion the cause of action on the guarantee is entirely different from the cause of action on the cheque. The pleas in the two actions would be different, the questions of fact and of law different. In the action on the cheque Thomas could not, under the old law before the Judicature Act, have put in a plea in abatement. In an action on the guarantee he could have done so. I come to the conclusion that the cause of action is entirely different. If that is so, *Drake* v. *Mitchell* is applicable, and I cannot distinguish the present case from it. In that case it was held that an unsatisfied judgment on a bill given by one of three joint covenantors for the debt secured by the covenant was no bar to an action of covenant against the three. The Master of the Rolls has already referred to the language of Lord Ellenborough. Grose, J., said: "The note or bill, not having been accepted as satisfaction for the debt, could only operate as a collateral security; and though judgment has been recovered on the bill, yet, not having produced satisfaction in fact, the plaintiff may still resort to his original remedy on the covenant." The other judges concurred in that view. In the present case no fruits of the judgment on the cheque were recovered, and every word of those judgments is applicable here. It also seems clear to me that that case is in direct conflict with *Cambefort* v. *Chapman*. Without hesitation I prefer the first case. It has stood since 1803, which is a strong reason for supporting it, but, in addition, my mind goes with it. In Lindley on Partnership, 6th ed., p. 263, allusion is made to *Cambefort* v. *Chapman*, and a doubt is expressed as to the correctness of that decision. I may say that we have mentioned the case to Lindley, L.J., and he tells us that he holds a strong opinion that the decision in *Cambefort* v. *Chapman* is wrong. *Cambefort* v. *Chapman* must therefore be considered as overruled. As regards the objection that Thomas could not be joined as a defendant in this action, the answer is that that is not so. It was entirely the fault of the defendant that Thomas was not joined. Though the plea in abatement is now abolished, the defendant could have taken out a summons to have Thomas added as a defendant. This he did not do, and he cannot now complain. In my opinion, therefore, the judgment against Thomas on the cheque is no bar to an action on the guarantee.

RIGBY, L.J.—The first question is whether there can be a merger of a joint cause of action by a judgment on a separate cause of action. The question seems to me to answer itself. There cannot be a merger in such a case. Indeed, in *Kendall* v. *Hamilton* the main question was whether there was a joint, or a joint and several cause of action, because in the latter case it was conceded that the judgment in the first action would be no bar. A judgment on a joint cause of action is entirely different from a judgment on a separate cause of action against one of the joint contractors. Here there was a separate cause of action against Thomas on the cheque, and in that action the evidence would be different from the evidence in an action on the guarantee. The judgment recovered in that action, being in respect of a separate cause of action against Thomas, had nothing to do with the joint cause of action on the guarantee. The parties to the two contracts were not the same. Therefore, upon the question of merger, it seems to me that the joint cause of action was not merged in the judgment on the separate cause of action.

But there is another ground upon which it is said that the appeal can be successfully maintained. That is the ground that was relied upon by Manisty, J., in *Cambefort* v. *Chapman*—namely, that the claim as against Thomas was extinguished by the judgment recovered on the cheque. That seems a somewhat serious question, for it is not only so laid down by Manisty, J., but it is stated as the law in Byles on Bills, 15th ed., p. 311. But the authorities cited in Byles on Bills for that proposition do not support it, and we have the clear authority of the King's Bench in *Drake* v. *Mitchell* that in such a case there is no extinguishment. There are, no doubt, differences of fact between *Drake* v. *Mitchell* and *Cambefort* v. *Chapman*, but upon examining the former case I cannot see that the judgment proceeded upon the fact that the original joint contract was a specialty contract. Each of the judges seems to me to have made it clear that where there is a separate contract as distinguished from the joint contract, the only way in which that separate contract or a judgment upon it can operate as satisfaction *pro tanto* is by showing that there has been real satisfaction by payment. Coming to the conclusion, as I do, that there must be real satisfaction, and finding nothing against that principle except the judgment of Manisty, J., in *Cambefort* v. *Chapman* and the passage in Byles on Bills, I agree with the decision in *Drake* v. *Mitchell*.

The only remaining point to be noticed is that, as the plaintiff has established that he obtained no real satisfaction upon the judgment against Thomas, some explanation should be given why Thomas was not made a joint defendant in this action. I take it as finally established by *Kendall* v. *Hamilton* that one joint contractor has a right to insist upon being sued with his other joint contractor. But the one sued has always had the power to require the other joint contractor to be joined, and unless before the Judicature Act he put in a plea in abatement, or since that Act he takes out a summons to have his joint contractor joined, the judgment would go against the one sued alone. It was the defendant's business to have required Thomas to be joined. No such step was taken here, and, that being so, the judgment against the defendant was right.

Appeal dismissed.

Solicitors for the plaintiff, *Woodcock, Ryland, & Parker*, for *E. M. Underdown*, Hereford.

Solicitors for the defendant, *Wrentmore & Son*, for *Morgan, Rhys, & Bruce*, Pontypridd.

High Court of Justice.

Chan. Div. } Nov. 1, 3, 6.
Chitty, J. }

In re NEGUS (A SOLICITOR). (*a*.)

Solicitor—Remuneration—Lease—Agreement for lease—Lessor's solicitor—Item bill—Taxation by lessee—Scale—Counterpart—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August,* 1882, *Schedule I., Part II.*

A lease in writing for a term not exceeding three years at a rack rent, or an agreement for the same, is within Schedule I., Part II., of the General Order to the Solicitors' Remuneration Act, 1881.

The lessee, on paying the bill of the lessor's solicitor, is entitled to deduct the costs of the counterpart from the scale charge.

The delivery of an item bill under Schedule II. for

(*a*.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

business to which Schedule I. applies does not entitle the client or party chargeable to insist on taxation under Schedule II.

Summons to review taxing master's certificate.

By an agreement (called a "tenancy agreement") "the landlord agreed to let, and the tenant to take," a certain flat for a term of three years at a rack rent. The landlord's solicitor delivered an item bill to the tenant, who thereupon obtained a third party taxation order. When before the taxing master both parties treated the business transacted as requiring an item bill within Schedule II. of the General Order to the Solicitors' Remuneration Act, 1881, and as not coming within Schedule I., Part II., of such order. The taxing master, however, thought the business fell within Schedule I., Part II., and taxed the bill on the scale footing. The solicitor accepted the taxing master's view, but the tenant objected, and took out this summons to review his taxation.

Whitehorne, Q.C., and *Edward Ford*, for the tenant.—(1) The solicitor is estopped by the delivery of his bill from denying that the business falls within Schedule II.: *In re Heather*, 18 W. R. 1079, L. R. 5 Ch. 694. (2) A tenancy agreement such as this is not a lease or an agreement for a lease within Schedule I., Part. II.: *In re Emanuel & Simmonds*, 34 W. R. 613, 33 Ch. D. 40; *Savery* v. *Enfield Local Board*, 42 W. R. 33, [1893] A. C. 218. (3) The scale charge includes the costs of the counterpart, for which the tenant is not liable. The scale is therefore inapplicable.

Manson, for the solicitor.—We will deduct the costs of the counterpart.

CHITTY, J.—The first point is best put in the form of *In re Heather* — viz., that the solicitor is bound by the bill as delivered, and that he must, therefore, submit to have it taxed as an item bill. *In re Heather* was, however, decided before the distinction between scale and item charges arose. At the present day, when an item bill is brought in to be taxed, and the scale is applicable, it is applied. This practice is correct. The taxing master is bound to tax according to law, and it is his duty to apply that law to the circumstances of the case. Though the solicitor submitted a bill in items in the first instance, yet, there being no previous election in writing to adopt Schedule II. (*vide* rule 6 of General Order), it was competent for him to acknowledge his error before the taxing master, and submit to taxation according to the scale. This he at once did, and the first objection therefore fails. The next point is whether the document is a lease or an agreement for a lease within the meaning of the first schedule. Now, the Court of Appeal, in *In re Emanuel & Simmonds*, put a construction on the meaning of the term "agreements for leases." The point arose in a case where the solicitor contended he could charge for both lease and agreement. The only point relevant to the present case is the decision that the solicitor could not make a double charge, and that the term "agreements for leases" was not to be confined to its strict technical meaning in law, but included agreements on which the parties intended to rely, without requiring a formal lease. It was not decided that agreements did not include "agreements to grant a lease." It is an error to say that Cotton, L.J., defined "agreements for leases." It was not a definition, but an explanation of the term, showing, as Bowen, L.J., said, that it was intended to include and cover agreements of the kind already described. Now, it is argued that the expression "leases or agreements for leases" only applies to such leases or agreements, the latter term being understood as explained by the Court of Appeal, as are required by law to be in writing, but it is admitted there are no words in the schedule to justify that interpretation.

The argument is really founded on supposed hard cases of short terms and low rents, with a contention that the scale, with its minimum charge of £5, must be so construed as to exclude such hard cases. It is unnecessary to give a disquisition on the term "lease." It is properly used to include any demise, however short or however long. It is sufficient to refer to the 1st section of the Statute of Frauds, which enacts that parol leases shall have the effect of leases at will only, with the exception (section 2) of leases under three years, at at least two-thirds rack rent. In that statute a demise by parol for less than three years is called a lease. Further on, in section 4, the distinction between lease and agreement is drawn, because section 4 would apply to an agreement for a parol lease within section 2. Then, by the Real Property Act, 1845 (8 & 9 Vict. c. 106), a lease required by law to be in writing is void if not made by deed. The tenant's argument, then, comes to this, that the scale only applies to leases required by law to be made by deed. I am unable to find leases in writing or leases by deed mentioned on the face of the schedule. I need hardly say it only applies where there is a document in writing, the charge being "for preparing, settling, and completing," but that is a long way from saying it only applies to deeds. That its application is not confined to deeds follows plainly from the fact that "agreements for leases" are mentioned, and having regard to the interpretation put by the Court of Appeal on that expression I cannot put that construction on the schedule. I am aware that with persons not very conversant with the subject the word "lease" is employed to denote a lease by deed, but these rules, which have the force of an Act of Parliament, were settled with the authority of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Incorporated Law Society, and I must therefore find a judicial ground to justify me in interpreting them in a loose sense. Cases of hardship may be put aside. They seldom arise. If a cottage is let at 7s. a week, the parties as a rule get on without consulting a solicitor. The rules are not addressed to cases of that kind. But if a solicitor is consulted as to the preparation of a lease for less than three years, a minimum charge of £5 does not seem wholly unreasonable. Many solicitors would not insist on the scale in such a case. In the letting of flats many special stipulations are inserted, often giving rise to litigation, and much skill is required on the part of the solicitor in settling the agreement. At all events, I cannot say that this £5 is so excessive a charge as to justify me in interpreting the language of the rule as suggested.

In the present case I think the document amounts to a lease, but if, as the documents have not been actually exchanged, it is to be looked upon as an agreement for a lease, then it is exactly within Cotton, L.J.'s example of parties who do not intend to have a more formal document.

The remaining point is as to the third party taxation. The third party taxing stands in the position of the party chargeable; but this does not prevent the taxing master from considering the question of the liability of the third party. There is one qualification. If a *cestui que trust* taxes a bill delivered to his trustee he is allowed to point out what items are not chargeable against the trust: *In re Brown*, 15 W. R. 1030, L. R. 4 Eq. 464. Now it is part of the general law that a lessee is not bound to pay for the counterpart. The first schedule includes the counterpart. The decisions show that the business contemplated by

the rules must be wholly perfected. There is, therefore, a counterpart, and it is plain the landlord must pay for it. The taxing master, however, in applying the scale, has necessarily included the charge for the counterpart, for which the tenant is not liable. The tenant, therefore, argues that the scale cannot apply, as the charges cannot be apportioned. Now these rules are made "to avoid dispute and discussion" (*per* Lord Halsbury in *Savery* v. *Enfield Local Board*, 42 W. R. 33, [1893] A. C. 218, 225): but, according to the argument, though the scale would apply between the landlord and his solicitor, the tenant is always bound to pay on the non-scale rule. When a tenant enters into such a transaction he would think he had only to pay scale charges, and then he would be told he must pay non-scale charges because a portion of the scale charge did not apply to him. This contention is not sustainable for a moment. The taxing master was right in applying the scale to the bill, as being the bill that the landlord had to pay. But there is a novelty as to the counterpart, the solution of which is that the taxing master ought to tax the bill, as he has done, as between the solicitor and his client the landlord—*i.e.*, on the scale footing—and then the solicitor, seeing that the tenant is only liable for the costs of the lease, must make a reasonable deduction for the counterpart.

In the present case sums of 8s. 8d., 9s. 4d., and 5s. for engrossing, re-engrossing, and stamp have been agreed, and these sums will be deducted from the bill as against the tenant. The tenant has substantially failed, and must pay the costs.

Solicitors, *Daubeny & Mead*, for *Smith & Sons*, Weston-super-Mare; *William Negus*.

Chan. Div. } July 24, 25, 1894.
Stirling, J. }

In re DEAKIN.
STARKEY *v.* EYRES. (*a.*)

Power of appointment — Objects of power "relations" of illegitimate and childless wife—Appointment amongst children of her "brothers and sisters" — Validity — Exclusive or non-exclusive power — Powers Law Amendment Act, 1874 (37 & 38 *Vict. c.* 37), *s.* 1.

A testator by his will gave all his property to his wife for her life, and after her death he gave one moiety of the residue "to my wife's relations as she may direct." The wife, who was illegitimate to the knowledge of the testator, and childless, survived him, and by her will purported to exercise the power in favour of children of persons whom she described as her "brothers and sisters," the latter being issue of the marriage of her father and mother.

Held, that, reading the language of the will by the light of the surrounding circumstances, the testator meant to use the words "relations," not in its primary sense of legitimate relations, but in a secondary sense, as meaning those persons who would have been her relations if she had been legitimate, and that, therefore, the appointment was valid.

Held, further, that the power of appointment was a power of distribution, and not a power of selection; that Lord Selborne's Act (37 & 38 *Vict. c.* 37) *did not apply, and that the old rule of law established by* Pope *v.* Whitcombe, 3 *Mer.* 689, *was unaffected by the Act, and consequently that the class of relations to take under the appointment was confined to the statutory next of kin of the widow, to be ascertained at her decease.*

Thomas Deakin, by his will, dated the 6th of December, 1854, gave all his property to his wife, Lydia Deakin, for life, and after her death directed payment of certain legacies, and then gave one moiety of the residue of his property in the following terms: "to my wife's relations as she may direct."

He died on the 14th of February, 1855, leaving his wife him surviving. She made her will, dated the 11th of November, 1891, by which she purported to exercise the power conferred by her husband's will in favour of various persons described as her brothers and sisters and their children, and amongst others she made an appointment in favour of "John Oscar Wilkinson, the natural son of my sister Phœbe Wilkinson." She died on the 27th of November, 1892.

Lydia Deakin was born in 1807, and was the daughter of Jane Hanson, then a single woman. In May, 1808, her mother intermarried with John Wilkinson, who recognized Lydia as his child and made no difference between her and the children born after the marriage. She married T. Deakin on the 13th April, 1825, but never had any children. Consequently, at the date of the will of T. Deakin she was of the age of forty-seven and childless, and it was in evidence that he was aware of her illegitimacy.

A summons was taken out by the surviving executors of the wills of Thomas and Lydia Deakin respectively to have it, among other things, decided whether the will of Lydia Deakin was a valid exercise of the power.

Seddon, for the plaintiffs, the executors.

Arnold Herbert, for appointees (other than J. O. Wilkinson) under Mrs. Deakin's will.—The word "relations" does not include children. The whole question is one of intention. The testator was aware of the circumstances of his wife's birth, and that she no relations properly so called. He must therefore have intended to include the appointees in the gift. It cannot reasonably be presumed that he had any desire to benefit children of his wife on a second marriage, and such children he meant to be included in the word "relations." Under circumstances such as the present the law makes no presumption either way as to intention: *In re Jodrell, Jodrell* v. *Seale* (2), 38 W. R. 721, 44 Ch. D. 590; *In re Harrison, Harrison* v. *Higson*, [1894] 1 Ch. 561.

Hastings, Q.C., and *R. J. Parker*, for the representatives of William and John Deakin, brothers of the testator.—"Relations" *primâ facie* means legitimate relations, just as "children" *primâ facie* means legitimate children, and, consequently, as there are no such relations of Mrs. Deakin, the appointment is invalid: *Hill* v. *Crook*, 19 W. R. 649, L. R. 6 Ch. App. 311, 22 W. R. 137, L. R. 6 H. L. 265; *Dorin* v. *Dorin*, 23 W. R. 570, L. R. 7 H. L. 568. The fact that the testator was aware of his wife's illegitimacy is immaterial. She might have had legitimate relations before her death, and although she was forty-seven years of age at the date of the testator's death and had never had any children, the law does not concern itself with the probability or improbability that there would be any children: *Jee* v. *Audley*, 1 Cox, 324; *Paul* v. *Children*, 19 W. R. 941, L. R. 12 Eq. 16; *In re Overhill's Trust*, 1 W. R. 208, 1 Sm. & Giff. 362; *In re Saville's Trust*, 14 W. R. 603. Under these circumstances there is an intestacy in respect of the portion of residue which is subject to the power of appointment.

A. F. Peterson, for J. O. Wilkinson.—If the appointment to the relations is a good one, J. O.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Wilkinson, who was in existence at the date of the will, is also entitled to claim his share as a relation. If he is not entitled, then I contend the appointment is wholly invalid: *In re Standley's Estate*, L. R. 5 Eq. 303, 16 W. R. Ch. Dig. 151. [STIRLING, J.—I have great difficulty in reconciling that case with *Hill* v. *Crook* and *In re Jodrell, Jodrell* v. *Seale*.]

J. W. Clydesdale and *C. E. E. Jenkins*, for other parties.

Arnold Herbert replied.

Cur. adv. vult.

May 7.—STIRLING, J., after stating the facts, continued: It is contended that the word "relations" in the will of Thomas Deakin means *primâ facie* legitimate relations—that although Lydia Deakin had not at the date of Thomas Deakin's will any such relations, she might have had issue by a subsequent marriage, who would have been legitimate relations of hers, and that under these circumstances Thomas Deakin cannot be taken to have authorized her to make an appointment in favour of persons who are not legally her relations.

Arguments of a similar kind have been frequently urged, and have been frequently dealt with in modern times in many cases, of which I desire to mention particularly two: *Crook* v. *Hill* and *In re Jodrell, Jodrell* v. *Seale*. [His lordship dealt with these cases, and, after referring to the judgments, proceeded:—] The law is stated by Lord Selborne in a single sentence in *Dorin* v. *Dorin* thus: "The word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." This statement equally applies to the meaning of the word "relations."

Now, among a wife's "relations" may be included her children or issue, if she has any; but the word "relations" is a much wider term than issue, and certainly according to its ordinary meaning includes other persons than children or issue. It might, no doubt, be interpreted to mean "issue" if the context of the will afforded ground for so doing, but there is no such context in the will of Thomas Deakin: on the contrary, such context as there is points in the other direction, for the testator speaks of the children of his sister Fanny Dignum. I must take it, then, on the true construction of the will, that the testator intended to benefit other relations than her possible future issue. Legally no such person existed, but inasmuch as the testator knew that his wife after nearly thirty years of married life was childless, and inasmuch as he knew that she was illegitimate, and consequently had no relations who would be benefited if the will were read in the strict legal sense of the word, it seems to me that the court ought, in accordance with the principles laid down in *Hill* v. *Crook* and *In re Jodrell, Jodrell* v. *Seale* to read the word "relations" otherwise than in its strict primary meaning. It is true that the present case does not, in point of decision, fall within those cases, for in both of them the courts arrived at the meaning of the wills which they had to construe by using those wills as dictionaries for the purpose of ascertaining the meaning of the language used, whereas here the interpretation is arrived at by reading the language in the light of the surrounding circumstances. That this may be done is shown by the case of *In re Haseldine, Grange* v. *Sturdy*, 34 W. R. 327, 31 Ch. D. 511, before the Court of Appeal, where, as it seems to me, the conclusion was arrived at on more slender grounds than exist in the present case. If, then, the word "relations" is to be read, as I think, in a secondary sense, I have no difficulty in holding that by his wife's relations the testator meant those persons who had recognized her and had been recognized by her as relations, the persons who would have been her relations in case her birth had taken place after instead of before the marriage of John Wilkinson and Jane his wife.

The case of *In re Standley's Estate*, decided by Lord Hatherley when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived. I must confess myself unable effectually to distinguish it; but it was decided before *Hill* v. *Crook*. The reasoning on which the decision is based appears to be inconsistent with the principles there laid down, and, notwithstanding the weight justly due to any decision of Lord Hatherley, I am unable to follow it, having regard to the more recent authorities which are binding on me. I think, therefore, that the appointments made by the will of Lydia Deakin are good, except that in favour of John Oscar Wilkinson, whom she describes as "the natural son of my sister Phœbe Wilkinson." There is nothing either in the will or the external circumstances (so far as I am entitled to look at them) which would entitle me to draw the inference that the testator included him among the persons whom he designated as his wife's relations.

A further question then arose whether the relations who were objects of the power were limited to the persons who at Mrs. Deakin's death would have been her next of kin according to the statutes of distribution if she had been legitimate, or comprised all persons who, if she had not been illegitimate, would have been her blood relations at the time of her death.

The summons stood over, and the question came on for argument on the 24th of July.

Seddon, for the executors.—Mrs. Deakin had a selective power of appointment among her relations. The rule before Lord Selborne's Act (37 & 38 Vict. c. 37) was that such a power to appoint could be exercised in favour of any relations, even those outside the statutory next of kin, but that a merely distributive power only authorized the donee to appoint among the statutory class: *Pope* v. *Whitcombe*, 3 Mer. 689. Further, the latter power could only be properly exercised before the Act by including every member of the class in the appointment. There would seem to be now no reason for the old rule, which may have been merely a rule of convenience.

C. E. E. Jenkins, for a child of a brother of the testatrix who was living at her death.—If, upon the true construction of the testator's will, this was not a selective power, then I rely upon Lord Selborne's Act as having done away with the distinction between the two classes of powers, and as enabling Mrs. Deakin to make an exclusive appointment in favour of any member of the class: *Harding* v. *Glyn*, 1 Atk. 469.

He also referred to the remarks of Sir J. Leach, M.R., in *Grant* v. *Lynam*, 4 Russ. 292.

A. F. Peterson, for the statutory next of kin.—The power of appointment here is merely a power of distribution confined to the next of kin, and the old rule of construction applies: *Lawlor* v. *Henderson*, Ir. Rep. 10 Eq. 150, 24 W. R. Dig. 321; Farwell on Powers, 2nd ed., p. 505. That rule has not been annulled by Lord Selborne's Act. The class to take is not altered by the Act, which merely provides that the exercise of a distributive power in favour of some members of a class to the exclusion of other members should not make the appointment invalid.

On the question of "relations" the judgment of

Chitty, J., in *Wilson* v. *Duguid*, 31 W. R. 945, 24 Ch. D. 244, 251, 252, was referred to.

C. E. E. Jenkins, in reply.—*Harding* v. *Glyn* was considered and explained in *Brown* v. *Higgs*, 5 Ves. 495, 501, 502.

STIRLING, J., after stating the facts, continued: The wife survived, and before she died made a will purporting to be in exercise of the power of appointment conferred upon her. One of the objects of the appointment made by the wife was the illegitimate child of her sister, as to which I have already held that the appointment fails. But there is a further question as to the validity of the appointment made to one of the children of the brother of the testatrix who was living at her death; and the question turns on what meaning is to be given to the word "relations" in the will of the testator. Obviously, in one sense, a child of the brother of the testatrix was a relation, but it is contended that in the circumstances of this will the word is to be more limited in its meaning, and must be confined to next of kin of the wife living at her death. The law as to that is in rather a peculiar state. I have not to express any opinion as to whether it is satisfactory or not, but simply to administer the law as I find it. The point is shortly stated by the Irish Master of the Rolls in *Lawlor* v. *Henderson*, Ir. Rep. 10 Eq. 150, at p. 151. He says: "The word 'relations' in gifts of this character has received a settled meaning, and the only point is whether the executors had under the will a power of selection or a simple power of distribution. It is plain that in the latter case they must confine themselves to the class falling within the limits of the statutes of distribution, subject, of course, to the consideration of the period when that class has to be ascertained. I am of opinion that the principle laid down in *Pope* v. *Whitcombe* governs this case, and having regard to it I think that there was no power of selection, but one of distribution simply." That is to say, that in deciding what meaning to attribute to it you have to consider in the first place whether the donor of the power has conferred on the donee what is commonly termed an exclusive power or not. If the power given is exclusive, enabling the donee to select any one or more of the objects, then the word "relations" has, according to the cases of *Harding* v. *Glyn* and *Grant* v. *Lynam*, a wide meaning given to it. So that the donee is able to select any one person who is properly designated a relation according to the ordinary meaning of the word in the English language. If, however, the power is not exclusive, but is a non-exclusive power, then the court puts a narrower meaning on the term. That is clearly established by *Pope* v. *Whitcombe*, where the language of the will was this: The testator gave the residue of his estate and effects to his wife for life, with remainder to his son absolutely if he should attain twenty-one, but in case of his son's death before twenty-one and without issue, then he gave certain legacies to some of his relations, and he directed his wife to dispose of the residue amongst his (the testator's) relations in such manner as she should think fit. The son died under twenty-one and without issue in the lifetime of the testator. There the power was non-exclusive, and it was held by the Master of the Rolls that the objects of the power were limited to the next of kin of the testator.

The first point to be consided here is whether the testator in the present case has conferred an exclusive or a non-exclusive power. He gives one moiety "to my wife's relations as she may direct." In my opinion it was plainly the latter. In the language of the Master of the Rolls of Ireland, Ir. Rep. 10 Eq., at p. 151, the testatrix had merely a power of distribution, and not a power of selection. According to the cases as they stood before the passing of Lord Selborne's Act it is clear that this power is only to be exercised in favour of the persons constituting the next of kin at the decease of the wife. That is clearly the period of distribution. The gift is to the wife's relations as they would, in the absence of anything to the contrary, be ascertained at her death. Then comes the question, Has the Act made any difference in the construction of the will or any difference in the effect of the power? Lord Selborne's Act is simply the completion of legislation which has reversed the old rule of law. The rule was that where there was a non-exclusive appointment the donee was compelled to give some portions of the property to every object of the power. That was first broken in upon by the statute of 1830 (11 Geo. 4 and 1 Will. 4, c. 46), which provided that "no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder or in default of such appointment take more than an unsubstantial, illusory, or nominal share of the property subjected to such power." The effect of that Act was to compel the donee to make an appointment, however small, to every object of the power or to leave a portion undealt with so as to devolve on them in default of appointment. That continued down to recent times, when in the year 1874 another Act (Lord Selborne's) was passed, which provides that "no appointment which from and after the passing of this Act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power." That relieves the donee of a power from the necessity of making an appointment of something to every object of that power, or leaving them a portion to devolve upon them in default of appointment. That is what the Act proposed to do. That is all it does. It does not alter the rule of construction laid down as to the meaning of powers, nor does it purport to affect the class which is to take. There is nothing to show that the Legislature had such a case as this in contemplation.

But it is contended that if you go back to the beginning of this series of old cases and try to ascertain the reasoning on which these decisions are based, probably, if the law had then been as it now is, the result would have been that settlements would be construed in the same way in all cases. I am not persuaded that that result would follow. It is difficult to find the origin of the rule. *Harding* v. *Glyn*, 1 Atk. 469, explained in 5 Ves. 501, is the first case, and no reasons are given for the decision. I do not think I ought to speculate in this inferential way what might have been decided if the law had been different in 1739, when that case was decided. I have only to apply the law as I find it, and I am of opinion that Lord Selborne's Act does not apply, and the rule is unaffected by that Act. I hold that the class to take is the same as it was before the passing

of the Act, and is confined to the next of kin living at the death of the widow.

Solicitors, *Taylor, Hoare, & Pilcher*, for *A. & J. E. Fletcher*, Northwich; *Coode, Kingdon, & Cotton*, for *W. C. Deakin*, Northwich; *Busk & Co.*, for *John H. Cooke*, Winsford.

Chan. Div. } June 22; July 26, 1894.
Kekewich, J. }

WELBY v. STILL. (a.)

Solicitor—Remuneration—Deduction of title—Mortgage—Leaseholds—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c. 44), *General Order, Schedule I., Part I.*

A mortgagor's solicitor is not entitled to charge the scale fee for deducing title and preparing and completing mortgage where he merely furnishes the mortgagee's solicitors with a statement of the dates and particulars of the several leases of the property and a form of the covenants, which were alike in each case.

This was a summons to review the taxation of a bill of costs.

One Batten was the lessee of property held under several leases all in the same form. On a mortgage of the property his solicitors supplied the mortgagee's solicitors with a statement of dates and particulars of the leases and a form of the covenants. The mortgagor's solicitors sent in a bill under Schedule I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, for deducing title, perusing and completing mortgage. The taxing master reduced the amount, on the ground that no title was deduced, and so the scale fee did not apply.

Renshaw, Q.C., and *Yate Lee*, for the solicitors, cited *Ex parte Mayor of London*, 35 W. R. 210, 34 Ch. D. 452.

Upjohn, for the respondent.

KEKEWICH, J.—I do not think any title has been deduced. The schedule to the General Order provides for the fee payable to the mortgagor's solicitor for "deducing title to . . . . leasehold property, perusing mortgage, and completing." Here there was no dealing with the leases (the mortgagor being the original lessee) and no title deduced. The Legislature could not intend that a solicitor could be said to deduce title when he simply hands over the lease under which his client holds the property. Producing the lease is not equivalent to deducing the title.

Summons dismissed.

Solicitors, *Trower, Freeling, & Parkin; Robert Chapman.*

Chan. Div. } June 28, 1894.
Wright, J. }

In re THE BREWERY ASSETS CORPORATION. TRUMAN'S CASE. (b.)

Company—Winding up—Allotment—Application for shares—Withdrawal of application—Authority of clerk in registered office—Contributory—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 23, 39.

In the absence of evidence to the contrary, the court will draw the inference that a clerk in the registered office of a company is, in the absence of the secretary, so far the clerk in charge that it must be imputed to the company that, in office hours, he had authority to receive communications so as to bind the company which were made in the absence of other persons who, if present, would have authority to receive such communications.

The above-named company was formed under the Companies Acts with ordinary shares of £10 each. The applicant, J. C. Truman, in October, 1890, received by post at his residence a prospectus accompanied by a form of application for shares, and he called at the registered office of the company with the form of application, and saw a clerk there and filled up the application form for ten ordinary shares of £10 each, and handed the same to the clerk with a cheque for £30, being 10s. per share and £2 10s. payable on allotment. Truman on the same day called again at the company's office, and saw there a clerk, and informed him that he withdrew his application for shares in the company, and demanded the return of his cheque. The clerk, however, stated that he could not give it up, as the secretary was out. Truman called later in the day, but found the office closed. On the next morning he called at his bankers and gave them full particulars of the cheque he had given the company, and instructed them to stop payment, which they did. A few days afterwards the company sent a form of allotment letter with the blank bankers' receipt for the payment of the allotment money, which he immediately returned to the company. The company went into voluntary liquidation, and the liquidator placed Truman's name on the list of contributories for the shares. This was a summons by Truman to have his name removed from the list of contributories, which was adjourned into court.

J. Tanner, for the summons.—Withdrawal may be by word of mouth: *Wilson's case*, 20 L. T. N. S. 962, 17 W. R. Ch. Dig. 70. The applicant withdrew properly, as he had never contracted to become a shareholder.

A. J. Chitty, for the liquidator.—There has been no communication to the company of the applicant's intention to withdraw. The clerk was not a proper person to make the communication to.

He referred to *Pennell* v. *Stephens*, 7 C. B. 987.

Tanner replied.

WRIGHT, J.—I have felt great doubt about this case. I think, however, that in the absence of evidence to the contrary I ought to draw the inference that the clerk—who, when the applicant called, was at the office and referred to the absence of the secretary—was so far the clerk in charge that it must be imputed to the company that in office hours he had authority to receive the statement which was made to him in the absence of other persons who, if present, would have had authority to receive such statement. The case is on the line; but the applicant did change his mind after applying for the shares, and on the facts, as I read them, he made a communication as to such change of mind to the company before the shares were allotted to him. As to the other point, the applicant stopped his cheque, and the fact of his having done so was placed on record in books which were before the directors. It is not shown that they read the entry as to the stoppage of the cheque, but I am inclined to think that, when directors are allotting shares on the basis of payments having been made by the applicants for shares to the company's bankers, the directors ought to make inquiry, and, if they find that a cheque has been stopped, that should

(a.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(b.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

be sufficient to put them on their guard. The company had no right to make this allotment at the time when they made it. The applicant at once repudiated the allotment, and in my judgment he is entitled to be relieved of the shares.

Solicitors, *Jerome & Co.; Nash, Field, & Co.*

Q. B. Div. (Charles and Collins, JJ.) April 30; May 1, 1894.

MAYOR, &c., OF DERBY v. GRUDGINGS. (a.)

Local government—Street—Notice by urban authority to frontager to sewer, &c.—Notice partly within and partly in excess of jurisdiction—Liability under—Apportionment of expenses, when conclusive—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257.

An urban authority gave notice under section 150 *of the Public Health Act,* 1875, *to a frontager to a street within their district, to sewer, &c., the street, including carriage way and footway, according to the frontage of his premises. The notice not being complied with, the urban authority executed the works, and sought to recover the expenses apportioned on the frontager before the justices. No notice disputing the apportionment had been given within three months by the frontager under section* 257, *but it was proved and found as a fact by the justices that the carriage way of the street was a highway repairable by the inhabitants at large, though the footway was not.*

Held (following Wake *v.* Mayor, &c., of Sheffield, 11 *Q. B. D.* 291, 31 *W. R. Dig.* 99, 12 *Q. B. D.* 142, 32 *W. R. Dig.* 23), *that the urban authority had jurisdiction to give the notice to sewer, &c., in respect of the footway, and that such notice was good* pro tanto; *that, the apportionment not having been disputed by the frontager, it was conclusive as to the amount of his liability, and could not be questioned in respect thereof before the justices.*

Case stated under the Summary Jurisdiction Acts by justices of the peace for the borough of Derby.

The appellants, as the urban sanitary authority for the borough of Derby, had preferred a complaint against the respondent before a court of summary jurisdiction, whereby they sought to recover from him, as a frontager, the expenses, amounting to £15, incurred by them in levelling, paving, metalling, and flagging a portion of a street called Boden-street in that borough.

The material statements in the case were as follows:—

The respondent was the owner of certain premises which fronted on Boden-street, which was a "street" within the meaning of the Public Health Act, 1875.

The appellants, as the urban sanitary authority, had, under section 150 of that Act, caused notices to be served on the owners of premises fronting on that street requiring them to sewer, level, pave, and flag the above street in the manner therein specified.

The requisite notices, plans, sections, estimates, and apportionments under section 150, requiring him to do the work, had been duly served, &c., upon the respondent, who had not complied therewith. The work was thereupon executed by the appellants, and the expenses had been duly apportioned upon the respondent according to frontage as required by the Act, and included work done, both to the carriage way and footway of the street. Demand for such expenses was duly made upon the respondent within six months of the complaint.

(a.) Reported by JOHN P. MELLOR, Esq., Barrister-at-Law.

No notice was given by the respondent under section 257 disputing the amount of the apportionment. He had not appealed to the Local Government Board under section 268, nor had he taken any steps to refer the matter to arbitration.

Boden-street was laid out by the owner of the land in 1871, and included the footways along the same, but although the sewers and kerbs were put down to the satisfaction of the local board of Litchurch, within whose district the street then was, the footway on which the premises of the respondent abutted had not been made or paved.

Boden-street was subsequently by a local Act brought within the borough of Derby.

At the hearing of the summons before the justices the respondent admitted his liability to pay for the work done to the footway in front of his premises, but disputed his liability for the carriage way. The appellants refused his offer to pay the expenses in respect of such footway, and contended that they were entitled to recover, if anything, the whole of the expenses claimed. Evidence to show that the carriage way was a highway repairable by the inhabitants at large was given on behalf of the respondent, to the effect that the carriage way had been taken over by the Litchurch Local Board; that it had been declared to be a highway; that fifteen years before, the carriage roadway had been completed and the sewers, kerbs, and grates laid; that such work had been done under the supervision of the local board; and that the repairs to the carriage way had been subsequently done by the board. Evidence to the effect that the carriage way and the footway were neither repairable by the inhabitants at large was given by the appellants.

The justices found as facts that at the time when the notices to do the work were given by the appellants the carriage way was a highway repairable by the inhabitants at large within the meaning of section 150 of the Public Health Act, 1875, but that the footways were never taken over by the Litchurch Local Board or by the appellants, and were not highways repairable by the inhabitants at large. They dismissed the summons against the respondent, and the above case was stated by the justices for the opinion of the court on the questions: (1) Whether, upon the facts and evidence stated, the justices were justified in their findings and decision? and (2) whether the respondent was precluded from raising before them questions as to his liability in respect of the carriage way, or of a part only of the sum claimed, by reason of his not having objected to the apportionment?

Section 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides that: "Where any other street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage way, footway, or any other part of such street is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same within a time to be specified in such notice. . . . If such notice is not complied with the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default according to the frontage of their respective premises, and in such proportion

as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses. The same proceedings may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large."

By section 181: "All questions referable to arbitration under this Act may, when the amount in dispute is less than twenty pounds, be determined at the option of either party before a court of summary jurisdiction, but the court may, if it thinks fit, require that any work in respect of which the claim of the local authority is made and the particulars of the claim be reported on to them by any competent surveyor, not being the surveyor of the local authority; and the court may determine the amount of costs incurred in that behalf, and by whom such costs, or any part of them, shall be paid."

By section 257: "Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same."

And by section 268: "When any person deems himself aggrieved by the decision of the local authority in any case which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties."

F. Low, for the appellants.—The justices were not justified in holding that Boden-street had become a highway repairable by the inhabitants at large, inasmuch as the local board could only declare it to be a highway when everything specified in section 150 of the Public Health Act, 1875, had been done—*i.e.*, when it had been "sewered, levelled, paved, flagged, metalled, channelled, and made good, and provided with the proper means of lighting to the satisfaction of the urban authority": *Attorney-General* v. *Bidder*, 47 J. P. 263. *Corporation of Portsmouth* v. *Smith*, 13 Q. B. D. 184, 32 W. R. Dig. 123, is distinguishable. At any rate, the justices had jurisdiction to deal with the matter, because it was admitted that the footway was not repairable by the inhabitants at large: *Wake* v. *Mayor, &c., of Sheffield, sub nom. Ex parte Wake*, 11 Q. B. D. 291, 31 W. R. Dig. 99, 12 Q. B. D. 144, 32 W. R. Dig. 123; *Midland Railway Co.* v. *Watton*, 34 W. R. 524, 17 Q. B. D. 30. The respondent omitted to question the apportionment within the time specified by section 257, and he was therefore debarred from disputing the amount of his liability, as to which the apportionment became conclusive.

H. Y. Stanger, for the respondent.—The notice to the respondent to do the work in the carriage road was *ultrâ vires* on two grounds—(1) because the evidence showed as the finding is that it had become a highway repairable by the inhabitants at large; and (2) because the local authority, when the work had once been done to their satisfaction, had no power to order it to be done over again: *Bonella* v. *Twickenham Local Board of Health*, 35 W. R. 578, 18 Q. B. D. 577, 36 W. R. 50, 20 Q. B. D. 63. The notice given by the local authority here being void, the apportionment founded upon it was a nullity: *Cook* v. *Ipswich Local Board*, 19 W. R. 1079, L. R. 6 Q. B. 451. The respondent had a clear right to show that he was under no liability as regarded part of the claim before the justices, because the carriage way was a highway repairable by the inhabitants at large: *Hesketh* v. *Atherton Local Board*, 22 W. R. 58, L. R. 9 Q. B. 4; *Eccles* v. *Wirral Sanitary Authority*, 34 W. R. 412, 17 Q. B. D. 107. And the question is not one of the correctness or otherwise of amount of the apportionment, but whether there is any liability to apportionment at all in respect of a distinct part of the work. *Wake* v. *Mayor, &c., of Sheffield* is clearly distinguishable on two grounds: (1) it was an application for a *certiorari* to quash an order of a magistrate, and it was, therefore, only necessary to show that there was jurisdiction over part of the subject-matter; and (2) the apportionment itself was there disputed, and what was required to be done, so far as the notice was concerned, was within the jurisdiction of the local authority to require; here the liability only is in dispute. If the surveyor had jurisdiction to make the apportionment, then the respondent's remedy would have been to go to arbitration as to the amount. But the respondent could not then have raised the question of jurisdiction as to part of the apportionment: *Bayley* v. *Wilkinson*, 12 W. R. 797, 16 C. B. N. S. 161. He must therefore have been entitled to raise that question before the justices.

He also referred to *Midland Railway Co.* v. *Watton*; *Parkinson* v. *Mayor, &c., of Blackburn*, 33 L. T. O. S. 119; *Shanklin Local Board* v. *Millar*, 29 W. R. 63, 5 C. P. D., Lopes, J., at p. 279; *Walthamstow Local Board* v. *Stainer*, [1891] 2 Ch. 606, Lindley, L.J., at p. 613, 40 W. R. Dig. 131; *Reg.* v. *Marsham*, 40 W. R. 84, [1892] 1 Q. B. 371, Lord Halsbury, L.C., at p. 376.

CHARLES, J.—In this case, in which we have been assisted by very able argument, the justices dismissed a summons which was taken out against the respondent by the local authority, who are appealing against that decision. From the statements in the case I think it is quite clear that there was a reference in the notice served on the respondent under section 150 of the Public Health Act, 1875, to a portion of the work which they were not entitled to require him to do, for they gave him a general notice to do work, not only with reference to the footpath, but also to the carriage way. Now there are two reasons why they were not entitled to give him that notice with reference to the carriage way. The first is that, according to the finding of the justices, the carriage way is now a highway repairable by the inhabitants at large, and if so, the jurisdiction of the local authority under section 150 is at an end.

It was said, on behalf of the appellants, that the justices were not warranted in that finding, but having regard to the facts found in both the original and the amended cases, I am not disposed to question the correctness of this view. It was argued that the facts found were not sufficient to entitle the local authority to give the notice under section 150, and the case of the *Attorney-General* v. *Bidder* 263, was relied upon to support that contention. All I can say to that is that although it may not be quite clearly found that everything which was required by section 152 to be done had been done, I, nevertheless, think that it was

sufficiently found, and the notice having been given, I cannot see my way to holding that the justices were wrong in their finding on that part of the case. The other reason against the notice given by the local authority in respect of the carriage way is that, according to the findings in the case, the carriage way had already been sewered, levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the local authority. That being so, I should have thought it clear that the local authority could not call on the frontager to do it over again, and moreover there is authority for that proposition, for it not only follows from the reasoning in the *Corporation of Portsmouth* v. *Smith*, but from a decision upon the section itself in the case of *Bonella* v. *Twickenham Local Board*, which decided that once the work had been done the local board could not call on the frontager to do it over again.

We have, therefore, to approach the case in the sense that the notice of the local authority contains matter which it ought not to have contained, and makes a requirement which the local authority had no power to make. But the notice also contains matter over which they had jurisdiction, for the footway had not become repairable by the inhabitants at large, and never had had any work done upon it under section 150 to the satisfaction of the local authority. So far, therefore, as the notice relates to that, there was jurisdiction to give it. What happened was this. The apportionment was made under section 150, and it was not disputed by the respondent within the time limited by section 257. The respondent was summoned to pay the amount apportioned upon him, and he admitted his liability for the footpath, but, although he was liable to that, he insisted that if the summons as to the whole was persisted in he had a good defence. The justices dismissed the summons, on the ground that it required him to pay for matters in respect of which he was under no liability. We have now to decide whether they were right in law.

Now there is no doubt that the apportionment of the surveyor is not conclusive of every defence; the frontager may say that the place is not a street or that he has no frontage, or that the place is a highway repairable by the inhabitants at large. He may set up these defences, or any other which is an answer to the whole of his legal liability. Here he cannot offer any of these answers to the whole, because he must confessedly pay for the footpath. Therefore, I think the question in this case, not going to the whole of the liability, becomes a question as to the amount of the liabity; and if so, the apportionment, not having been challenged in proper time, becomes conclusive. It was argued, however, that *Cook* v. *Ipswich Local Board* was an authority for saying that where the apportionment includes certain matters in respect of which the frontager is under no legal liability, he cannot be precluded from raising that defence before the justices when he is called upon to pay. But if that case is closely examined there is a good deal to be said against that view of it. The frontager there was sought to be charged, not only in respect of the street to which he had frontage, but also of another street, and the apportionment confused those streets together, and was consequently a bad apportionment. There it was contended in the Queen's Bench that a further apportionment which was made was bad, because a second apportionment could not be made. But the answer to that was that the first apportionment was a nullity, and therefore the second was good; and that was the view which was taken by the court, and which I thought for some time did support the respondent's argument in this case. But upon a more careful consideration of the matter it does not do so, because the parties have a double function to perform in such a matter. They have to consider the summons which is taken out for the apportioned amount, and they have also power, when the amount in dispute is under £20, to determine, as arbitrators under section 181, where the apportionment is challenged, whether it is good or bad, or whether the apportioned amount ought to be paid or not; and, as appears from Mr. Archibald's argument in *Shanklin Local Board* v. *Millar*, that is what was done in the *Ipswich case*. The first apportionment was thought to be bad, and a second one was made; the first was not a nullity in the sense of being absolutely void, but was considered to be so by the justices in their capacity of arbitrators, and, as was pointed out by Denman, J., in *Shanklin Local Board* v. *Millar*, Cockburn, C.J., in the *Ipswich case*, did not mean to say that the first apportionment there made was an absolute nullity, but that, as it was not enforceable, it was a practical nullity. But the *Ipswich case* came up for consideration in *Wake* v. *The Mayor, &c., of Sheffield, sub nom. Ex parte Wake*, where the argument also was that the apportionment was an absolute nullity for the same reason as the first apportionment in the *Ipswich case*. Now the apportionment in *Wake's case* clearly included matter in respect of which the local authority had no jurisdiction, for the notice commanded the frontager to pave, &c., in respect of land which was no part of the street on which his premises abutted, as well as the street on which they did so, and which so appeared from the notice and plans deposited. Therefore the local authority partly had and partly had not jurisdiction, which was the case here, for the local authority gave a notice which they had partly power to give and partly had not. I fail to see any distinction between this case and *Wake's case*. It is said that there is a distinction because the application there was for a *certiorari*, and it was therefore sufficient there to say that the justices had some jurisdiction over the matter, or over some part of it, and no doubt the language of Cave and A. L. Smith, JJ., in the court below gave some ground for that view. But the reasoning of two of the judges below and all the judges in the Court of Appeal is fatal to the respondent's case here, because, after the *Ipswich case* had been referred to and distinguished, it was pointed out that if justices have jurisdiction to entertain part of the subject-matter, they have jurisdiction to hear the complaint. Then the question arises, What are their powers when they come to entertain it? In *Wake's case* the stipendiary magistrate was of opinion that the whole of the work was within the jurisdiction of the local authority—in other words, that the whole of the expenditure was upon a street on which the premises fronted. On appeal to quarter sessions the recorder of Sheffield disagreed with that opinion, and held that a part only of the work was within the jurisdiction of the local authority, because he thought that a part of the work had to be done in a place which was not a street. But he nevertheless confirmed the order, because he considered he had only jurisdiction to review the order on a matter of arithmetic. His decision was that where there was jurisdiction as to part of the subject-matter, and the apportionment is not questioned in time, the apportionment becomes conclusive, and that the only mode of questioning it is by appeal to the Local Government Board. It is true that A. L. Smith, J., in the court below, offered no opinion, but in the Court of Appeal it was un-

doubtedly held by Esher, M.R., and Bowen, L.J., concurring, that the apportionment could only be questioned in that way. That opinion has, moreover, been reiterated by the Master of the Rolls in *Midland Railway Co.* v. *Watton*, where the appellant had been charged in respect of a longer frontage than he possessed—the Master of the Rolls said: "Assuming there is ground for the complaint which the appellants make as to apportionment, unfortunately they have not taken the steps required by the section for the purpose of disputing such apportionment, and, therefore, as it seems to me, they are prevented from raising this objection unless they can show that the surveyor had no jurisdiction to make the apportionment. It was argued that there was an excess of jurisdiction by the surveyor in respect of part of the sum apportioned. But it seems to me that if he had jurisdiction to make an apportionment against the appellants, which it is admitted he had, then the only possible objection is that he made such apportionment incorrectly; but that is only an erroneous exercise of jurisdiction, not an excess of jurisdiction. If he had made an apportionment on a person who was not a frontager in respect of any land there would be an excess of jurisdiction, but that is not the present case." Taking, therefore, the judgment of the Master of the Rolls in *Wake's case* together with his observations in the *Midland Railway Co.* v. *Watton*, even if I differed from his opinion, I should feel myself at liberty only to act upon these decisions. I own that my opinion has fluctuated somewhat, the cases differ to some extent, but I cannot say that I do differ from what has been said in those two cases in the Court of Appeal; but that, at any rate, is immaterial, because this court is bound by them. I feel the hardship upon the respondent, but I am of opinion that, having allowed the apportionment to stand, he cannot now take the objection he has endeavoured to raise, because it is an objection, not to the liability, but to the amount of the liability. The case must, therefore, be remitted to the justices with the expression of our opinion to that effect.

COLLINS, J.—I am of the same opinion. I will not deal with that part of the case which has been so completely disposed of by my brother Charles, and I will therefore proceed upon the assumption that the local authority had no right to deal with the carriage way at all, but that they had with regard to the footpath. The question is whether a notice as to both as made in this case is a nullity or not. I think when the argument for the respondent is sifted, it all comes back to one point, whether the original notice given by the local authority was one which they had no power to give, and one which could not found jurisdiction. If it could found jurisdiction, it is clear that the justices could not inquire into amounts. Now Mr. Stanger was driven to contend that the original notice was bad, that it could not found jurisdiction for the apportionment, and, therefore, could not found jurisdiction for the justices to hear the summons for the non-payment. But I think that *Wake's case* is an authority directly in point against that contention, and I cannot follow the distinction it is attempted to draw.

There a notice was served on the frontager ordering him to pave, &c., certain portions of land which were certainly no part of the street in question, and I observe that the notice was given in the form in schedule 4 of the Public Health Act, 1875, and if so it must have prescribed in detail the work which the local authority required the frontager to do, and shown the places where it was to be done by plans. Well, having given the notice, the local authority did the work, and the frontager was summoned for non-payment of the amount of the apportionment in consequence. The objection was raised that the magistrate had no jurisdiction, and, the application being for a *certiorari*, it became absolutely necessary to decide whether the original notice followed by the apportionment gave him jurisdiction to hear the matter. The court below and the Court of Appeal were of opinion that he had jurisdiction. The Master of the Rolls said: "It would be without the statute if no order at all could have been made by the local authority, but if any part of the expenditure had been made in respect of a street within the meaning of the statute, it is obvious that as to that part the local authority might fix the proper sum to be apportioned by the surveyor. Here it cannot be denied that a part of the expenditure was in respect of that which was a street within the meaning of the statute, and that the appellant was a frontager on that street, and it therefore follows that an order might be made upon him which would be an order within the meaning of the statute, and all that could be said against it would be that, although it might lawfully be made, it was a wrong order." No doubt he pointed out in an early part of his judgment that a remedy in respect of a wrong apportionment or order of the local authority would be under section 268 of the Act; but at the root of the decision was the principle that the original order was an order within the competence of the local authority to make, and that it therefore founded their jurisdiction; and if that is so, all the distinctions drawn between that case and the present by the respondent fall to the ground. Here the notice given by the local authority no doubt referred to the carriage way as well as to the footway, and there was no power to give that notice in respect of the carriage way. But that is not a distinction in point of law at all. This case appears to me to be on all fours with *Wake's case*, and every observation of the Master of the Rolls applies equally here.

The only difficulty arose in connection with the decision in the case of *Cook* v. *Ipswich Local Board*, not, indeed, upon the decision itself, but upon a point decided on the road to the decision. Proceedings were there taken to dispute an apportionment in which two streets had been lumped together. The magistrates treated the apportionment as a nullity. The surveyor then made a new apportionment, and that was the one in question. The jurisdiction of the surveyor to make the second apportionment was disputed, and the court said that the first apportionment might be treated as a nullity, and that decision at first sight presented a difficulty. But an examination of it shows that the decision that the first apportionment was a nullity was merely a decision, as the court thought, of the justices sitting as arbitrators. And I think that disposes of the argument here based upon that case. But it does not quite rest there, for I have found a case, the *Mayor, &c., of Manchester* v. *Hampson*, 35 W. R. 334, 591, in which the decision was the same on the same point. There the local authority included in their notice work which could not legally be included. The proceedings taken to enforce the apportionment failed, and a subsequent apportionment was made. Manisty, J., in giving judgment, said: "The substance of this case is that the original notice, though erroneous, was not void; and as the defendant refused to do any of the work, and did not dispute the first apportionment within three months, if the local board had proceeded for a charge upon the apportionment they would have been strictly entitled to succeed." Therefore, that is a clear decision that an apportionment based on a notice which contains some-

thing beyond what can legally be ordered to be done, though erroneous, is not void, and that case seems to me to be exactly in point here.

I am, therefore, clearly of opinion that the case must go back to the justices with an expression of our opinion that the order ought to be made against the frontager.

Judgment for the appellants; leave to appeal.

Solicitors for the appellants, *Satchell & Chapple*, for *Gadsby & Coxon*, Derby.

Solicitors for the respondent, *Greenfield & Cracknell*, for *W. Hollis Briggs*, Derby.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Oct. 25.

In re KING & BEESLEY.
Ex parte KING & BEESLEY. (*a*.)

Bankruptcy—Petitioning creditor's debt—Merger of debt in judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (2) (3).

The old common law of bankruptcy, that a debt, though merged in a higher security, such as a judgment, will still support a bankruptcy petition, remains unaltered by the Bankruptcy Act, 1883.

Appeal by the debtors from a receiving order made against them by the registrar of the Birmingham County Court.

Upon the 20th of April, 1894, the debtors executed an assignment for the benefit of their creditors. Upon the 27th of April the petitioning creditor, Homer, obtained a judgment against them for £64, and upon the 29th of April he filed a bankruptcy petition against them, setting forth that they owed him £64 on the judgment and £13 for goods sold and delivered, and that he held no security but the judgment; the act of bankruptcy alleged being the assignment for the benefit of creditors on the 20th of April. A receiving order was made.

The debtors appealed.

Muir Mackenzie, for the appellants.—The petitioning creditor has not proved his debt within the meaning of section 7 (2) of the Bankruptcy Act, 1883. The debt must be a debt recoverable by action. Here only £13 of the debt is recoverable by action, the rest is a judgment which has been obtained since the act of bankruptcy. The debt must be the same at the date of the act of bankruptcy and at the date of the petition. Here the debt has been changed and extinguished by the judgment, and a debt merged in a higher security will not support a petition when the merger has taken place since the act of bankruptcy. The Bankruptcy Act of 1883 has altered the old common law of bankruptcy, that a debt merged in a higher security will support a petition: *Ex parte Hayward*, 19 W. R. 833, L. R. 6 Ch. App. 546; *Ex parte Sadler, In re Whelan*, 27 W. R. 156; *Ex parte Sturt, In re Pearcey*, 20 W. R. 200; *King* v. *Houre*, 13 M. & W. 494; *Florence* v. *Jenings*, 2 C. B. N. S. 454; *Ex parte Charles*, 14 East, 197, 15 Ves. 256; *Bryant* v. *Withers*, 2 Rose, 8, 2 M. & S. 123. The proper course for the petitioning creditor in this case would have been to issue a bankruptcy notice founded upon the judgment, and allege non-compliance with such notice as the act of bankruptcy.

Yate Lee, for the respondent.—The debt alleged is a good petitioning creditor's debt. The reason why the creditor did not wait to issue a bankruptcy notice is that it was very important that the relation back of the trustee's title should be to the assignment of the 20th of April, so that he might get the advantage of all dealings with the debtors' property since that date. *Bryant* v. *Withers* is in my favour.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—This appeal must be dismissed. The appellants say that the debt here is a judgment debt extinguishing the original debt. I do not agree. The judgment has not extinguished the debt for the purpose of supporting the petition. I do not consider that the Bankruptcy Act, 1883, has altered the old common law. The case of *In re Griffiths, Ex parte Mostyn*, 1 W. R. 237, 3 De G. M. & G. 174, is conclusive against the appellants, and if further authority be needed the judgment of Lord Ellenborough in *Bryant* v. *Withers* is also against them. I say that the debt was in existence both at the date of the act of bankruptcy and at the date of the hearing of the petition.

KENNEDY, J.—I concur. For some purposes debts are merged in judgments, but not for the purposes of bankruptcy procedure. In the courts of common law this plea in bar was allowed for reasons such as that the court had already given its judgment upon the matter in dispute: *Smith* v. *Nicolls*, 5 Bing. N. C. 208.

Appeal dismissed.

Solicitors for the appellants, *T. A. Dennison & Co.*, for *Plant*, Dudley.

Solicitor for the respondent, *R. M. Kerr*, Halifax.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

House of Lords.

From C. A. (England). — July 30, 1894.

ROUSE (*Appellant*) *v.* BRADFORD BANKING CO. (*Respondents*). (*a*.)

Principal and surety—Banker and customer—Release of surety—Giving time—Retiring partner—Partnership debt—Covenant to indemnify.

In 1885 *R. and his three partners, who were jointly and severally indebted to the respondent banking company in a sum of over* £50,000, *dissolved partnership. By the deed of dissolution R. was to cease to carry on the business and the other members were to continue to do so, the debts of the firm were to be paid by the new partnership, and the members thereof covenanted with R. to indemnify him against those debts, provided always that R. should not be entitled to require them to pay, so long as he was kept indemnified. The bank were aware of this. The new firm opened a new account, but the old debt was kept distinct. In* 1889 *and* 1890 *the bank agreed to allow the new firm additional overdrafts upon certain terms, but there was in fact no agreement to give time or to alter the arrangements as to the existing liability for the amount of the old debt still unpaid.*

R was also a shareholder in the respondent banking company, and upon the new firm stopping payment the

(*a*.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

bank claimed a lien on R.'s shares in respect of the balance of the old debt remaining due.

Held (*affirming, on different grounds, the decision of the* Court of Appeal), *that the terms upon which the balance of the old debt was recoverable underwent no alteration, and, consequently, R. was still liable.*

Quære, *whether the proviso to the covenant of indemnity limiting the rights of the surety prevented the application of the ordinary rule.*

Semble, *where co-debtors arrange, as between themselves, either at the time when the debt was contracted or afterwards, that one of them shall only be liable as surety, the creditor, after he has notice thereof, must do nothing to prejudice the interest of the surety in any dealing with the principal debtor, or he will thereby release the surety.*

Oakeley *v.* Pasheller, 10 *Bli. N. S.* 548, 4 *Cl. & Fin.* 207, *and* Overend, Gurney, & Co. *v.* Oriental Financial Corporation, *L. R.* 7 *H. L.* 348, *discussed.*

This was an appeal from an order of the Court of Appeal (Lindley and A. L. Smith, L.JJ.; Kay, L.J., dissenting), 38 SOLICITORS' JOURNAL, 270, [1894] 2 Ch. 33, allowing the appeal and entering judgment for the respondents.

The facts are given in the Lord Chancellor's judgment, and are shortly as follows:—

The appellant (the plaintiff in the action) was partner with three other persons in a firm carrying on business as William Rouse & Co. In 1885 a deed of dissolution was executed by which William Rouse assigned his share in the partnership business to his three co-partners, which was henceforth to be carried on by them, and they covenanted with him to pay the debts of the firm and to indemnify William Rouse against them, with a proviso set out in the Lord Chancellor's judgment.

At this time the old firm were jointly and severally indebted to the respondent banking company in a sum of over £50,000, afterwards reduced to £34,000, and the partnership property was mortgaged to secure the same. William Rouse held fifty-five shares in the respondent banking company. The new firm carried on the business for some time and continued to bank with the respondent company. A new account was opened with the new firm, but the old debt was kept separate. The bank charged interest on the old debt and commission against the new firm. Further advances were made to the new firm, on certain terms which (in the view taken by the House of Lords) did not affect the old debt in any way, in 1889 and 1890. In 1892 the new firm stopped payment, and, the respondent company having claimed a lien upon the shares of William Rouse in their bank for the balance of the old debt, William Rouse brought an action by which he claimed that he was entitled to his shares free from any lien.

At the trial of the action Kekewich, J., held that the terms of the arrangements made in 1889 and 1890, when further advances were made by the bank, constituted a giving of time to the new firm for the payment of the old debt, and that the banking company had thereby lost their claim against the plaintiff in respect of the old debt. This decision was reversed by the Court of Appeal upon the ground that, having regard to the proviso in the covenant of indemnity contained in the deed of dissolution of partnership, the plaintiff had authorized the new firm to obtain time, if necessary, to pay the old debt, and, consequently, that the plaintiff was not released by time being given to the new firm by the banking company.

From this decision the plaintiff appealed.

Cozens-Hardy, Q.C., and *Renshaw, Q.C.* (*Frederic Thompson* with them), for the appellant.—The case comes within the principle of *Oakeley* v. *Pasheller*, 10 Bli. N. S. 548, 4 Cl. & F. 207. The creditor's assent to the arrangement between two debtors whereby one becomes a surety only is not necessary: *Oakford* v. *European and American Steam Shipping Co.*, 1 H. & M. 182, 11 W. R. Ch. Dig. 67; *Maingay* v. *Lewis*, 3 Ir. Rep. C. L. 495, 5 *Ibid.* 229; *Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, 20 W. R. 253, L. R. 7 Ch. App. 142, and in the House of Lords (*Overend, Gurney, & Co.* v. *Oriental Financial Corporation*), L. R. 7 H. L. 348; *Wilson* v. *Lloyd*, 21 W. R. 507, L. R. 16 Eq. 60, Bacon, V.C., at p. 70. In *Swire* v. *Redman*, 24 W. R. 1069, 1 Q. B. D. 536, Blackburn, J., took a different view, but it is inconsistent with *Bailey* v. *Edwards*, 12 W. R. 337, 4 B. & S. 761, 772. There was a binding agreement on the part of the respondents to give time.

Finlay, Q.C., and *Vernon Smith* (*B. C. Gardner* with them), for the respondents.—The overdraft was allowed on the usual terms on which overdrafts are granted by bankers, and it is an arrangement terminable on notice: *Baynton* v. *Morgan*, 37 W. R. 148, 22 Q. B. D. 74; *Oakeley* v. *Pasheller*. Smith, L.J.'s view of *Oakeley* v. *Pasheller*, is the correct one.

Cozens-Hardy, Q.C., replied.

Lord HERSCHELL, L.C.—The appellant, who was the plaintiff in the action, was formerly in partnership with certain other persons carrying on business as worsted spinners under the firm of William Rouse & Co. The partnership between them was dissolved by a deed of the 17th of April, 1885. By that deed William Rouse was to cease to carry on the business, and the other members of the firm, John Frederick Rouse, Frank Rouse, and Herbert Rouse, were to continue to do so. By that deed the debts of the firm were to be paid by the new partnership, who were to take over its assets, and they covenanted with William Rouse, the retiring partner, to indemnify him against those debts. That covenant contained a proviso to which I will call attention presently.

At the time of the dissolution, amongst the debts owing was a debt of upwards of £50,000 to the Bradford Banking Co. At the time when the new firm failed, some years afterwards, the debt had been reduced below £50,000, but a considerable amount was still owing to the bank, and this action was brought to recover it, or rather to enforce their right to hold certain shares belonging to William Rouse as security for it. The answer to the action was that William Rouse had been discharged from all his liability to the bank by reason of transactions between the bank and the new firm. The case was put in this way: that upon the dissolution of the firm under the deed which I have mentioned, as between themselves the continuing partners became the principal debtors, and William Rouse merely a surety for them; and that inasmuch as the bank had notice of the deed of dissolution and its terms, it was brought to the knowledge of the bank that such was the relation of the parties after that date. Then it was said that the bank, thus knowing that William Rouse had become surety only as between him and his former co-partners, gave time to the continuing members of the firm for the payment of the debt in question, and so discharged William Rouse. It was contended indeed, alternatively, that there had been novation, and that the bank had accepted the new firm as their debtors in place of the co-debtors who had previously been liable to them, and that, by this novation, William Rouse was discharged. That argument has not found favour with any of the learned judges before whom the case has come, and your lordships have already

intimated that, in your opinion, it cannot be supported.

With regard to the question whether time was given so as to discharge the surety, the general principle of equity that where there is a contract with two persons, one as principal and the other as surety, and time is given to the principal without the assent of the surety, and without the rights of the surety being reserved, the right against the surety has gone, was not contested; but it was said to be inapplicable to such a case as the present, when those who as between themselves became principal and surety had been originally both of them principal debtors to the creditor. On the other hand, it was contended that that made no difference, and that the rule of equity was as applicable to a case where, two having both been principal debtors, one afterwards became, with notice to the creditor, a surety, as it was to a case where the contract between him and the creditor was one of principal debtor and surety. Reliance was placed for this proposition upon the case of *Oakeley* v. *Pasheller* decided in this House. The case has been very much discussed, and inasmuch as I believe all your lordships have formed a clear opinion upon the argument which has been addressed to you on that point, it is probably well to express it, although the decision in this House does not turn upon the conclusion arrived at with regard to *Oakeley* v. *Pasheller*.

In *Oakeley* v. *Pasheller* Lord Lyndhurst, in delivering judgment, said this: "Now, in consequence of an arrangement which took place between the representatives" (that is, the representatives of the retiring partner) "and the new partnership" (in that case an additional partner was taken in when one of the partners went out) "they stood in the character of sureties; and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new position and exposes him to risks or contingencies which he would not otherwise be liable to." The proposition is there laid down in terms quite unequivocal by Lord Lyndhurst affirming Lord Brougham as Lord Chancellor, and the Master of the Rolls.

It has been suggested, in a case to which I will call attention in a moment, that that case turned upon the fact that the creditor had been a party to an arrangement by which the representatives of the deceased and retiring partner were, as between him and them, to be sureties only. I cannot myself find any trace of such an arrangement as being the foundation, in any respect, of the judgment of Lord Lyndhurst.

In the case of the *Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, before Lord Hatherley when Lord Chancellor, he referred somewhat elaborately to the facts in *Oakeley* v. *Pasheller*, and he said: "There is really in substance no hardship; and that is one reason why I dwelt at some little length to show that it was not a doctrine which was at all shaken by the right of the creditor to preserve his remedies against the surety; and if there was any small hardship they could have freed themselves from that hardship and all difficulty whatever. A person comes and tells them that since the debt was contracted circumstances have arisen by which he is in fact surety and the other debtor is the principal debtor. Thereupon all that they have to do is to give the principal debtor time and reserve their rights against the surety." It is quite clear, from the language used in the earlier part of the judgment, that Lord Hatherley considered he was really following the principle laid down in *Oakeley* v. *Pasheller*. The case of the *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* was this: that two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors, and he afterwards obtained notice of the fact that one of them was a surety only. It was held that when once he had received that notice, he could not give time to the one who, as between themselves, was the principal debtor, without discharging the surety.

That case came before this House on appeal from the decision of Lord Hatherley as Chancellor, and the judgment was affirmed. Lord Cairns said: "It appears to me that after the case which was referred to at the bar, decided by your lordship's House, of *Oakeley* v. *Pasheller*, it is impossible to contend if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." That is a distinct and clear expression of opinion as to the limits and the grounds of decision in *Oakeley* v. *Pasheller*, and it is in accordance with the view which I have myself formed of that case. And in this House, as I have said, the decision of Lord Hatherley was affirmed, and therefore the proposition was actually applied in a case where the two debtors had both been believed to be principal debtors by the creditor at the time the contract was entered into.

I own I am quite unable to see any distinction, even if *Oakeley* v. *Pasheller* did not exist, between the case of *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* and the present case. If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case (for otherwise there would be a distinction, resting on no intelligible or solid basis) that where, although both principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, a dealing by the creditor, in the way of giving time, with the one who remains the principal debtor discharges the surety.

So far I have expressed the opinion that on the point of law relied on, namely, that if it can be shown that there was a giving of time to the new firm this would release the debtor the plaintiff, I think the case is made out, unless the proviso to the covenant of indemnity in the deed of partnership alters the rights of the parties. The proviso is that William Rouse "shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said John Frederick Rouse, Frank Rouse, and Herbert Rouse" (the continuing partners) "so long as the said William Rouse, his heirs, executors, and administrators, shall be indemnified according to the covenant last hereinbefore contained." In the view taken by the learned judges in the court below, the fact that this proviso was added to the covenant of indemnity prevented the ordinary doctrine to which I have been referring applying, inasmuch as, in the opinion of those learned judges, the fact of giving time would not have prejudiced any rights which William Rouse was possessed of, the proviso having by agreement between him and his co-partners limited those rights to an extent which would prevent his being prejudiced. That is certainly a question of some gravity. I do not intend, because in the view that I take it is unnecessary, to express a decided opinion upon it, but I own that I

should entertain great doubts and I should have to give further consideration to the question before I could give any assent to the proposition which has been the foundation of the view of two of the learned judges in the court below.

I come now to the question which of course lies at the root of the defence, whether it has been made out that the bank gave time to those who had become principal debtors. There are two transactions relied on for the purpose of establishing this. It was upon one of these that the learned judges in the courts below pronounced judgment. It became unnecessary to consider the other because they came to the conclusion that the first of these did amount to a transaction by which there was an agreement to give time. I cannot but think that some of the considerations which have been dwelt upon in your lordships' House were not fully present to the minds of the learned judges in the court below in dealing with this part of the case. Very little is said upon this question. It is somewhat summarily dismissed as being clear and free from difficulty and as being a case in which there was a binding agreement to give time.

Now we have no evidence as to what actually passed between the parties on the occasion when the suggested agreement was come to. It is of course obvious that time is only given within the meaning of the rule to which I have been referring if there is a binding agreement arrived at for good consideration. There was here no written agreement, and we are left to find out what the agreement was from a perusal of certain minutes of the bank with reference to the transaction; but of course those minutes can only be construed, and will only assist us to arrive at what the real bargain between the parties was, if we consider them in the light of the relation between the parties at the time when those minutes were made. We must look at their position before and after in order to understand the minutes and to arrive at any just conclusion as to what the parties intended to agree to, and did agree to.

Now there is a minute of the 16th of February, 1889, which is in these terms: "Mr. John F. Rouse attended and submitted the balance-sheet of his firm up to the 31st of December last and made application for an overdraft of £53,046 until the 14th of March." Before saying anything upon those words, I think it is essential to see what arrangement for overdraft had existed, if any, prior to that date. A minute is put in of the 31st of December, 1886, which is in these terms: "Resolved that the account of Wm. Rouse & Co. may be for a short time in excess of the normal limit of £50,000 by £2,000." That is the earliest of the minutes before us; but at the time of the dissolution there was an overdraft to an extent a little exceeding £50,000, that is to say, in the time of the old firm. I have no hesitation in drawing the inference under those circumstances that there had been an agreed overdraft with the old firm, which was continued afterwards, for a limit of £50,000, and that that agreed overdraft with that normal limit was in existence on the 16th of February, 1889, when the minute of that date was made. What, then, is the meaning of "making application for an overdraft of £53,046 until the 14th of March"? It seems to me to be no more than this—an application that the agreed overdraft of £50,000 which had existed for many years should for a limited period of time be increased to £53,000. But I do not think it was intended that the rights of the parties, whatever they were, as regards the £50,000 overdraft should be in any respect altered, or that the £53,000 overdraft, so long as it existed, should be an overdraft meaning anything else or on any other terms than those which had been applicable to the agreed overdraft of £50,000. Certainly I should be very much surprised if it was ever intended by the parties that supposing (which is the assumption of the appellant and which I will make for the purposes of this case) that prior to this agreement at any time a writ had been issued or a claim made for the £50,000, the right to claim or to sue for the £50,000 was to cease during this term until the 13th of March because there was for that time to be an increase of the overdraft. I think it is manifest from the subsequent minutes that this £50,000 overdraft was regarded by both parties as continuing after the 14th of March. This is not a separate application for a single transaction of an overdraft of £53,000 for a certain time, because there was an overdraft before and there was an overdraft afterwards. It is obvious, therefore, that all that this transaction had relation to was an increase of that overdraft which began before and was continued, and was understood by both parties to be so. If that be the true view, it seems to me to be conclusive that there was here no agreement to give time or to alter in any respect the relation between the parties, because, in my judgment, whatever could have been done in the way of enforcing any right to this £50,000 before the 16th of February continued just as much within the power of the bank, after the 16th of February and down to the 14th of March, and indeed thenceforward.

It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is, of course, of the commonest. It may be that an overdraft does not prevent the bank, who have agreed to give it, from at any time giving notice that it is no longer to continue, and that they must be paid their money. This, I think, at least, it does; if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect I think it has, in point of law; whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature. It may be, therefore, that the parties simply contracted upon the basis of that state of things, that there is a legal right throughout for the bank at any time to sue for the money. But whatever the right was, it seems to me that that right was in no way diminished, but continued in full force and effect, notwithstanding the arrangement of the 16th of February. That, of course, is sufficient to dispose of that part of the case.

It was asked by Mr. Renshaw what was the meaning, then, if the bank might thus have sued, of saying that there was to be an overdraft until the 14th of March. It had the effect I have just described—precisely the same effect as the previous overdraft had—that just as before they could not have refused to honour drafts, within the limit, drawn and put in circulation before they had given notice, so it appears to me that between that date and the 14th of March they could not refuse to honour drafts drawn within the greater limit, namely, up to £53,000, unless they had given notice that the overdraft would be withdrawn.

It is not necessary to say whether this agreement was entered into for valuable consideration or not. If it was not, of course it must wholly fail; but inasmuch as I think there was no agreement to give time in the sense required, it is not necessary to inquire whether the minutes disclose a contract for valuable consideration or not.

So much for the first transaction. The second transaction arose in this way. At that time the limit had been reduced from £50,000 to £45,000. That took place on the 9th of April, 1889, when there was a resolution, "That the limit of the account of William Rouse & Co. for the future be £45,000." They had reached that limit and were anxious that certain bills should be met. The bills amounted to the sum of £18,000, and they were maturing at various dates from the 13th of August till the 18th of November, 1890. The firm were very anxious that the bank should undertake to meet those bills. The bank were unwilling to do this without further security, inasmuch as it was beyond the £45,000 limit. Upon that an agreement was entered into by which two persons each became surety to the extent of £2,500 to the bank, and in consideration of that the bank undertook that if Messrs. William Rouse & Co. paid into the bank before the 30th of September sums amounting to not less than £10,000, they would meet those bills. The security makes it clear that no part of it was given for the £45,000; it was only for such excess as there should be in the amount due from the firm to the bank over £45,000. The last clause is in these terms: "It is hereby agreed and declared that this guarantee and the liability of the surety thereunder shall absolutely cease and determine when and so soon as the balance owing by the said principals to the said company shall after the 18th day of November next be reduced to the sum of £45,000." No doubt it was in the contemplation of the parties that it would not be until the 18th of November that it would be reduced to the sum of £45,000. £45,000 was the limit; with that limit the bank were content; and this was an advance beyond that limit, and it was because they were advancing beyond that limit that they required this fresh security.

Now, it seems to me that this entire agreement had relation only to this new advance, to this undertaking to meet those bills which were in excess of the limit, and that it was not intended by any of the parties to it that it should affect any of the rights which the bank possessed in relation to the sum within the limit, namely, £45,000. No security was given for that; the bank got nothing in respect of it; and it would be strange indeed if, the bank getting nothing in respect of it because they entered upon greater liabilities, which greater liabilities alone were secured to them by any fresh security, it should be held that they gave up, or that they intended to give up, or that the debtor supposed that they gave up, any rights which they possessed in respect of the £45,000. For these reasons I think, on the construction of that document, the true conclusion as to the intention of the parties is, that upon that occasion also there was no binding agreement to give time as to this £45,000, which alone could establish the claim that the plaintiff sets up.

For these reasons I move your lordships that the judgment appealed from be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—When two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that, *inter se*, one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley* v. *Pasheller* and *Overend, Gurney, & Co.* v. *Oriental Financial Corporation*.

I am not prepared to affirm, upon the evidence before me, that the bank twice gave time to their debtors. In my opinion, all that they did on the first occasion was to substitute a wider for a narrower limit of overdraft during a specified period. But, save as to its amount, the overdraft was to remain in all respects the same as before. The terms upon which the balance due was recoverable underwent no alteration. On the second occasion there is still less ground for suggesting that time was given.

I think it right to state that as at present advised I am not prepared to assent to the view taken by two of the learned judges of the Appeal Court with regard to the effect of the proviso. Seeing that it has become unnecessary to decide the point, I shall not waste time in discussing it.

I therefore concur in the judgment which has been proposed by the Lord Chancellor.

Lord ASHBOURNE.—I entirely concur in the opinions which have been expressed by my two noble and learned friends who have already spoken.

Lord MACNAGHTEN.—I concur.

Lord MORRIS.—I concur.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellant, *Field, Roscoe, & Co.*, for *Taylor, Jeffery, & Jessop*, Bradford.

Solicitors for the respondents, *Patersons, Snow, Bloxam, & Kinder*, for *Gardiner & Jeffery*, Bradford.

Lunacy.

(Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) Nov. 5.

In re HINCHLIFFE. (*a*.)

Practice — Affidavit — Documents annexed — Right of inspection — Lunatic — Committee — Final discharge — Documents relating to lunatic's estate.

Although, under the present practice, documents exhibited to an affidavit are not filed along with the affidavit, that is a mere rule of convenience, and does not affect the right of inspection.

Where, therefore, an affidavit was filed which referred to certain documents as "annexed" thereto, it was held that any person having a right to see the affidavit had a right to see the documents annexed.

The executor of a deceased lunatic asked for an order upon the committee of the lunatic's estate to hand over to him certain documents relating to the lunatic's estate and to the committee's management thereof. The committee had not received a final discharge.

Held, that the application was premature, and must be refused.

Motion.

Emma Jane Hinchliffe, a lunatic, was entitled to a share of certain property under the will of one Roberts; her sister Mrs. Fereday, who had acted as the committee of her estate, and a third sister, who was of sound mind, being also entitled to shares in the same property. The committee and the sane sister were of

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

opinion that the trustees of Roberts' will had dealt improperly with this property, and contemplated taking proceedings against them. Under these circumstances they desired to join the lunatic as co-plaintiff. With this view the committee took the necessary proceedings to obtain the master's consent, and, on the 6th of January, 1891, filed an affidavit, in paragraph 17 of which she stated that she had taken the opinion of counsel upon the question of joining the lunatic, and that the instructions to counsel and opinions, were annexed thereto and marked "C." The next paragraph referred to certain other instructions annexed thereto and marked "D." Acting upon the strength of this affidavit, the master, on the 21st of January, 1891, granted leave to join the lunatic. The writ in the action was issued on the 26th of January, 1891, the lunatic being an original co-plaintiff.

The lunatic died in 1893, having, by her will, appointed E. R. Smith executor thereof. On the 15th of February, 1894, the executor was added as a defendant to the action. Upon the lunatic's death the committee handed to the executor a number of papers relating to the lunatic's estate. These papers included a copy of the affidavit filed on the 6th of January, 1891, but did not include the instructions to counsel and opinions annexed thereto, nor certain transcripts of accounts, draft costs of the next of kin and committee of passing her accounts, copies of various affidavits, office copies of accounts, and certain other documents.

Upon the trial of the action, certain allegations against the defendants being withdrawn, all costs were reserved. Since the trial of the action the defendants had threatened to ask for an order that the plaintiffs should pay all the costs of the action, or, at any rate, the costs caused by the allegations which were withdrawn.

On the 29th of June, 1894, the executor took out a summons asking that the committee might be ordered to produce to him the cases for the opinion of counsel and the opinions thereon exhibited to the affidavit of the 6th of January, 1891, and also to deliver up to him all papers and documents in her possession in any way relating to the estate of the lunatic, or to the dealings of the committee therewith or to her management thereof.

On the 25th of July the master refused to make the order asked for by this summons, and on the 9th of August, 1894, Kay, L.J., sitting in lunacy, upheld the master's refusal.

This was a motion by way of appeal from the decision of Kay, L.J.

Henry Terrell, for the executor.—I am desirous of saving the estate of the lunatic from liability to costs, and I am entitled to see the cases and opinions which are annexed to the affidavit, and acting upon which the master gave leave to join the lunatic as co-plaintiff. Under the present practice, exhibits to an affidavit are not filed with the affidavit, but that is merely a rule of convenience, and does not affect the executor's right to the production of these documents.

Willis Bund, for the committee.—There is in general no obligation to produce documents referred to in pleadings or affidavits. In the present case the documents are the property, not of the lunatic or her estate, but of the committee. The executor should have applied in the action, for discovery, in which case these documents, as they affect the committee's title solely, would have been held privileged. The lunacy is at an end, and the court has no jurisdiction to order production of a committee's private papers. As to the draft accounts and office copy accounts, the application is premature, inasmuch as the committee has not yet received her final discharge.

He referred to *Webster* v. *Whewall*, 28 W. R. 951, 15 Ch. D. 120.

Henry Terrell, in reply upon the question of the draft accounts and office copy accounts.—I ask for an order that the committee may make an affidavit of documents. [Lord HERSCHELL, L.C., referred to *In re Ferrior*, 16 W. R. 298, L. R. 3 Ch. App. 175.] If I am not entitled to that, I confine myself to asking for the lunatic's property to be handed over. The committee has these office copy accounts, which can be of no use to her, but which are necessary to enable me to administer the estate.

Lord HERSCHELL, L.C.—This is an application in the lunacy of Emma Jane Hinchliffe, who is now dead, for an order that her executor should be permitted to have inspection of certain cases and opinions referred to in terms which I will allude to presently, and made exhibits to an affidavit of her committee, dated the 6th of January, 1891. It appears that the committee was the sister of the lunatic, and there was a third sister who was sane. The committee and the sane sister entertained the view that the trustees of certain property, in which they were interested with the lunatic, had dealt improperly therewith, and they contemplated taking proceedings against them. They desired to join the lunatic as plaintiff in those proceedings, and applied to a master in lunacy for an order permitting them to do so. Of course the joinder obviously so far affected the lunatic's rights as possibly to subject her to the payment of costs, In order to obtain the consent of the master to this joinder, the committee made an affidavit, in which she said that she had taken the opinion of counsel, as she and her sisters were interested in the question of the liability of the trustees. Then her affidavit states that the instructions to counsel and opinions are annexed to the affidavit and marked "C." The next paragraph refers to certain other instructions which are annexed and marked "D." On that affidavit the master granted leave to join the lunatic, and by so doing, as I have previously said, necessarily affected her rights. The lunatic is now dead, and this affidavit which was made in lunacy is handed over by the committee to the executor. He, being in possession of it, sees that the master was induced to act by the production of the documents which I have before referred to. Thereupon the executor says that he is entitled to see those documents. Mr. Willis Bund, on behalf of the committee, denies that right, and has persuaded Kay, L.J., to hold the same view, on the ground that those documents are not the property of the lunatic, but of the committee. Mr. Willis Bund also suggests that these are documents of the committee which are privileged, and which she is not compellable to produce. But I think the questions of property and privilege have nothing to do with the application now made. The opinions of counsel may be the property of the committee taken for her own protection, and it may be that she could not have been compelled to produce them. But the committee chooses herself to put them before the master as part of an affidavit in order to induce him to act in a manner which may possibly prejudice the lunatic's rights. I am at a loss, in the absence of authority, to see the ground on which the lunatic, if she became sane, or her executor if she died, could be refused inspection of these documents made in lunacy. Though they are not filed, they form as much a part of the affidavit as if they were actually annexed and filed. For these reasons it seems impos-

sible to hold that the committee can refuse inspection of these documents.

The other application is made on behalf of the executor that the committee should be ordered to hand over certain documents which are said to be the property of the lunatic, and are in the possession of the committee. They consist of draft and office copy accounts. The committee has not yet received her final and absolute discharge, and avowedly the executor says he desires to examine those accounts in order possibly to impeach the action of the committee. When the committee is absolutely discharged, if she still insists on retaining property of the lunatic which she obtained as committee, the court may interfere in the manner pointed out by Rolt, L.J., in *In re Ferrior*; but until that time it would be premature for the court to do so. Therefore there will be no order as to the second part of the motion, and there will be no costs of the application.

LINDLEY, L.J.—I agree. I think that the cases and opinions referred to in the affidavit as annexed thereto do not turn on property or privilege. It is a mere matter of convenience that they were not lodged in the master's office. Anyone having a right to see the affidavit has the right also to see the exhibits annexed thereto. As to the other documents, it is not in accordance with the practice in lunacy to make such an order. The reason why committees produce such documents is because an action will lie against them if they do not. I quite agree that on this part of the case the application is premature, and I also think there should be no costs.

A. L. SMITH, L.J.—I am of the same opinion. The position in regard to these cases and opinions is just the same as if they had been set out in the affidavit. If a person is entitled to see an affidavit he must also be entitled to see what is annexed thereto.

Solicitors, *Frith Needham; Kennedy, Hughes, & Kennedy*, for *Colmore & Monckton*, Birmingham.

Court of Appeal.

From Chan. Div. (Lindley and A. L. Smith, L.JJ.) — Nov. 9, 10.

KITTS v. MOORE & CO. (a.)

Practice — Injunction — Arbitration — Jurisdiction — Action impeaching agreement containing arbitration clause—Liverpool Corn Trade Association Rules—Judicature Act, 1873, *s.* 25, *sub-section* (8).

The court has jurisdiction to grant an injunction to restrain arbitration proceedings until the trial of an action in which the agreement containing the arbitration clause is itself impeached.

North London Railway Co. *v.* Great Northern Railway Co., 31 *W. R.* 490, 11 *Q. B. D.* 30, *and* Wood *v.* Lillies, 61 *L. J. Ch.* 158, 40 *W. R. Dig.* 8, *explained and distinguished.*

Mylne *v.* Dickinson, *Coop. Ch. Rep.* 195, *and* Maunsell *v.* Midland Great Western (Ireland) Railway Co., 11 *W. R.* 768, 1 *H. & M.* 130, *approved and followed.*

Appeal by the defendants from the judgment of Lord Russell of Killowen, C.J., sitting as vacation judge.

This appeal raised a question as to the jurisdiction of the High Court to grant an injunction to restrain arbitration proceedings, under the following circumstances.

On the 13th of June, 1893, the defendants by telegram informed the plaintiff that they thought they could buy a cargo of hay from a foreign merchant at £5 per ton; the plaintiff at once wired to the defendants to take the cargo at that price, and that the plaintiff would go joint account with the defendants, and the defendants on the same day (the 13th of June) wired in reply that they were working the matter and expected a firm offer from the foreign merchant next day. The defendants in fact purchased the cargo on the 14th of June at a price of £4 15s. a ton.

On the 19th of June the defendants sent to the plaintiff a sold note (dated the 15th of June) purporting to be an agreement for sale of the cargo by the defendants to the plaintiff at £5 a ton, subject to the terms of the printed rules of the Liverpool Corn Trade Association; the sold note was accompanied by a memorandum, dated the 19th of June, that the defendants should take one-half joint interest with the plaintiff in the cargo. On the receipt of this sold note and memorandum the plaintiff on the same day (the 19th of June) wrote to the defendants that he confirmed the same in all respects. Rule 17 of the rules of the Liverpool Corn Trade Association provided that "all disputes arising out of transactions connected with the trade shall be referred to arbitration."

The cargo on its arrival in England was found to be short in weight, and the defendants rejected it and obtained from their vendor £400 compensation for breach of contract. The plaintiff thereupon claimed £200 as being the plaintiff's half share of the profit made, but the defendants claimed that as they had in fact bought the cargo at £4 15s. a ton, they were entitled to retain in the first instance, as profit to themselves, the difference between that price and £5 a ton. The plaintiff, however, alleged that the correspondence showed that on the 14th of June (the date when the defendants purchased the cargo) a partnership agreement subsisted between him and the defendants, whereby they were respectively jointly interested as partners in the whole transaction as to the cargo; that the plaintiff had accepted the sold note and memorandum on that footing, and in the belief that the defendants had bought the cargo at the price of £5 a ton, and consequently that the defendants as partners could not make any secret profit out of the transaction.

On the 15th of September, 1894, the defendants gave notice to the plaintiff claiming arbitration and appointed an arbitrator. The plaintiff refused to arbitrate, and on the 28th of September issued the writ in this action, whereby he claimed a declaration that a partnership existed between him and the defendants in respect of the cargo purchased by the defendants, and asked for an injunction to restrain the defendants proceeding with any arbitration having reference to any dispute between the plaintiff and the defendants in respect of the cargo or of the partnership. After issuing the writ the plaintiff immediately moved for an injunction in the terms of the writ.

The motion came on for hearing before the Lord Chief Justice, sitting as vacation judge, when it was contended on behalf of the defendants that the court had no jurisdiction to restrain the arbitration proceedings, and the case of *North London Railway Co.* v. *Great Northern Railway Co.*, 31 W. R. 490, 11 Q. B. 30 (a decision of the Court of Appeal), was relied upon as an authority for that proposition. The Lord Chief Justice, however, declined to accede to this argument, and granted an injunction restraining the

(a.) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

defendants proceeding with the arbitration until the trial of the action.

The defendants appealed.

T. Willes Chitty, for the appellants.—Assuming that the plaintiff's construction of the transaction is correct, the only result would be that the arbitration proceedings would be futile, and a nullity; but even if that should be the result, the court has no jurisdiction to restrain the arbitration: *North London Railway Co.* v. *Great Northern Railway Co.*; and the arbitration proceedings in that case were not founded (as has been supposed) upon a claim made under the Lands Clauses Consolidation Act, 1845. In arbitration proceedings taken under the Lands Clauses Act, 1845, it is now well settled that the court has no jurisdiction to stay such arbitration by injunction: *South-Western Railway Co.* v. *Coward*, 5 Rail. Cas. 703, and *East and West India Docks Co.* v. *Gattke*, 3 Mac. & G. 155, in which the opinion of Cottenham, L.C., to the contrary in *London and North-Western Railway Co.* v. *Smith*, 1 Mac. & G. 216, was not followed; and in such cases section 25, sub-section (8), of the Judicature Act, 1873, has not extended the jurisdiction of the court to grant an injunction (see *London and Blackwall Railway Co.* v. *Cross*, 34 W. R. 201; 31 Ch. D. 354). But the case of *North London Railway Co.* v. *Great Northern Railway Co.* was not a case arising under the Lands Clauses Act, and it shows that the doctrine that the court has no jurisdiction to restrain arbitration proceedings is not confined to cases under the Lands Clauses Act, but extends to all arbitration proceedings; and the doctrine laid down in the *North London Railway case* was followed by Kekewich, J., in *Farrar* v. *Cooper*, 38 W. R. 410, 44 Ch. D. 323, and by Chitty, J., in *Wood* v. *Lillies*, 61 L. J. Ch. 158, 40 W. R. Dig. 8, which last case is exactly in point. [A. L. SMITH, L.J., referred to the observations of Lord Halsbury in *Monson* v. *Tussauds*, [1894] 1 Q. B. 671.] Lord Halsbury's view as to the effect of section 25, sub-section (8), of the Judicature Act, 1873, was dissented from by the majority of the Court of Appeal in that case.

Marten, Q.C., and *P. S. Stokes*, for the plaintiff, the respondent.—The alleged agreement relied upon by the defendants, and which contains the arbitration clause, is contained in three documents, the so-called sold note dated the 15th of June, the memorandum of the 19th of June, and the plaintiff's letter of the 19th of June confirming the same; but the plaintiff's contention is that the prior correspondence shows that on the 14th of June (the date when the defendants in fact purchased the cargo of hay) there existed a concluded partnership agreement between the plaintiff and the defendants, whereby they were respectively jointly interested as partners in the whole transaction as to the cargo of hay, and that the plaintiff's acceptance of the sold note and the memorandum of the 19th of June was given upon that basis and in that belief. The action brought by the plaintiff claiming a declaration of partnership is in effect an impeachment of the agreement set up by the defendants. It has always been the practice of the Court of Chancery, long before the Judicature Act, 1873, where a suit was brought to rectify or set aside an alleged agreement which contained an arbitration clause, to restrain arbitration proceedings pending the trial of the suit impeaching the agreement itself: *Mylne* v. *Dickinson*, Coop. Ch. Rep. 195; *South-Western Railway Co.* v. *Coward*; and *Maunsell* v. *Midland Great Western (Ireland) Railway Co.*, 11 W. R. 678, 1 H. & M. 130; and section 25, sub-section (8), of the Judicature Act, 1873, has at all events not curtailed the jurisdiction of he old Court of Chancery to grant injunctions. The cases of *North London Railway Co.* v. *Great Northern Railway Co.* and *Wood* v. *Lillies* are not in point, because in neither of those cases was there an action pending to impeach the agreement containing the arbitration clause; in the present case there is such an action pending.

They also referred to *Witt* v. *Corcoran*, L. R. 8 Ch. App. 476 n.; *Malmesbury Railway Co.* v. *Budd*, 2 Ch. D. 113, 24 W. R. Dig. 9; and *Sissons* v. *Oates*, 10 Times L. R. 392.

T. Willes Chitty, in reply.—The plaintiff in his writ does not claim to have the agreement relied upon by the defendants set aside or rectified, nor does he allege fraud or misrepresentation againt the defendants. [LINDLEY, L.J.—He claims to have a declaration that the whole transaction was one of partnership, and that is inconsistent with the agreement upon which the defendants rely; the grounds upon which the plaintiff relies will doubtless be shown when the statement of claim is delivered.] In the *North London case* the Court of Appeal has laid down the doctrine that the High Court has no jurisdiction to restrain arbitration proceedings (except, perhaps, on the ground that there is corruption on the part of the arbitrator), and this court ought not now to do anyanything to unsettle the practice which has grown up since that decision. The old case of *Mylne* v. *Dickinson* is inconsistent with the *North London case*, and besides, that was a decision given *ex parte*. [LINDLEY, L.J.—Lord Eldon did not usually come to any conclusion hastily.] In *Sissons* v. *Oates* the *North London case* was not cited; and *Malmesbury Railway Co.* v. *Budd* was a case of corruption on the part of the arbitrator.

LINDLEY, L.J.—The question raised on this appeal is one of some practical importance, and it is not altogether free from difficulty; but I do not feel that there is so much difficulty about it as counsel for the appellants endeavoured to make out.

The case is this: the plaintiff and the defendants entered into a speculation in hay, and they have disagreed about the mode in which the accounts between them are to be adjusted. The agreement between them is contained in a series of documents beginning on the 13th of June, 1893, and running down to the 19th; and amongst those documents there is what is called a sold note, which has really given rise to the difficulty, the defendants having adopted, as business men often do, a printed form, which is really inapplicable to the case. The printed form they have used is as if the transaction was a transaction of sale, instead of such an adventure as I have described. This printed form refers to the Rules of the Liverpool Corn Trade Association; and the plaintiff has confirmed that sold note and the memorandum which accompanied it. The dispute now is whether the hay in question is to be invoiced to the partnership firm (a sale is out of the question, there is no sale in it) at 100s. or at 95s. (which is what the plaintiff says). The defendants contend that that must be referred to arbitration; but the plaintiff refuses arbitration, and declares that he will bring an action to have the rights of the parties determined, and that he will impeach the agreement upon which the defendants rely, by asking the court to hold that the printed document upon which the defendants rely does not contain the true agreement between them.

The plaintiff accordingly brings an action against the defendants for an ordinary partnership account, and asks for an injunction to restrain the arbitration proceedings; he does so upon the footing that the agreement which contains the

arbitration clause is not binding—for some reason or other, whether for fraud, or mistake, or surprise, I do not know, because the statement of claim has not yet been launched. But that is his equity—to impeach the agreement; and he contends that, having impeached the agreement, courts of equity have always had power to grant an injunction to restrain an action upon the agreement or a reference to arbitration under the agreement, until the suit in equity to impeach the agreement has been determined. It appears to me that that is a correct statement of what has been the practice of the courts of equity before the Judicature Act; that is shown by the cases of *Mylne* v. *Dickinson*, *South-Western Railway Co.* v. *Coward*, and *Maunsell* v. *Midland Great Western (Ireland) Railway Co.*, in all of which the Court of Chancery did grant an injunction to stay a reference to arbitration, on the ground that the agreement containing the arbitration clause was impeached. Now is there any authority altering that practice, or rendering it incumbent upon us to depart from it? Mr. Willes Chitty argued that there is, and he pressed us with the cases of *North London Railway Co.* v. *Great Northern Railway Co.*, *London and Blackwall Railway Co.* v. *Cross*, *Farrer* v. *Cooper* (Kekewich, J.), and *Wood* v. *Lillies* (Chitty, J.), but on looking at those cases it appears to me that they do not touch upon the principle upon which we are proceeding. In the *North London case* there was a clause for reference to arbitration, and one of the parties wanted to refer, and the other did not, and brought an action to stay the reference. But in that case there was no impeachment of the agreement, or anything of the kind; there was no more ground in that case for stopping the arbitration than there would have been for stopping an action because it was admittedly a frivolous action; and when the judgments of Lord Esher, M.R., and Cotton, L.J., in that case are looked at it will be found that what they said was that the courts of equity never did that, and that—and this was the important part of that decision—section 25, sub-section (8), of the Judicature Act, 1873, had not extended the jurisdiction to enable the court then to do it. That was the decision in that case; and the learned judges there never meant to say that in cases where the courts of equity used to interfere by injunction, the power to do so was gone. Whether the Court of Appeal in that case has taken too narrow a view of section 25, sub-section (8), of the Judicature Act, 1873, is another matter. I do not consider that I am at liberty to discuss that question. The Court of Appeal has put its construction upon that section, and by that construction I am bound. But that case does not touch the principle on which I am now proceeding; and I protest altogether against its being thought that I am now frittering away a case which I am bound to follow.

The case of *London and Blackwall Railway Co.* v. *Cross* was really a case under the Lands Clauses Act, and it amounted really to this, that, notwithstanding section 25 of the Judicature Act, 1873, the court will not alter the practice which has prevailed under the Lands Clauses Act since it was settled by Lord Truro in 1850 in *East and West India Docks Co.* v. *Gattke*. Before *Gattke's case* there had been a considerable difference of opinion; there were great inconveniences either way, and these inconveniences had been pointed out by Lord Truro himself, and also by Lord Cottenham. Lord Cottenham thought (*London and North-Western Railway Co.* v. *Smith*) that the best way was to allow a person to bring an action, and to have his rights determined by the court, before the arbitration under the Lands Clauses Act was proceeded with; while Lord Truro thought (*South-Western Railway Co.* v. *Coward*) that that way was inconvenient, and that the better way was to let the parties have an arbitration under the Lands Clauses Act, and get their rights determined in that way. The practice was settled in *Gattke's case* in accordance with the view of Lord Truro. All that the Court of Appeal decided in *London and Blackwall Railway Co.* v. *Cross* was that, notwithstanding section 25 of the Judicature Act, 1873, the court would not alter the practice as settled in *Gattke's case*.

Mr. Willes Chitty, with all his industry, has not been able to discover a single case which in any way curtails the power of the court to stop an arbitration which is founded upon an agreement which is impeached.

I think that the Lord Chief Justice took a correct view; and this appeal must be dismissed. Of course the injunction will only be, as the Lord Chief Justice has worded it, until the trial of the action.

A. L. SMITH, L.J.—The real question in this case is whether we are bound by authority to hold that the Lord Chief Justice had no power to grant the injunction he did grant.

On the facts brought before us I have not the slightest doubt that, as a matter of convenience, the proper course is to stay this arbitration until the issue in dispute between the plaintiff and the defendants has been adjudicated upon.

At first, before I fully understood the facts, I was of a contrary opinion. But in my judgment it has been shown that there is a real controversy between the parties as to whether or not the printed document (which is the only document containing an arbitration clause) is or is not indicative of the real position between the plaintiff and the defendants. With regard to the question—and it is the real question ultimately to be decided between the plaintiff and the defendants—whether this hay is to be placed on joint account at the cost price of 100s. or at the cost price of 95s., a ton, if that document is left unimpeached it seems to me that the plaintiff's case goes by the board, because in that document the cost price is stated to be 100s. a ton. The plaintiff, therefore, brings this action for the purpose of impeaching that agreement. The defendants, before that, had commenced proceedings by way of arbitration. The plaintiff thereupon brought his action to impeach the agreement—I do not say upon what ground—and applied to the Lord Chief Justice to stay the arbitration. The Lord Chief Justice came to the conclusion that it was "just and convenient" that the injunction should be granted.

It was contended on behalf of the defendants, before the Lord Chief Justice, and also in this court, that the court had no power to grant this injunction, because, as Mr. Willes Chitty put it, the Court of Appeal held in *North London Railway Co.* v. *Great Northern Railway Co.* that "under no circumstances has the court jurisdiction to stay arbitration proceedings by injunction." In my opinion, however, that is too wide a statement of the decision of the Court of Appeal in that case. The point that came up for adjudication there was, whether or not section 25, sub-section (8), of the Judicature Act, 1873, has enlarged the jurisdiction which the Court of Equity had theretofore exercised, and the Court of Appeal undoubtedly held that where a litigant had no right to an injunction and could not get an injunction from the Court of Chancery prior to the Judicature Act, 1873, he could not get one now; that was the *ratio decidendi* in that case, and I loyally follow it. In that case there was no question of impeaching the agreement for arbitration; the sole reason urged for staying the arbitration by injunction

was, that the arbitration would be futile and useless. The court held that, inasmuch as before the Judicature Act, 1873, that would be no ground for staying the arbitration, so it was no ground in that case for staying the arbitration. That, in my opinion, is the decision in the *North London Railway case.*

Mr. Marten, on behalf of the plaintiff, accepts that view of that case; and the court is loyally following it. But Mr. Marten argued that prior to the Judicature Act, 1873, there were decisions of the Court of Chancery which showed that where a litigant was seeking to impeach a document which contained an arbitration clause, jurisdiction was entertained to grant an injunction when it was thought right to do so; and the salient cases he cited were *Mylne* v. *Dickinson*, before Lord Eldon in 1815, and *Maunsell* v. *Midland Great Western (Ireland) Railway Co.*, before Wood, V.C., in 1863. The latter was a case in which there was an agreement to refer, and an injunction was asked by one of the parties to restrain proceedings by arbitration, that party impeaching the agreement because he said the directors had been acting *ultrà vires*. If the point had been, not that the agreement was *ultrà vires*, but that it was an agreement *intrà vires*, and that the other party wanted to get rid of the arbitration proceedings on the ground of its being useless and futile, no injunction would have gone. But the plaintiff there impeached the agreement on the ground that it was *ultrà vires* the directors, and was not binding upon the plaintiff, and that the plaintiff was not bound by the arbitration clause; thereupon the court granted the injunction.

The case of *South-Western Railway Co.* v. *Coward* shows the same practice of the Court of Chancery.

Therefore, loyally following the case of *North London Railway Co.* v. *Great Northern Railway Co.*, I say it does not cover this case, because in that case there was no pretence for saying that anybody was impeaching the agreement, and I am satisfied that the practice of the Court of Chancery was to grant an injunction under these circumstances prior to the Judicature Act, 1873. I do not think that anyone would now be bold enough to argue that section 25, sub-section (8), of that Act was intended to curtail the jurisdiction of the court. The point as to whether or not that section was intended to enlarge the jurisdiction seems to have been argued in *Monson* v. *Tussauds*, where Lord Halsbury held that the object of the section was to enlarge the jurisdiction; but he stands by himself in that at the present time.

There being jurisdiction, I think this is a case in which it ought to be exercised, and I refuse to overrule the Lord Chief Justice.

Appeal dismissed.

Solicitors, *Pritchard, Englefield, & Co.*, for *Preston & Son*, Manchester; *Woodard & Hood.*

From Chan. Div.
(Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Nov. 5, 6.

In re RYMER.
RYMER *v.* STANFIELD. (*a.*)

Charity—Will—General charitable purpose—Particular charity—Failure of object—Lapse—Cy-près.

Where a legacy is bequeathed, upon the true construction of the will, to a particular charitable institution, existing at the date of the will, and the institution has ceased to exist before the testator's death, the doctrine of cy-près *does not apply, and the legacy lapses.*

A., by his will, dated in 1883, *bequeathed* £5,000 "*to the rector for the time being of St. T. Seminary for the Education of Priests in the diocese of W., for the purposes of such seminary.*" *At the date of the will there was such an institution known as St. T. Seminary; but before the death of the testator it had ceased to exist.*

Held (*affirming the decision of* Chitty, J., 42 *W. R.* 581), *that the legacy was a gift to the particular institution, and must be taken, on the above principle, to have lapsed.*

Appeal by the Attorney-General from a decision of Chitty, J., reported 42 W. R. 581.

The facts and arguments are stated in the former report and in the judgment of Lord Herschell, L.C.

Cozens-Hardy, Q.C., and *Ingle Joyce* (*Sir R. T. Reid, A.G.*, with them), for the Attorney-General, referred to the following cases:—*In re White, White* v. *White*, 41 W. R. 683, [1893] 2 Ch. 41; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Syderfin*, 7 Ves 43 n.; *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193; *Mills* v. *Farmer*, 1 Mer. 55; *Loscombe* v. *Wintringham*, 13 Beav. 87; *Clark* v. *Taylor*, 1 W. R. 476, 1 Drew. 642; *Russell* v. *Kellett*, 3 Sm. & G. 264, 4 W. R. Dig. 131; *In re Clergy Society*, 4 W. R. 664, 2 K. & J. 615; *Marsh* v. *Attorney-General*, 9 W. R. 179, 2 J. & H. 61; *Fisk* v. *Attorney-General*, 15 W. R. 1200, L. R. 4 Eq. 521; *In re Maguire*, 18 W. R. 623, L. R. 9 Eq. 632; *In re Ovey, Broadbent* v. *Barrow*, 33 W. R. 821, 29 Ch. D. 560; *Biscoe* v. *Jackson*, 35 W. R. 554, 35 Ch. D. 460; and *In re Slevin, Slevin* v. *Hepburn*, 39 W. R. 578, [1891] 2 Ch. 236.

Levett, Q.C., and *T. L. Wilkinson*, for the plaintiffs, the executors of the will, and for the residuary legatee, were not called upon.

P. S. Stokes, for Cardinal Vaughan.

Lord HERSCHELL, L.C.—In spite of the able argument which has been addressed to us by the learned counsel for the appellant, I entertain no doubt that the judgment of Chitty, J., was right. The first step to be taken is to construe the will of the testator. By his will, subject to the payment and satisfaction of certain legacies, he gives a legacy in the following terms: "I give the following charitable legacies to the following institutions and persons—to the rector for the time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster, for the purposes of such seminary, £5,000, and I direct that the said rector shall, at his discretion, make a settlement thereof by deed in the names of proper trustees, so as to make the same a permanent fund, and I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary, and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part on this foundation." That bequest is followed by a number of other bequests. Legacies of £2,000 each are given to certain persons for school and orphanage purposes, the bequest in each case being described as given for the purposes of the particular institution. Then follow legacies of £1,000 each, given to representatives of institutions having some of the same objects precisely as the previous gifts, the legacy being limited in the case of these particular institutions to £1,000.

Now the contention on behalf of the appellant is

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

that from this gift now in question is to be inferred an intention on the part of the testator to benefit the priests by educating them, quite apart from their education taking place in or in connection with this particular seminary, and that it is quite immaterial that he has designated that particular seminary. The gift, it is said, can be regarded as a charitable one, which must take effect even though the seminary should have ceased to exist at the time of the death of the testator. I am unable so to construe this bequest. I think in all these gifts (and they may all be looked at for the purpose of throwing light on this bequest), the testator had in view particular institutions, and, although their object may be the same, he graduated his bounty towards them, showing that it was the education of orphans at this institution or that which he had in his mind, and not merely the education of orphans, if I may say so, at large. In the first place, I observe that he says: "I give the following charitable legacies to the following institutions and persons." The persons are named in connection with the institutions. There is no institution named except in connection with a person, and, therefore, he indicates at the outset that the legacy is to be a legacy of the institution which is to take it. It seems to me, therefore, that we start with that indication. Then he mentions St. Thomas's Seminary, in conjunction, it is true, with the words "for the education of priests in the diocese of Westminster." It is said that these are his own words and do not form part of the title, but it would be obviously a piece of prudence to insert these words, in order to make sure that the bequest should go to the St. Thomas's Seminary which he had in view, not to one that might possibly have existed under the name of "St. Thomas's Seminary," not having that object and being a different institution. But the gift is to be "for the purposes of such seminary," and then it is to be observed that, although the testator does not make it a condition of the gift, he does couple with it a request that a yearly mass for the repose of his soul may be said at the same seminary. The whole is localized, connected with that institution, as distinctly, it seems to me, as a bequest could be. That is the construction which I put upon the language which the testator has used.

Now there did exist at the date of the will an institution answering in every respect the description given; but that institution was no longer in existence at the the time of the death of the testator. The appellant contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this contention, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority. They placed reliance upon the decision of Lord Eldon in *Moggridge* v. *Thackwell* and *Mills* v. *Farmer*. The nature of those cases, and the effect of the decision is I think very well emphasized in a short passage in Lord Eldon's judgment in the latter case. He points out that giving property to "such persons as I shall name to be my executors," and appointing no executors, leaves that, in the case of an individual, a void gift. "But to give effect," he says, "to a bequest in favour of charity, the court will, in both instances, supply the place of an executor, and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode, which alone was left deficient." That is *Moggridge* v. *Thackwell*; that is *Mills* v. *Farmer*; and the principle would, of course, cover a considerable class of cases. The testator has defined the general character of the charity which he has in view, but has left the objects to be specified by a particular individual who can no longer specify them. That is one illustration of it, but of course many might be given which all come within the language to which I have referred. Then reference is made to another class of case, such as *Du Costa* v. *De Pas*, Amb. 228, where there was a gift for a charitable purpose which the court held to be illegal, and to which, therefore, it could not give effect; and in those cases, seeing that there was a charitable purpose, but it being one which the court could not give effect to, the courts have applied the money so designed in their view for charity upon the *cy-près* doctrine, in some charitable fashion other than that illegal fashion designated by the testator. Of course that is a class of cases which we need not further discuss in connection with the one now before the court. But then follows a series of cases of another description, although coming within the same principle, it may be said, as *Moggridge* v. *Thackwell* and *Mills* v. *Farmer*.

The first of these is *Loscombe* v. *Wintringham*, where a bequest of £500 was given for a society for the encouragement of servants in good conduct. No such society was known to exist, and we may take it none did exist. The court there said that there was a charitable purpose, and that, though the machinery for carrying it into effect, the channel through which it should be carried into effect, had not been designated by the testator, the court would, nevertheless, carry it into effect. That was also the position in *In re Clergy Society*, which was a society named, but which might as well have been left unnamed, because there was no such society existing. That was the case of *In re Maguire*, where a Church Pastoral Aid Society in Ireland was mentioned, also a non-existing society. Those cases also form a class which has been established upon the same principles and considerations, I think, as guided the court in *Moggridge* v. *Thackwell* and *Mills* v. *Farmer* and that class of cases, but they do not seem to me to be cases at all governing the present, when once the construction which I have put upon the will of this testator has been arrived at. One other case I may allude to in connection with the class of cases beginning with *Loscombe* v. *Wintringham*, which I have mentioned, and that is the case of *Biscoe* v. *Jackson*. It seems to me that Cotton and Lindley, L.JJ., in delivering their judgment in that case, so far from using language favouring the argument of the appellant, seemed to assume the case against the appellant upon the construction which I have put upon the will, but decided in favour of the bequest there on the ground that it was not a bequest to any particular institution, but a bequest for a purpose which, if it could not be carried out precisely in the way named, must be carried out as nearly as possible.

Now I come to another class of cases, within which the present case falls. The first of these is *Clark* v. *Taylor*, where reliance was placed upon *Loscombe* v. *Wintringham*, but the judge declined to decide the case in the same way as *Loscombe* v. *Wintringham* had been decided, because Kindersley, V.C., regarded

that case as distinguishable. He did not intend to impugn that case, as he said, in the slightest degree, but he regarded it as not governing the case then before him. The language which he uses (and there are few judges more careful in the use of their language or more accurate) is this:—"There is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution, and if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases." Now there the Vice-Chancellor lays down the distinction in the clearest terms. It is said that in that case the facts show that the institution had not ceased to exist till after the death of the testator, that therefore the decision of the Vice-Chancellor must be read as referable to such a case, and that in that case his decision has been overruled. I cannot think that any such point was raised in that case. It is true that on the statement of facts it would seem to have arisen, but then the statements of facts is now shown to be inaccurate. The report, 1 Drew, 642, states that the testator died in October, 1840, and an examination of the record has shown that the testator did not die till October, 1846. It is true that Drewry's Report states the institution came to an end in November, 1846, which would have shown that it survived the testator by a month or part of a month. But it is just as likely that there has been some mistake in the date of the cessation of the institution, as in the date of the death of the testator. At all events, it is to me inconceivable that, if such a point existed, and it could have been argued in that case, Mr. Wickens, who argued for the Crown, should not have made the point, and that there should be no allusion to it whatsoever in the judgment of the Vice-Chancellor. I therefore cannot regard the judgment of Kindersley, V.C., in *Clark* v. *Taylor* as otherwise than a decision upon the point which it purports to decide in the judgment, or as having any relation to the fact that the institution had survived the testator. That clearly was the view taken by Wood, V.C., in *Fisk* v. *Attorney-General*. He had there a similar point before him. The institution was, I think, the Women's Benevolent Institution at Liverpool, and the institution had come to an end before the death of the testator. The Vice-Chancellor followed *Clark* v. *Taylor*, and held that, the institution having so come to an end, the gift failed altogether. I pass by *Russell* v. *Kellett* because, on the facts of the case, there may be some discussion as to how far the principle was properly applied, but the same principle was recognized by Stuart, V.C., in that case. It was afterwards recognized and followed in the case of *In re Ovey* by Pearson, J., and it seems to me that in the case of *In re Slevin* in this court not the slightest dissent was expressed from the view of Kindersley, V.C., but rather the contrary. In delivering the judgment of the court Kay, L.J., says: "In the present case we think that the Attorney-General must succeed, not on the ground that there is a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown." So that, so far from throwing any doubt upon *Clark* v. *Taylor*, it seems to me to recognize the distinction, and decides the case, not on any ground inconsistent with *Clark* v. *Taylor*, but exclusively on the ground that, the charity having survived the testator, the bequest had taken effect, and when the charity ceased to exist its property fell to the administration of the Crown. One case was referred to which was said to be somewhat an exception to those with which I have been dealing—the case of *Attorney-General* v. *Marsh*—and at first sight it appeared to be so. It was a gift to the president of the Nautical School of Deal, and the Nautical School of Deal was not in existence at the time of the death of the testator. But, rightly or wrongly it is quite immaterial to inquire, the court there came to the conclusion, on the true construction of the will, that the money was given to the president of that school, not for the benefit of the school, but that education might be given to certain boys, and it was said that the trust would have been perfectly discharged by educating the boys at Oxford or Cambridge or elsewhere than at the school. It therefore forms no exception, in the construction put on the will, to the cases to which I have been alluding.

I think I have now referred to every one of the cases which has been relied on by the learned counsel for the appellant, and they seem to me to lead to the conclusion that this case comes within the class of cases, the first of which is *Clark* v. *Taylor*, decided forty years ago, but which has been followed in numerous cases since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound, and I do not think it would be in accordance with sound principle, or that any prior decisions necessitate our holding that where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, and that that was the essence of the bequest, if that institution had ceased to exist, the charitable legacy ought still to be held as effectual, and the money to be applied by the court on the *cy-près* principle. For these reasons I think the appeal should be dismissed, with costs.

LINDLEY, L.J.—I think the result at which Chitty, J., has arrived is right. I have attended to and followed the arguments both of Mr. Cozens-Hardy and of Mr. Ingle Joyce, and in a great many of those arguments I concur. I think, with Mr. Joyce, that it does not do to approach a will of this kind by a short cut, by saying there is a lapse and there is an end of it. It is begging the question, whether there is a lapse or not. You must construe the will, and see what the real object of the language which you have to interpret is. I will not read the words of this gift again; I have read them very often, and studied them with care. I cannot arrive at the conclusion at which Mr. Ingle Joyce wants me to arrive, that this is, in substance and in truth, a bequest of £5,000 for the education of the priests in the diocese of Westminster. I do not think it is. It is a gift of £5,000 to a particular seminary for the purposes thereof, and I do not think it is possible to get out of that. I think the context shows it—the choice of candidates, the offering of prayers, and so on. If once you get at that, then you come to ask yourself, Does that seminary exist? The answer is, it does not. Then you arrive at the result that there is a lapse, and if there is a lapse, is there anything in the doctrine of *cy-près* to prevent the ordinary doctrine of lapse applying? I think not. Once you get the fact that

there is a lapse, then it appears to me that all the authorities which are of any value tend to show that the residuary legatee takes the lapsed gift. We are asked, if the argument is pushed further, to overrule that doctrine, which is the doctrine laid down by Kindersley, V.C., in the earliest case of *Clark* v. *Taylor*, and, using ordinary language, to overrule the doctrine of *Fisk* v. *The Attorney-General*.

I think that doctrine is perfectly right. There is always a difficulty in applying it, but when once you arrive at the fact of a gift to a particular seminary or institution, or whatever you may call it, "for the purposes thereof," and for no other purpose, if you once get to that, and then to the cessation of that institution or seminary or whatever it is, you are driven to arrive at the conclusion that there is a lapse and there is an end of it. That is in accordance with the law, and in accordance with all the cases that can be cited. I quite agree that in coming to that conclusion you have to consider whether the mode of obtaining the object is machinery or not, or whether the mode is not the substance of the gift. Here it appears to me the gift to the seminary is the substance of the whole thing. It is the object of the testator; I think that is plain from the language used, and that it decides the case.

Those are the short grounds of my judgment. I do not comment upon the decisions, because the Lord Chancellor has done that sufficiently.

A. L. SMITH, L.J.—It appears to me, in investigating whether Chitty, J.'s judgment is correct, the first point we must make up our minds upon is this, whether he is right upon the construction he puts upon this bequest. The construction he has put on this bequest is this, that it was a gift to a particular institution, for the purposes of that institution. The Lord Chancellor and Lindley, L.J., have dealt with the considerations as to whether that is correct or not. I entirely agree with them. In my opinion this is a bequest to a particular institution for the purpose of that institution. When once that is arrived at, the cases cited by Mr. Cozens-Hardy and Mr. Ingle Joyce seem to me to be tolerably plain. The difficulty in this case is to find out whether that is in reality the intention of the testator or not. Having got to that, then the authorities appear to me to be all one way. They begin with *Clark* v. *Taylor*, as explained by the Lord Chancellor, and as appears from the judgment of Kindersley, V.C., and go on to the decisions of Wood, V.C., in *Fisk* v. *The Attorney-General*, and Pearson, J., in *In re Ovey*. I am not saying that *In re Ovey* is a decision in point, but one does see how the learned judge deals with the law relating to *cy-près* upon a bequest like this. Then there is *Biscoe* v. *Jackson*, where Cotton and Lindley, L.JJ., also deal with the principles of law, and it seems to me that from *Clark* v. *Taylor* down to that case the authorities are all in sequence upon this point. Therefore, I am of opinion that Chitty, J., being right in the construction he put on the bequest, is also right in the law, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors, *Hare & Co.; Frank Richardson & Sadler; Witham, Lambert, & Roskell.*

High Court of Justice.

Chan. Div. } Chitty, J. } Nov. 9.

CLEVELAND WATER CO. v. REDCAR LOCAL BOARD. (a.)

Waterworks company—Local government—Restriction on construction of waterworks by local authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52 —"*Waterworks*"—"*Commencing to construct.*"

By the Public Health Act, 1875, *s.* 51, *any local authority may provide their district with a supply of water, and may construct and maintain waterworks; and, by section* 52, *before commencing to construct waterworks within the limits of supply of any water company having parliamentary powers, the authority must give such notice as is thereby required to the company; and section* 75 *of the Public Health Act,* 1848, *contained similar enactments.*

After the predecessor of R. Local Board had exercised the power of providing a water supply conferred by section 75 *of the Public Health Act,* 1848, *the C. Water Co. was incorporated by Act of Parliament to supply a district comprising R. The R. Board having resolved to make considerable additions to their waterworks, involving the acquisition of land and a fresh source of water supply, the C. Co. thereupon applied for an injunction unless and until the board gave them notice pursuant to section* 52 *of the Act of* 1875.

Held, that sections 51 *and* 52 *of the above Act must be read together, and that, on the true construction of the enactments, section* 52 *was not applicable to the case where the local authority had, previously to the Act incorporating the water company, substantial waterworks already in existence; and, therefore, that the application for an injunction must be dismissed.*

Motion.

The predecessors of the defendant board in 1856 began to construct waterworks for the supply of Redcar. They obtained in 1858 a lease for 99 years of the required land, and a supply of water from a spring called Wort's Well, with leave to lay the necessary pipes and to construct a reservoir, which was not to be larger than eight hundred yards square; and borrowed moneys under their powers in that behalf for the purpose of these works. The works were duly constructed under section 75 of the Public Health Act, 1848, which was substantially the same as sections 51 and 52 of the Act of 1875, stated below. From time to time they added to and enlarged their works without any interference by the plaintiff company, borrowing further sums on the several occasions to meet the expenses.

Thus, in 1866, they laid new pipes. Again, in 1883, they laid new pipes and built a reservoir of a capacity of 450,000 gallons. They also laid new pipes in 1886.

In 1869 the plaintiff company were incorporated by Act of Parliament, and obtained powers for supplying a large district, including Redcar. The company had not hitherto supplied water to Redcar, but had recently constructed pipes through Redcar for the supply of Coatham, in their district, and it was not disputed that they were able and willing to supply Redcar.

The population of Redcar was shown to have increased from 1,200 in 1856 to about 2,800 and the rateable value from £3,500 to £13,000. The drought of 1893 and the increasing requirements

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

of the place led to the defendant board planning additions to their waterworks, and in August, 1894, the statutory notices were issued of their intention to construct a reservoir of 6,000,000 gallons' capacity. The board had arranged to take a 99 years' lease of additional land for a site for this reservoir, and of a supply of water from a spring called Soap Well. The board had borrowed in all about £7,500 for the purposes of their waterworks, a large portion of which had been repaid.

By the Public Health Act, 1875, it is provided (section 4) that in that Act, if not inconsistent with the context, "waterworks" includes streams, springs, wells, pumps, reservoirs, cisterns, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, engines, and all machinery, lands, buildings, and things for supplying, or used for supplying, water, also the stock-in-trade of any water company; (section 51) that any urban authority may provide their district, or any part thereof, and any rural authority may provide their district, or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may (1) construct and maintain waterworks, dig wells, and do any other necessary acts; and (2) take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water, or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and (3) contract with any person for a supply of water; and (section 52) that, *before commencing to construct waterworks* within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which and (as far as may be practicable) the extent to which water is required by the local authority. And that it shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority; and that any difference as to whether the water which any such company are able and willing to lay on is proper and sufficient for the purposes for which it is required, or whether the purposes for which it is required are reasonable, or (if and so far as the charges of the company are not regulated by Parliament) as to the terms of supply, shall be settled by arbitration in manner thereby provided.

A motion was now brought on behalf of the plaintiff company to restrain the defendant board from commencing, or proceeding to construct, waterworks in the district of Redcar or elsewhere within the limits of supply of the plaintiff company, unless and until they should first have given written notice to the plaintiff company of the purposes for which, and the extent to which, under the Public Health Act, 1875, water was required by them as the urban sanitary authority for the district of Redcar, and unless and until the settlement by arbitration under that Act of any differences between the parties as to the supply of water within the said district.

Whitehorne, Q.C., and *Micklem*, for the water company.—The object of section 52 of the Public Health Act, 1875, is to preserve the monopoly of a water company: *Richmond Waterworks Co.* v. *Vestry of Richmond*, 3 Ch. D. 82, 24 W. R. Dig. 307. This water company being duly empowered to supply the district with water, the local board must comply with the requirements of the 52nd section before commencing the contemplated works, which are waterworks in virtue of the 4th section of the Act. That they will be an addition to existing waterworks is immaterial. In *Newhaven and Seaford Waterworks Co.* v. *Newhaven Local Board*, Times, Jan. 21, 1882, Hall, V.C., said that the scope and effect of the 52nd section was that the local authority were not to throw away the money of the ratepayers in constructing waterworks where there was an existing body who could provide a proper water supply without recourse being had to such money. Moreover, the company being able and willing to provide a sufficient water supply, the case comes within the second branch of the 52nd section, and it is not lawful for the board to construct any such works as proposed.

Byrne, Q.C., and *A. T. Lawrence*, for the local board.—The proposed works are only by way of addition to or enlargement of existing waterworks, and are, therefore, not on any reasonable construction of the Act within the 52nd section, which is not meant to apply where the local authority is already supplying water. It is in effect a proviso on the 51st section: compare section 75 of the Public Health Act, 1848, corresponding to sections 51 and 52 of the Act of 1875. Section 55 imposes on the board the duty of providing pure and wholesome water. See *West Surrey Waterworks* v. *Rural Sanitary Authority of Chertsey*, *ante*, p. 6. If the company is right, what is the limit to the restrictions of the 52nd section, short of putting an end to all improvements of existing waterworks? The Act is an enabling Act for local authorities. The qualified protection to which the water company is entitled does not enable it to assert in this manner rights which were only acquired after the construction of waterworks by the local authority.

Whitehorne, Q.C., replied.

CHITTY, J., after stating the facts, continued:—The 52nd section of the Act of 1875 must be read with the 51st section, and I think that its object was, at any rate, to afford protection to waterworks companies like the plaintiff company. Perhaps, also, Hall, V.C., was right in holding what he did in the *Newhaven case* as to the scope and effect of the 52nd section, and I am not throwing any doubt on his decision. The expression "monopoly" is used of the plaintiff company's rights in a popular sense, but the true view is that Parliament has constituted the plaintiffs to supply the district named in their Act with water, and there is no monopoly in terms—*i.e.*, no section denying the right of any other company to do so. But the term fairly represents the position of the plaintiffs — first, because Parliamentary authority is required to carry on this business; and, secondly, because, where there was an existing company competent to do and doing its duties, no other company would be incorporated by Parliament for the same purpose. It is plain here that the plaintiffs had no true monopoly, because the local board have the right of supplying water. An injunction is asked for; but if no injunction is granted, the plaintiffs are still at liberty to supply water to anyone wanting it of them. These sections 51 and 52 of the Public Health Act ought to be read together, and section 51 authorizes the local authority to provide their district with water like section 75 of the Act of 1848, the words of which were similar. The defendants, having the rights of their predecessors, must be considered to have exercised that power, and to have Parliamentary authority for what the have done.

It was on the first words of section 52 that the argument mainly turned. With regard to the meaning of waterworks in this section, the plaintiffs admit that the whole of the words in section 4, containing the interpretation of the expression "waterworks" in the Act, are not introduced into section 52. In my opinion it must be at least accepted that the meaning of the Legislature is that when there are existing waterworks provided by the local authority, the mere repair of those waterworks would not be within the restrictions of section 52. It was admitted by the plaintiffs that any slight enlargement would not be so. Such admission is perfectly correct, and I accept it as one within the true construction to be put upon the section. It therefore comes to this—that the prohibition in section 52 is not absolute, but one of degree. That being so, the question arises at what particular point the court is to declare that the enactment is to have operation. In my opinion the section is not intended to apply to the case where the local authority has, previously to the passing of the special Act of Parliament incorporating the waterworks company, already substantial waterworks in existence. That is the defendants' position in the case before the court. When the plaintiffs were incorporated, the defendants' waterworks were in existence and operation and were sufficient for the wants of Redcar as then existing. There may in time be many things justifying alterations and additions in waterworks. It seems to me that it would be unreasonable to hold that Parliament meant by section 52 that a local authority having already existing waterworks could not improve those waterworks; and not to make long strides, but proceeding cautiously, it also seems to me that the intention was not to prohibit such waterworks from being enlarged.

I think in effect that I ought to hold that the term waterworks in section 52 means new waterworks, and does not include improvements or additions to existing waterworks, and I am unable to see how I can safely stop at any degree of enlargement or of improvement. Besides, the Act imposes obligations on the authority to maintain their existing waterworks: see section 55. It therefore seems to me that on the true construction of sections 51 and 52 the defendants are not under the obligation contended for by the plaintiffs, of giving them notice before proceeding to execute the works. As the motion is agreed to be treated as the trial of the action, the order I make is that the action be dismissed, with costs.

Motion and action dismissed.

Solicitors for the plaintiffs, *Howe & Rake*, for *Lucas, Hutchinson, & Meek*, Darlington.

Solicitors for the defendants, *Warriner & Kinch*, for *A. H. Sill*, Redcar.

Chan. Div. North, J. — May 10, 1894.

In re HAMBRO.
HAMBRO *v.* HAMBRO. (*a.*)

Settlement—Jointure rent-charge—Charge on income—Arrears—Jurisdiction to sell corpus.

Where a jointure rent-charge, although only a charge on the income of a settled estate, has fallen into arrear and cannot be recovered by the powers of distress and entry, the court has jurisdiction to order a sale or a mortgage of the corpus *of the estate to raise the arrears.*

Taylor *v.* Taylor, 22 *W. R.* 349, *L. R.* 17 *Eq.* 324, *and* Horton *v.* Hall, 22 *W. R.* 391, *L. R.* 17 *Eq.* 437, *discussed.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Originating summons.

By a settlement dated the 3rd of April, 1861, made upon the marriage of Charles, Baron Hambro (then a widower), with the plaintiff, Eliza Greathed, certain hereditaments were conveyed to the use and intent that the said Eliza Greathed (after the decease in her lifetime of Baron Hambro) should receive and take during her life out of the rents and profits of the premises a clear yearly rent-charge of £3,000 for her jointure, in lieu of dower, to be paid by equal quarterly payments on the usual quarter days; with powers (upon non-payment for twenty-one days) of entry and perception of the said rents and profits and of distress to secure payment of said rent-charge, and all arrears thereof; and, subject to the said yearly jointure rent-charge, the premises were limited to trustees for a term of years to provide portions for the children of the said marriage; and, subject to the said term and charged and chargeable as aforesaid, to the uses declared in the marriage settlement made upon the marriage of said Baron Hambro with his first wife (then deceased).

The marriage settlement of 1861 contained no express provision (by means of the creation of a term or otherwise) making the jointure rent-charge, or the arrears thereof, a charge on the *corpus* of the settled estate. Baron Hambro died in 1877, in the lifetime of his second wife, Eliza Greathed, and there was no issue of that marriage.

Under the provisions of the marriage settlement made by Baron Hambro on his first marriage, the defendant, C. T. Hambro, became, upon the death of Baron Hambro, tenant in tail in possession of the settled estate. Prior to the commencement of these proceedings the defendant, C. T. Hambro, had barred the entail and become owner in fee. The jointure rent-charge had been punctually paid by the defendant in full down to the 29th of September, 1893; after that it fell into arrear, and it was proved that the rents of the settled estate had become insufficient to provide for the payment of the full jointure rent-charge of £3,000 a year.

The jointress thereupon took out this originating summons for a declaration that the jointure and arrears were a charge upon the *corpus* of the settled estate; or, in the alternative, that they constituted a continuing charge on the rents and profits, and that the arrears of the jointure, with interest, might be raised by a sale or mortgage of a sufficient part of the *corpus* of the settled estate.

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the plaintiff.—The plaintiff is entitled to a sale; as the charge is a charge on the *corpus*, the defendant does not come in for anything until the jointure is satisfied. Even if it is not a charge on the *corpus*, it is admitted that the charge is a continuing charge on rents and profits. There is no term limited to secure the jointure, and therefore a sale, and not a mortgage, is the proper remedy.

They referred to *In re Tucker, Tucker* v. *Tucker*, 41 W. R. 505, [1893] 2 Ch. 323; *Cupit* v. *Jackson*, 13 Price. 721; *Hall* v. *Hurt*, 2 J. & H. 76, 10 W. R. Ch. Dig. 5; *Taylor* v. *Taylor*, 22 W. R. 349, L. R. 17 Eq. 324; *Phillips* v. *Gutteridge*, 11 W. R. 12, 3 De G. J. & Sm. 332.

Cozens-Hardy, Q.C., and *J. G. Wood*, for the defendant.—There has been no decided case in which the court has ordered a sale when the annuity has not been charged on the *corpus* of the estate. This is the case of an annuity, and not of a charge on the *corpus*. It is, in fact, a jointure in lieu of dower,

which only issues out of rents and profits. The gift over is subject, not to the jointure, but to the term for securing portions, the words being "subject to the term and charged and chargeable as aforesaid." The argument on behalf of the plaintiff confuses a rent-charge issuing out of lands and an annuity charged upon lands. [They referred to *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368; *Searle* v. *Cooke*, 43 Ch. D. 519, 38 W. R. Dig. 49; *Cupit* v. *Jackson*.] The decision in *Phillips* v. *Gutteridge* was not intended to lay down a general proposition; and if it was, it is contradicted by subsequent cases in the Court of Appeal. *Taylor* v. *Taylor* is in point, and is not contradicted by *Horton* v. *Hall*, 22 W. R. 391, L. R. 17 Eq. 437.

They referred also to *Scottish Widows' Fund* v. *Craig*, 30 W. R. 463, 20 Ch. D. 208; *Bailey* v. *Badham*, 33 W. R. 770, 30 Ch. D. 84.

Swinfen Eady, Q.C., in reply.—This is a charge on the *corpus*; but even if it is not, the court has power to order a sale. *Taylor* v. *Taylor* has been practically overruled by *Horton* v. *Hall*. *Bailey* v. *Badham* was the case of a tithe rent-charge.

NORTH, J.—The first question asked here is whether this jointure is a charge on the *corpus* as well as on on the income. That I do not propose to decide, because it does not seem to me to be necessary for deciding the real point at issue, which is whether there is a right to have a sale of the estate for the purpose of raising the arrears of the annuity. I confess that I felt some little doubt about the question whether the jointure here could or could not be said to be a charge on the *corpus*, because, although the present case comes very near to *Birch* v. *Sherratt*, 16 W. R. 30, L. R. 2 Ch. App. 644, yet it seems distinguishable from that case, for the words which in the present case are said to throw a charge on the *corpus* are these: "From and after the end, expiration, or other sooner determination of the said term of 1,000 years, and in the meantime subject thereto"—that is, the term and the portions secured by it—"and charged and chargeable as aforesaid," then to certain uses. The phrase "charged and chargeable as aforesaid" seems to me to refer to the jointure rent-charge, and to be words of reference, and nothing else. It is not as if the words used were "charged and chargeable with the jointure rent-charge as aforesaid and subject thereto," then to uses and so on. That would have been like *Birch* v. *Sherratt*.

However, under the circumstances, I do not think it necessary to express an opinion on that abstract question, because, even if it is not a charge on the *corpus*, still it is a case in which the jointress has a right to resort to the sale of the *corpus* to pay the arrears. [After referring to the words of the settlement, his lordship continued:—] There is here a jointure rent-charge strictly so called. In my opinion the cases show that where a jointure rent-charge does fall into arrears and cannot be recovered by the exercise of the powers of distress and so on, the court has power to raise the arrears by a sale or mortgage of the capital of the estate. It does not follow, however, as a matter of course, that because the court has such jurisdiction it will exercise it immediately after a small amount falls into arrear. I do not think the time has come when I could order any such sale; but dealing with the question of whether the court has power to order a sale, I think it has.

It was said that in all the cases referred to, excepting *Hall* v. *Hurt*, the *corpus* of the property, as distinguished from annual income, was charged with the rent-charge. I do not think that is a correct criticism upon the decisions.

In *Cupit* v. *Jackson* I see no reason for saying that the property there was charged in the sense which I have just mentioned. The limitations were these: the property was conveyed to the use that the settlor should himself receive thereout an annuity for life of £45, and that his widow should receive another annuity of £30; and to the further use, intent, and purpose "that in case the respective annuities of £45 and £30 should happen to be behind or unpaid by the space of twenty-eight days," and so on, then the annuitants might enter upon the messuages "thereinbefore charged with the payment of the respective annuities of £45 and £30, and distrain." The phrase "thereinbefore charged with the payment of the annuities" does not amount to making the annuities themselves a charge on the *corpus*. Unless that is so it is simply an annuity or rent-charge issuing out of the property. That that was the true construction of the document before the court in that case is clear from the judgment of the Lord Chief Baron, who says that what they had to deal with was a rent-charge. He speaks of the statutory remedy that a person who has the rent-charge possesses, and says: "I do not know that the plaintiff may not avail herself of those remedies, but the effect of either might be very uncertain." It was held in that case that it was not necessary to limit the owner of the rent-charge to such remedies as those, but an additional remedy could be given by the court. The reason given is this: "I think the bill is sustainable notwithstanding that objection, and that her having the possibility of a remedy at law is not of itself an answer to it. The remedy in equity is more convenient and effectual than the legal remedy. It is in many respects a better and a safer remedy. The annuity being a charge and an incumbrance on a real estate itself, and not merely a demand against the owner of the estate," (that is the contrast between a charge on the estate and a demand against the owner), "I apprehend the court might, if necessary, raise the arrears out of the estate by sale or mortgage; and in practice that is a sufficient equitable ground of application to a court of equity for relief, because it is out of the powers of a court of law."

In *Graves* v. *Hicks*, 11 Sim. 536, 551, no doubt the yearly rent-charges were charges on the residuary estate, not confined, as I gather, to real estate; but they had been declared to be by the order on further consideration a charge on residuary real estate. In that case the Vice-Chancellor declined to order the realization of the arrears by a sale of property; but he dealt with it upon a separate ground altogether—namely, that although there was clearly jurisdiction to direct a sale, the court had a discretion not to do it if it did not think fit to do so, and the fact that the property was settled would be a reason for not doing it.

Then in *White* v. *James*, 7 W. R. 35, 26 Beav. 191, there seems to have been ordinary legal rent-charges, and I think nothing else. By an indenture of the 30th of January, 1845, Robert Smale, in consideration of £50, granted to the plaintiff for ever a rent-charge of 40s. issuing out of a piece of land and six cottages; and that was followed by a covenant that if it should be in arrear for forty-one days the grantee might enter and distrain and sell the distresses in like manner as distresses reserved by lease or common demise, and that if in arrear six months the grantee might enter and hold for his own use until the arrears should be paid. He also covenanted for title, and that the hereditaments should for ever remain charged with the rent-charge free from all incumbrances, except

those in the schedule. There were twenty other similar rent-charges granted out of the same property at the same time. I am not satisfied that the meaning of that covenant is that the rent-charges were charges on the *corpus* of the property in any sense but this, that they were legal charges issuing out of the property; and, that being so, the decision of Sir John Romilly would be in point. My view is fortified by this, that I do not find any case in which it has been decided that any distinction is drawn, or any reliance placed upon, the fact that the annuity is a charge upon the *corpus*. It is obvious that Wood, V.C., in *Hall* v. *Hurt* understood it as I do; it did not occur to him that there was any difference between *White* v. *James* and *Hall* v. *Hurt*. It seems to be perfectly clear, and it was admitted, that the latter is a case where there was a clear rent-charge only; which is not distinguishable from the present case.

Then we come to *Taylor* v. *Taylor*, and I must say that case is not very satisfactory. I am not quite satisfied that we know all that took place in that case. The report as given in the *Law Reports* and the report as given in the WEEKLY REPORTER differ a good deal. It is very shortly reported in the *Law Reports*, and being more fully reported in the WEEKLY REPORTER, I think it is more probable that the latter is the correct report. The great difficulty in it arises from this, that the ground of the decision is put by the Vice-Chancellor himself, ten days later (in *Horton* v. *Hall*), as having been totally different from that on which it appears by the reports to have been put. The property in the case of *Taylor* v. *Taylor* was settled—it corresponded with the position of the property in *Graves* v. *Hicks*. The report does not show that the Vice-Chancellor placed much reliance on that. But the report in *Horton* v. *Hall* does represent him as saying that it was on that ground he went; and it was that very thing which caused the distinction between his decision in *Taylor* v. *Taylor* and his decision in the later case of *Horton* v. *Hall*. The case of *White* v. *James*, which was apparently not called to the attention of the Vice-Chancellor in *Taylor* v. *Taylor*, having been called to his attention in *Horton* v. *Hall*, he then says: "In a recent case before me—*Taylor* v. *Taylor*—*Cupit* v. *Jackson* was referred to, and I declined to apply it, because in *Taylor* v. *Taylor* the land charged with the annuities or yearly payments was in strict settlement"—that is to say, if it had not been for that, he would have applied it—"but that is not so with the land in this case, and, therefore, having regard to the case of *White* v. *James*, I shall follow *Cupit* v. *Jackson*, and make the order asked for." Therefore, those two cases taken together, taking the first as explained in the second, are very clear, and show that, although the Vice-Chancellor declined to direct the sale where the property was subject to a succession of trusts or limitations, he did direct it where the property was not so subject, and I refer to the report of *Horton* v. *Hall* in the WEEKLY REPORTER, 22 W. R. 391, because it is expressed there very clearly. "Hall, V.C., made the order asked for, and remarked that he should here follow *Cupit* v. *Jackson*, though he had in *Taylor* v. *Taylor* refused to do so, on the ground that the land subject to the chief rent was there in settlement, which was not the case here." That was the ground for deciding *Horton* v. *Hall* as it was decided.

The case of *Phillips* v. *Gutteridge* I do not think is very much in point. The case of the *Scottish Widows' Fund* v. *Craig* is in point, because there, no doubt, the rent-charge was charged on the inheritance; yet the whole of Vice-Chancellor Hall's reasoning is addressed to the case of its not being charged on the inheritance, because he treats it as an ordinary case. He refers to the charge on the inheritance, and he says: "It may be said, no doubt, that the object of making the charge on the inheritance was, not to give any remedy beyond those specially provided by the statute, but only to bind those in remainder, or the successors of the incumbent of the living. I must, however, take the facts as I find them, and if this be a rent-charge which would ordinarily be raisable by the court out of the inheritance by resorting to it in the mode usually adopted—by means of a sale or mortgage of it—if that be the character of the charge, I do not see that I should be justified in holding that there is anything in these statutes that deprives the plaintiffs, the owners of the rent-charge, of the ordinary remedies." That is to say, he refers to an argument showing that the charge on the inheritance did not help the parties, and then he proceeds to point out that it is unnecessary to go into that. It does not matter if it does not help them, because the ordinary rights of persons in this position are such as will give them all that they are asking for. Then he goes on dealing with the case as one in which a rent-charge is ordinarily raisable out of the inheritance by sale or mortgage, and then he says: "It seems to me that, quite independently of any special provision in the statutes which have been referred to, the plaintiffs, the owners of the rent-charge, are entitled, on ordinary principles, to claim the assistance of the court for the purpose of raising the charge, and I am not aware of any authority which states that because there are powers of distress and entry upon the property belonging to an ecclesiastical corporation, and because the payments which are to be made in respect of the rent-charge are not to be perpetual, but will be determined in a certain time, the owner of the rent-charge shall not be entitled to the ordinary remedies of having it raised by a sale or mortgage." Then he refers to *White* v. *James*, *Cupit* v. *Jackson*, *Graves* v. *Hicks*, and *Hall* v. *Hurt*. He does not refer to either of his two previous decisions. I take it at this time (which is subsequent to his former decisions) that he was laying down in clear terms what are the ordinary rights (independently of any special statutory provision) of a person entitled to a legal rent-charge which has fallen into arrear.

Then the later case of *Bailey* v. *Badham*, before Bacon, V.C., does not seem to me to help one much. I think that he was dealing with the case as being something that was not a rent-charge, although in the nature of a rent-charge. A charge in lieu of tithes, in respect of which only two years could be recovered, was not an ordinary rent-charge; and that case, therefore, does not throw any light upon the numerous cases on which I have just commented, and does not affect in any way what I consider to be the legitimate conclusion from those cases.

As to *Tucker* v. *Tucker*, that does not seem to me to carry it any further. There was an additional ingredient there, viz., that the *corpus* clearly was charged with the annuities, which very likely were rent-charges, but were none the less annuities. No one disputes that in that case there could be a sale. Therefore, that case does not assist the point with which I am dealing at the present moment.

I do not think this is a case where there should be any sale at present. All I can do is to say: The court being of opinion that there is jurisdiction to order the raising by sale or mortgage of the arrears of the rent-charge, but there being no ground at present for exercising the jurisdiction, directs the summons to stand over, with liberty to apply.

Solicitors, *Preston, Stow, & Preston*, for *Rooke & Coker*, Bath; *Hawes, Wood, & Ware*.

Chan. Div. }
Kekewich, J. } Aug. 8, 1894.

In re SHEPHERD.
CHURCHILL *v.* ST. GEORGE'S HOSPITAL. (*a.*)

Will—Legacy—Demonstrative legacy—Gift of £10,000 *New* 3 *per Cent. Bank Annuities—Codicil—Conversion—National Debt* (*Conversion*) *Act*, 1888 (51 *Vict.* c. 2), *s.* 25, *sub-section* 2.

A testator, by his will, dated the 3rd of October, 1887, *gave to trustees* £10,000 3 *per Cent. Bank Annuities upon trust to make payments out of the income thereof to his wife, and on her death to sell the stock and to divide the proceeds of sale among forty-six named charities; he also gave his residuary estate to beneficiaries therein named. By a codicil dated the 28th of February*, 1890, *after reciting the above bequest, and that the Bank Annuities had been converted, under the National Debt* (*Conversion*) *Act*, 1888, *into* 2¾ *per Cent. New Consolidated Stock, he gave the trustees* £15,000 *of such stock upon trust to make the above-mentioned payments out of income to his wife; and, further, to make annual payments out of surplus income to the charities named; and in all other respects he confirmed his said will. Testator died in March*, 1894, *his wife having predeceased him.*

Held, (1) *that there was no gift in the codicil of* corpus *to the charities*; (2) *that the codicil did not revoke the gift of* corpus *to the charities in the will, as it was a demonstrative legacy, and therefore came under the first part of sub-section* 2 *of section* 25 *of the National Debt* (*Conversion*) *Act*, 1888, *and not under the second part of that sub-section, which refers to specific legacies only.*

Summons.

A. H. Shepherd, by his will, dated the 3rd of October, 1887, gave to trustees £10,000 New 3 per Cent. Bank Annuities upon trust to apply the dividends in payments to his wife as therein stated, and after her death to sell the stock and to divide the proceeds equally between forty-six charities therein named. His residuary estate he gave to his sister and her son equally.

By a codicil dated the 28th of February, 1891, to his said will, the testator, after reciting the above bequest, and that the £10,000 3 per Cent. Bank Annuities had been converted into 2¾ per Cent. Consolidated Stock, gave to the trustees £15,000 2¾ per Cent. Consolidated Stock then standing in his name, upon trust to apply the dividends in the payments to his wife directed by his will, and further directed that, in addition to such payments, the trustees should, out of such dividends, during his wife's life, make further annual payments to the charities therein mentioned, and in all other respects confirmed his said will.

Testator's wife died in January, 1892, and testator died in March, 1894. Testator had at the date of his will £14,000 New 3 per Cents., which were subsequently, under the National Debt Conversion Act of 1888 (51 Vict. c. 2), converted into 2¾ per Cent. New Consolidated Stock, and at the date of his codicil, and also of his death, there was standing in his name a sum of £15,000 2¾ per Cent. New Consols, of which the above-named sum of £14,000 formed part.

This summons was taken out by the residuary legatees against St. George's Hospital (as representing the several charities named by the testator in his will), and against the trustees and executors of the will, to have the two following questions determined:

(1) Whether the legacy of the £10,000 New 3 per Cents. given by the will to the charities had failed by reason of the conversion? and

(2) Whether the charities had any, and, if so, what, interest in the £15,000 New 2¾ per Cent. Consols bequeathed by the codicil?

The National Debt (Conversion) Act, 1888 (51 Vict. c. 2), provides by section 25, sub-section (2), that "in any Act passed or instrument executed before the passing of this Act references to any stock liable to be converted or exchanged in pursuance of this Act may, if the stock is so converted or exchanged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition which, but for the passing of this Act, would have operated as a specific bequest of any such stock, shall, if the same is so converted or exchanged, be construed as a specific bequest of such new stock, and if the same is not so converted, but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money equal to the nominal amount of the stock so paid off or redeemed."

Warmington, Q.C., and *Method*, for the plaintiffs.—Section 25, sub-section 2, of the National Debt (Conversion) Act, 1888, does not apply, as there is no specific gift. There is no ultimate gift in the codicil with respect to the £15,000. Therefore the charities get nothing, or at most only £10,000 converted stock under the gift in the will if that gift is valid: *Duke of Northumberland* v. *Earl Percy*, 41 W. R. 597, [1893] 1 Ch. 298; *Lord Lovat* v. *Duchess of Leeds*, 10 W. R. 397, 2 Dr. & Sm. 62.

Renshaw, Q.C., and *Vaughan Hawkins*, for St. George's Hospital (representing also the other charities).—The testator has substituted the £15,000 New 2¾ per Cent. Consols for the £10,000 Bank Annuities. Consequently we are entitled to them; failing that, we are entitled to £10,000 New 2¾ per Cent. Consols under the opening portion of sub-section 2 of section 25 of the National Debt (Conversion) Act, 1888: see *Duke of Northumberland* v. *Earl Percy*, [1893] 1 Ch., at p. 302.

H. Tindall Method, for the trustees.

KEKEWICH, J.—I must not guess at the meaning of a testator, or I might with some confidence guess, in reading the codicil, that the testator intended to increase his generosity—that he thought £10,000 £3 per Cents. were not very fairly represented by £10,000 £2¾ per Cents., and it would be better to increase the amount. But if you read a little further, as Mr. Renshaw has pointed out, the amount may have been increased simply in order to provide for the increased payment thereout during the life of his wife; that may have been, not only the governing motive, but the only motive, and there may have been an intention on the testator's part not to give £15,000, but only still to give the £10,000. He has not said what is to happen to the £15,000 in words which I can in any way construe as a gift; that is, there is no gift at all. That being so, the question is, What happens to the gift under the will? I find no revocation of the gift under the will as regards the charities, and it is immaterial to consider whether there is any revocation during the life of the wife. There is none as regards the charities—the ultimate gift. He recites it, and it looks very much as if he were leading up to something like revocation; but it is certainly not expressed, and I do not see that it is necessarily implied.

Then, the legacy standing, what is the meaning of it? It is a demonstrative legacy. A legacy of that character is not specific, though a very little change in the language would have made it a specific legacy, as probably it was intended to be. There, again, I must not guess; I must take the words as they are. He gave £10,000 New 3 per Cents., and there is no

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

such thing now, either standing in his name or in any other person's name, and the second branch of sub-section 2 of section 25 of the National Debt (Conversion) Act, 1888, has no application, because there is no specific bequest. I adopt North, J.'s explanation of that sub-section, which is to be found in *Northumberlavd* v. *Percy* at page 303 of [1893] 1 Ch. I have no doubt that the provision in that branch of the sub-section was inserted to meet that particular case; but does not what I have here, fall within the first branch of the same sub-section? "In any Act passed or instrument executed before the passing of this Act references to any stock," and so on; and why should that not refer to the will. The only possible argument against it is that you have a testamentary disposition mentioned below, and that therefore the "instrument" mentioned in the first part cannot possibly refer to what is specifically dealt with in the second part. That would be a strong argument if all dispositions by will were mentioned in the second part; but they are not. What is dealt with there, for the reasons mentioned by North, J., is a specific disposition by will; anything else must be presumed to have been intended to fall, as it does in language fall, under the general description of "any instrument" in the earlier part of the sub-section. The result is that there is a good gift of £10,000 2¾ per Cent. Stock in trust for the charities. The costs of the application must come out of the residue.

Solicitors, *Pyke & Parrott; Palmer, Eland, & Nettleship.*

(1895) 1 Q.B. 533.

Q. B. Div. (Divisional Court) (Mathew and Kennedy, JJ.) } Aug. 9, 1894.

REG. *v.* ORMESBY LOCAL BOARD OF HEALTH. (*a.*)

Local government — Building line — Street — "Front main wall"—"Building on either side in the same street"—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

In November, 1893, *T. built a house near to, but not abutting on, the west side of Westbourne-grove (part of Ormesby-road),* 240 *yards north of a house on the west side erected in* 1886. *The house fronted towards the south. In February,* 1894, *T. bought some land, seventy feet deep, along the west side of Ormesby-road, to the north of his house, with the object of erecting cottages upon it. On the east side of Ormesby-road a number of houses had been built close up to the road. The building plans showed that the cottages would be somewhat nearer Ormesby-road than T.'s house was. The urban authority decided that the cottages must be in line with T.'s house, under section* 3 *of the Public Health (Buildings in Streets) Act,* 1888. *There was no continuous line of buildings where it was proposed to build the cottages.*

Held, that the cottages need not be in line with T.'s house, as, under the above circumstances, there would be no erection of a "house or building beyond the front main wall of the house or building on either side thereof in the same street."

The Ormesby Local Board was the urban sanitary authority of the district situate immediately outside the boundary of the borough of Middlesborough, and to the south-east of it.

In 1856 a Mr. Pennyman laid out a portion of his estate in North Ormesby for building purposes, and made certain roads to improve communication with it, one of such roads being Ormesby-road, which ran south from the borough of Middlesborough for a distance of two miles.

About the same time the owners of the Middlesborough Estate laid out building land within the borough of Middlesborough, and continued the Ormesby-road northwards into Middlesborough, calling the continuation North Ormesby-road.

A turnpike gate was erected where the Pennyman joined the Middlesborough Owners' Estate.

From time to time houses were built fronting into and adjoining Ormesby-road. On the east side of Ormesby-road a row of houses was built, about the year 1864, called Westbourne-terrace, and to the south of Westbourne-terrace was erected a cottage hospital. Ten villa residences were also built on the east side, and the part of Ormesby-road adjoining them was known as Westbourne-grove. In 1886 a house was built on the west side of Westbourne-grove.

In November, 1893, a Mr. Thorrold built himself a house on the west side of Westbourne-grove, 240 yards north of the house on the west side, erected in 1886. The house fronted towards the south, and its back adjoined, but did not abut upon, Westbourne-grove.

In February, 1894, Mr. Thorrold bought a strip of land, seventy feet deep, along the west side of Ormesby-road, immediately to the north of his house, for the purpose of erecting cottages upon it. He prepared plans and submitted them to the Ormesby Local Board for their approval on the 1st of March, 1894. The cottages, according to the plans, were to be set back ten feet from Ormesby-road, but would, nevertheless, be somewhat nearer Ormesby-road than Thorrold's house was.

On the 16th of April, 1894, the board decided that the proposed cottages must be in line with the house already erected by Mr. Thorrold, having regard to the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52), s. 3.

By section 3 of the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52): "It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street. . . ."

A rule *nisi* calling upon the Ormesby Local Board to show cause why a writ of *mandamus* should not issue directing them to pass the plans was obtained.

Roskill showed cause.—The wall of Mr. Thorrold's house is a front main wall: *Ravensthorpe Local Board* v. *Hinchcliffe*, 24 Q. B. D. 168, 38 W. R. Dig. 116. The proposed cottages will be buildings in a "street," erected "beyond the front main wall of the house or building on either side thereof in the same street."

He cited *Barlow* v. *St. Mary Abbotts, Kensington*, 34 W. R. 521, 11 App. Cas. 257; *Attorney-General* v. *Edwards*, [1891] 1 Ch. 194, 39 W. R. Dig. 115; *Warren* v. *Mustard*, 66 L. T. N. S. 26, 40 W. R. Dig. 128.

T. F. Hobson, in support of the rule.—First, the wall in question is a back wall and not a "front main wall." Secondly, the cottages which Mr. Thorrold proposes to build are ninety feet away from his house, and there is therefore no "building on either side thereof." Thirdly, a non-continuous row of buildings is not a "street": *Reg* v. *Fullford*, 12 W. R. 715.

Roskill replied.

MATHEW, J.—The only point for us to consider is that which has been described as the second point in the argument. The first point, that the wall of Mr.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

Thorrold's house was not a "front main wall," seems to me to have nothing in it. A "front main wall" is the front main wall in the road, and unquestionably this wall comes within that description.

The second point made by Mr. Hobson was that there was not under the circumstances of this case a "building on either side in the same street," and unless that condition was made out the Act of Parliament was not infringed and the urban sanitary authority ought not to have interfered.

Each of these cases must depend on its own circumstances. It is idle to refer to a particular case in which it was said that a space of one hundred feet was too little, or to a case in which two hundred feet was said to be too much. It is not a question of measurement merely. The Act must be construed reasonably, having regard to the public interest, for the purpose of which the urban sanitary authority is created; and where it is proposed by describing the building line, as in this case, to take away from the adjoining land proprietors a portion of their estates, we are bound to look very carefully at the circumstances of the particular case. It appears that Mr. Thorrold some time ago built a house, the main wall of which is in a certain line with regard to the roadway in front of it. It is now proposed to build four cottages at a distance of seventy to ninety feet, the front walls of which will project slightly beyond that line. It is intended to build these cottages in a locality where there is no continuous line of buildings of any sort, but where, it is said, the land is laid out for building operations, and where in the future a very different state of things may arise. That may be. We have to deal with the case as it stands—*i.e.*, with the original building and with the projected building and nothing more. The side of the road where the original building is and the proposed structures are to be is the side of the road where at present there are no other houses. On the opposite side—*i.e.*, higher up Westbourne-grove—houses have been built, and without reference to the line supposed to be necessary in this case. The houses there have been built close up to the road, and the owner has been allowed to utilize the whole of his property without objection. It cannot be suggested that any objection was taken to those houses being built, and we put the question, Why is the objection taken now to the houses on the opposite side of the road? To that there is no answer except that the urban sanitary authority is entitled, in the exercise of what is called its discretion (which turns out to be in the exercise of any captious view which may be taken by the majority) to say how, under such circumstances, the land on the opposite side of the road is to be used. I can only say that it appears to me that there is no evidence of the existence, on the side of the original building and in the same street, of what is necessary under this Act. There is no evidence of the existence of any house on either side of the original construction and in the same street with it. Therefore the urban sanitary authority is not entitled to keep the line of the original house as the building line, and these plans ought to be approved.

KENNEDY, J.—I agree.

Rule made absolute.

Solicitors for the Ormesby Local Board, *Williamson, Hill, & Co.*, for *S. Spry*, Middlesborough.

Solicitors for Mr. Thorrold, *Belfrage & Co.*, for *Bainbridge & Barnley*, Middlesborough.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 21.

GUILFORD v. LAMBETH. (*a*.)

County court—Jurisdiction—Power to remit action from High Court—Counter-claim for unliquidated damages—Practice—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

Under section 65 *of the County Courts Act*, 1888, *there is power to remit to the county court an action of contract for less than* £100, *although the defendant has set up a counter-claim for unliquidated damages.*

Decision of the Divisional Court (ante, *p.* 45) *affirmed.*

Appeal from an order of a divisional court (Hawkins and Lawrance, JJ.) refusing to set aside an order remitting the action to the county court, reported *ante*, p. 45.

The action was brought in the High Court to recover the sum of £32, the price of a horse sold by the plaintiff to the defendant.

On the 29th of June, 1894, the plaintiff, having unsuccessfully tried to sign judgment under order 14, obtained an order from a master remitting the action to the county court of Northampton.

On the 2nd of July the defendant gave notice of appeal from that order.

On the 3rd of July the defendant delivered a defence and counter-claim, in which he counter-claimed for £35 damages for an alleged breach of warranty that the horse was quiet.

On the 4th of July the appeal came on for hearing before Mathew, J., who affirmed the order of the master. The fact of the counter-claim having been delivered was not called to the attention of the learned judge. The defendant appealed to the Divisional Court, and contended that, there being a counter-claim for unliquidated damages, there was no jurisdiction to remit the action to the county court. The Divisional Court affirmed the order of the judge. The defendant appealed.

W. E. Hume Williams, for the defendant.—There is no jurisdiction to remove this action out of the High Court. An action for unliquidated damages cannot be remitted to the county court: *Basset* v. *Tong*, 42 W. R. 668, [1894] 2 Q. B. 332, following the earlier case of *Knight* v. *Abbott*, 31 W. R. 505, 10 Q. B. D. 11. On the same principle neither can a counter-claim for unliquidated damages be so remitted. It was expressly held in *Mackay* v. *Banister*, 34 W. R. 121, 16 Q. B. D. 174, under section 26 of the County Courts Act, 1856, that where in an action for less than £50 a counter-claim was set up for unliquidated damages, there was no power to remit the action to the county court. It is true that when the County Courts Act, 1856, was passed, counter-claims were unknown. But the Legislature have, in section 65 of the County Courts Act, 1888, re-enacted section 26 of the County Courts Act, 1856, and section 7 of the County Courts Act, 1867, and they have not added any reference to counter-claims or any words showing an intention to extend the jurisdiction to cases in which counter-claims are set up. It is not necessary to contend that no counter-claim of any kind can be remitted to the county court, but a counter-claim for unliquidated

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

damages cannot be so remitted. If this action can be remitted, so also could an action in which the defendant counter-claimed for £1,000, and it is impossible to suppose that the Legislature intended such a counter-claim to be tried in a county court. If such a counter-claim were set up in an action, which had been originally brought in the county court, the whole proceedings, or at any rate the counter-claim, might be removed into the High Court on an application under either section 90 of the Judicature Act, 1873, or section 18 of the Judicature Act, 1884.

Morton Smith, for the plaintiff.

Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. We must act on the simple words of section 65 of the County Courts Act, 1888, and we must give those words their ordinary grammatical construction. They are as follows:—"Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, . . . it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon . . . the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." This case comes within those plain words; it is an action of contract, and the claim indorsed on the writ is for less than £100. It is therefore a case in which the master had jurisdiction to send the action to be tried in the county court. It is, however, now said that that right of having an action remitted to the county court—a right given by the Legislature for the benefit of suitors—is taken away by reason of the defendant having put in, as one of his defences, a counter-claim. According to this argument the delivery of any counter-claim, even one for liquidated damages, would take away the jurisdiction to remit. There are, however, no words in the section which put any such limitation on the jurisdiction, and we cannot introduce such words. A reason why we should do so is suggested by reference to the history of the legislation relating to this procedure. No doubt the history of past legislation may sometimes be looked to; but I cannot help thinking that such an argument is often used as a last resource, and at any rate it cannot properly be used if the language of the Act to be construed is plain. I think that when an action is within the terms of section 65, the court has jurisdiction to send the case to be tried in the county court, and that jurisdiction cannot be affected by anything which may afterwards happen in the course of the action. Whatever counter-claim may be set up is pleaded in the action and must go with the action to the county court. It is urged that the defendant might set up a counter-claim for £1,000. I do not flinch from that consideration. I think that even in such a case the jurisdiction to remit would still exist, though when the court came to consider how it should exercise its jurisdiction it would not allow such a counter-claim to be tried in the county court. In this case, however, the counter-claim is nothing but a defence to the action, or, if it is a real counter-claim, it is one which it will be very easy to try. I am of opinion that there is no reason why this action should not be sent to the county court.

As to the authorities, it is said that Field, J., in *Knight* v. *Abbott*, spoke of the corresponding section in the County Courts Act of 1856 as being a restrictive enactment. I cannot see that. I think that this section was intended to be beneficial, and ought to be construed largely. Then there is the case of *Mackay* v. *Banister*. If the judgment in that case were applicable to this case and were binding on us, then, no doubt, we should have to determine this case in a way contrary to what I have said. But it is not binding on us, and we have no occasion to overrule it, for it is a decision on an Act of Parliament which is now repealed. It is sufficient to say that it has no application to the present case.

LOPES, L.J.—An action has been brought in the High Court for £32, the price of a horse. The defendant has set up a counter-claim for £35 for an alleged breach of warranty. It is to be observed that both claim and counter-claim are within the jurisdiction of the county court. Therefore, if the action had been brought in the county court, it might have been tried throughout, both claim and counter-claim, in that court. An order has been made and affirmed remitting the action to the county court. It is now said that by reason of the counter-claim there was no power under section 65 of the County Courts Act, 1888, so to remit the action. There appear to me to be two answers to that contention. In the first place, when the case was before the master, no counter-claim had been delivered, and it was not suggested before the judge that the counter-claim was any objection to the order. It cannot be said that the master had no jurisdiction to remit the action, or that the judge was wrong in affirming the order. In the second place, section 65 clearly includes a case such as the present. The action is within the terms of the earlier part of the section, being an action of contract in which the claim indorsed on the writ does not exceed £100. And the section, after saying that any such action may be ordered to be remitted to the county court, proceeds to show what shall be the effect of such order:—"The action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." There is nothing here to exclude counter-claims, but on the contrary the words "all proceedings" include counter-claims.

The case of *Mackay* v. *Banister* is said to be contrary to this view. That case, however, was a decision, not on this statute, but on a statute passed at a time when counter-claims were not known. That statute is now repealed, and that decision has no application to the present case. Neither do I think that *Basset* v. *Tong* applies to this case. There the plaintiff's claim was for unliquidated damages; here the claim indorsed on the writ is for a liquidated sum.

I think that the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion. I think that neither *Knight* v. *Abbott*, nor *Mackay* v. *Banister*, nor *Basset* v. *Tong* give us any assistance in the determination of this case.

Appeal dismissed.

Solicitors for the plaintiff, *Pitman & Sons*, for *W. Lane*, Kettering.

Solicitor for the defendant, *H. R. Newson*.

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) Nov. 7, 8, 12.

RHODES *v.* MOULES. (*a.*)

Solicitor—Partnership—Fraud of partner—Liability of firm—Mortgage transaction—Ordinary course of business—Partnership Act, 1890 (53 *&* 54 *Vict. c.* 39), *s.* 11.

The plaintiff, being a client of a firm of solicitors, entered into negotiations for obtaining a loan upon the security of certain real estate to which he was entitled. The transaction was carried out by R., a member of the firm, the money being advanced by the defendants M., who were also clients of the firm. R. represented to the plaintiff that the mortgagees required some further security, and suggested that there should be included in the mortgage certain bonds payable to bearer, upon the security of which the plaintiff had, on two previous occasions, borrowed money, the transaction in each case having been carried out by R. on behalf of the firm. The plaintiff accordingly handed these bonds to R., who subsequently misappropriated them and absconded. The defendants M. never required any additional security, and neither they nor the defendants the partners of R., had any knowledge of the circumstances under which he obtained possession of the bonds. The plaintiff sought to make all the defendants liable for the loss of the bonds.

Held, that the defendants M. were not liable, inasmuch as they had never authorized R. to include the bonds in the mortgage security, and had never ratified what R. had done; but

Held, that the plaintiff's transaction with R. was a transaction with the firm, which rendered not only R., but the firm liable; and that, therefore, the defendant partners of R. were liable to make good the loss to the plaintiff.

Cleather *v.* Twisden, 33 *W. R.* 435, 28 *Ch. D.* 340, *distinguished.*

Appeal of the plaintiff from the decision of Kekewich, J., who dismissed the action against all the defendants.

Warmington, Q.C., and *Dibdin*, for the appellant.

Marten, Q.C., and *Boome*, for the respondents Mrs Moules and her son.

Renshaw, Q.C., and *S. Dickinson*, for the respondents Messrs. Hughes & Masterman referred to *Cleather* v. *Twisden*, 33 W. R. 435, 28 Ch. D. 340, and *Hardman* v. *Johnson*, 3 Mer. 347.

Dibdin replied.

Lord HERSCHELL, L.C.—This is one of those painful cases in which, whatever judgment is pronounced, the loss must fall upon some innocent person who has not by act or default contributed to it.

The litigation in this case has arisen out of the frauds of one Rew, who practised his profession as a solicitor in partnership with Messrs. Hughes & Masterman in the City of London. There is no doubt that 280 De Beer shares were placed in his hands by Mr. Rhodes, the plaintiff, in August, 1891. These shares he has fraudulently misappropriated, and the first question is whether his partners, Messrs. Hughes & Masterman, are liable to make good the loss to the plaintiff.

Before stating the circumstances under which the shares were received by Rew it is necessary to revert to some prior transactions between the plaintiff and Rew, acting on behalf of the firm. It is clear that Mr. Rhodes was a client of the firm, and that the firm had acted for him in previous matters. In the month of September, 1889, Mr. Rhodes was desirous of raising a loan of £4,000, and he communicated with Rew on the subject. Ultimately it was arranged by Rew that an advance should be made by a firm of stockbrokers named Haes & Sons, and 280 De Beer shares were transmitted by or on behalf of Mr. Rhodes to Rew, and by him placed in the hands of Messrs. Haes & Sons, who made the advance. That loan was paid off in the month of November, 1890, and on the 29th of October in that year Rew wrote to the plaintiff a letter, in which he said: "I send you statement of account which shows the balance of £292 9s. 4d. in favour of my firm. The matter, you will see, commenced about a year ago, and I have brought everything up to date." That account was an account showing payments made by the firm on behalf of the plaintiff, and cash received by the firm on behalf of the plaintiff. The balance brought down was the sum mentioned in the letter. One item of that account was in these terms: "Our account as to negotiating and procuring loan, including making payments of interest from the 5th of November, 1889, to date, £32 10s." On the 10th of November, 1890, that account was settled by payment to the firm, no doubt through the hands of Rew, and the receipt was given, signed by Rew, "Hughes, Masterman, & Rew." That is an account with the firm which passed through the books of the firm, and in every respect bore the character of a transaction of the firm, and the firm received payment for the work done in negotiating that loan. On the 29th of November Rew received back from Messrs. Haes the shares given as security, the loan having been repaid, and gave to Messrs. Haes a receipt for the 280 De Beers to bearer, and the forty-five transfers signed, "Hughes, Masterman, & Rew, solicitors for Mr. Wm. Rhodes," and the shares were then received by Rew, and he wrote on the 22nd of December, 1890, to the plaintiff a letter, in which he said: "The De Beer shares which were with Messrs. Haes are now in our strong room and at your disposal. They might be utilized in case you wanted a temporary loan at short notice." In the month of January following, Mr. Rhodes, wanting a loan of £1,000, the loan was raised again on the deposit of these shares with Messrs. Haes, and the shares remained for some time in their possession.

At this time Mr. Rhodes was desirous of obtaining a loan of a more permanent character, the transactions with Messrs. Haes being of the nature, I believe, of a loan from fortnight to fortnight. Accordingly he was in correspondence with Rew with reference to a property of his called the Flore Fields property, and Rew intimated that he had a client with whom he thought that mortgage might be negotiated. Those negotiations proceeded and the defendants the Moules' agreed to advance £6,000 upon a mortgage of the Flore Fields estate, a transaction which was completed in August, 1891. Rew had written to Mr. Rhodes stating that, owing to a charge of an annuity upon the property, there was some difficulty as to the sufficiency of the security, but that he thought that his clients would be content to take it if they got, as collateral security, the De Beer shares, or some of them. Mr. Rhodes said that he was quite willing that the De Beer shares should be given to the mortgagees as collateral security. He came to London on the 28th of August, 1891, to complete the transaction. He found that the De Beer shares were still in the hands of Messrs. Haes, although the £1,000 had been repaid, and he obtained from Rew a letter to Messrs. Haes in these terms: "The bearer of this letter is Mr. William Rhodes, who

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

will be glad to have the De Beer shares, so that he may collect the dividend. Will you kindly give them to him and oblige," and endorsed on that is a receipt by Mr. Rhodes for the De Beer shares. Having received the De Beer shares from Messrs. Haes, Mr. Rhodes handed them to Rew, and on that same day, I think, the mortgage was executed to the Moules. The statement made by Mr. Rhodes as to the circumstances under which he left the shares with Rew is as follows: "Mr. Rew said that his clients were prepared to accept the shares as collateral security, that they were to be deposited with the firm, and that they would have charge of them, providing interest was not forthcoming from the Flore Fields property." Some criticisms were presented to the court on the evidence of Mr. Rhodes, and the learned judge in the court below has adverted to some inconsistencies in his evidence. I have read his evidence, and there seem to me to be no inconsistencies in it which are at all material. I think it cannot be doubted that Rew did represent to Mr. Rhodes that the lenders required some security beyond the mortgage of the freehold, that the security was to be collateral and to consist of these De Beer shares, or that Rew induced Mr. Rhodes to leave the De Beer shares with him on the representation that he would arrange with the lenders that he should hold the shares for them as collateral security for their loan. Whatever verbal differences there may be, I think there can be no doubt that this is the substance of the transaction, in view not merely of Mr. Rhodes' statements, but of the letters to which I have referred, written previously by Rew to Mr. Rhodes. There is only one other fact I should mention—viz., that the coupons attached to the shares were collected, in some cases at all events, by the firm by means of their clerks from the De Beer Co., and that on the 11th of October, 1892, a letter was written to the plaintiff signed in the name of the firm in these terms: "We have paid to the credit of your account at Lloyd's Bank (Limited), Fleet-street, £245 12s. 6d., De Beer coupons, £170 12s. 6d." and that was signed by one of the clerks of the firm whose business it was to attend to the securities.

The question is whether, under these circumstances, the firm are liable in respect of these shares, which have been misappropriated in the manner I have mentioned. It is said that they are not, inasmuch as it was beyond the scope of Rew's authority as a solicitor to take the shares for any such purpose, or under such circumstances, and that, inasmuch as his partners were admittedly ignorant of his having so taken them, they cannot be bound by the transaction or incur any liability in respect of it. It is clear that on previous occasions the firm had acted for Mr. Rhodes in negotiating loans, and in receiving from him these very securities and transmitting them to the lenders, and, in the first instance certainly, receiving them back from the lenders. That that was a firm transaction I think it is impossible to dispute, because, as I have shown, it passed through the books of the firm: the firm credited themselves with the charges in respect of it, and an account was sent in in the name of the firm, and that account was discharged by Mr. Rhodes. Therefore, it is impossible to dispute that Mr. Rhodes had on the previous occasion actually carried through such a transaction with the firm. As a part of the transaction they not only negotiated the loan, but received from him these very securities to be handed to the lenders. Even apart from that, I am not prepared to say that it would be outside the scope of solicitors' business, when they are negotiating a loan for one of their clients, to receive from him securities, whatever their nature, for the purpose of transmission to any of their clients who are making the loan. But it is not necessary to decide that as a matter of law. All I say is, I am not satisfied. But in the present case, having regard to the prior dealings of this gentleman with the firm, I think it is impossible for them to say that Mr. Rhodes was not perfectly justified in assuming that the partner with whom on this occasion he dealt had authority to receive from him the shares which he handed over for the purpose of carrying out the mortgage negotiation which they were negotiating for him. If these shares had been handed over to the lenders, the transaction would be on all fours with the one which had been previously carried through by him on behalf of the firm. In the present case it is true that the shares were not handed over to the lender; but Rew represented to the plaintiff that this was by arrangement between him and the lender, who was another of his clients, and who had arranged that he, or rather the firm, should hold the securities on behalf of the lender, instead of handing them over to him. It seems to me that that can make no possible difference in the result. That was merely a matter between Rew, or the firm, and their other clients, for whom they had negotiated the loan. If in fact that authority had been received, a question which I shall have to deal with presently, it seems to me it would be quite immaterial whether the transaction was carried out in that way or by Mr. Rew receiving them afterwards to hand them over to his clients, the lenders.

For these reasons, apart from authority, I find it difficult to discover any ground upon which it could be stated that Mr. Rhodes was not justified in treating, and entitled to treat, the transaction as a transaction with the firm, which rendered not him only, but the firm responsible, if the shares received under the circumstances I have detailed were misappropriated and not forthcoming. This, of course, is subject to the question whether the firm had discharged themselves by showing that they were held for the Moules under such circumstances that the Moules are liable to the plaintiff; in which case, of course, the other defendants would be discharged from liability, because they would in fact have handed them over to the lenders and be freed from responsibility to Mr. Rhodes, the Moules being the persons responsible; but that is a subsequent part of the case which I will deal with presently.

The defendants relied mainly upon the case of *Cleather* v. *Twisden*, decided in this court in the year 1884. It was said that this case established that it was not part of the business of a solicitor to take over, for custody, bonds payable to bearer, and consequently, when one partner had done so without his other partners being aware of it, they were under no liability if he misappropriated them. I do not think that case covers the present case. In the view which I take, these bonds were not handed to Rew merely for safe custody; they were handed to him in connection with a mortgage transaction which he was carrying out, in order that they should pass to him and from him to the lenders, for whom he was acting, as collateral security. But it is to be observed that in the case of *Cleather* v. *Twisden* Bowen, L.J., said: "The claim is against the firm to which Parker belonged in respect of the custody of certain bonds by Parker. This is conceded to be beyond the ordinary scope of the business of solicitors, though, of course, it may be brought within it by special circumstances." There was, therefore, no evidence, it being conceded by those who were arguing the case that such a transaction was beyond the ordinary scope of the business of solicitors. It cannot be said, therefore, that in that case it was held as a matter of law to be so, because obviously when that had been conceded

as a matter of fact any finding as a matter of law would have been superfluous. So I do not think that case can be taken as a decision, in point of law, that such a transaction would be beyond the scope of the solicitor's authority. As the Lord Justice said, it must depend upon the special circumstances, and certainly if it were to appear that it had been part of the practice of solicitors in the City to take securities of this description for safe custody, or if, indeed, in the case of a particular firm it appeared that such had been the practice, the case would have been one that would have required the consideration of the court to determine whether, in the case of that firm at all events, if not generally, it was not a matter within the scope of the authority of one of the partners. I should say substantially that decision appears to me to have amounted to this, that Parker had really taken charge of these bonds for a client as a personal matter as between him and that client, as a solicitor, of course, but still not as a member of the firm, but as an individual. That seems to have been the conclusion at which the court arrived, and there were undoubtedly circumstances which point to that conclusion, to which it is not necessary to refer further. Bowen, L.J., says this: "That the bonds were in the custody of Parker is common ground. The real question is whether, in letters for which the firm are responsible, language has been used which would justify the plaintiffs in assuming that Parker's custody was the custody of the firm." I have difficulty in seeing how it can be doubted that letters for which the firm were responsible, letters relating to the previous transactions to which I have alluded, which passed through the letter-book of the firm, and in respect of which charges were made by the firm and paid by the plaintiff—I have difficulty in seeing how it can be doubted that these letters justified the plaintiff in assuming that when Rew received those bonds he received them, not as an individual, but received them on behalf of the firm, and that his receipt of them was the receipt of the firm. In Fry, L.J.'s judgment he says this: "He [that is, Parker] was advising the trustees in the realization of the property, and I do not doubt that as to any parts, such as the mortgages which were received by Parker for distribution, the firm would be responsible; but as to the bonds, they were not received for the purpose of distribution, but for safe custody long before the distribution began." Therefore, I do not see any reason to think that, if circumstances such as these had been brought before the court which decided that case, and they had been aware of the previous transactions which we are aware of here, and had seen that these shares were received in connection with the mortgage transaction in the way I have described, I see no reason to think that they would have come to any other conclusion than that at which we have arrived.

But then it is said on behalf of the firm that the defendants Moules are responsible for these shares, and that the receipt of them by Rew was a receipt on their behalf; that he held them on their behalf, and that, whatever the liability of the firm to the Moules, the Moules could not call upon the plaintiff to repay the sum lent without giving up to him—not only reconveying to him, but giving up to him—these De Beer shares. In order to establish this case I think they must make out two things—first, that Rew did in fact receive and hold these De Beer shares for the Moules, and, next, that he did so with the authority of the Moules. Now I have not been satisfied that he did in fact receive them, or ever intended to receive them, and hold them for the Moules. No doubt he led Mr. Rhodes to believe that he did; but that is quite a different question. The case is a very peculiar one. Rew, when he drew up the mortgage from Mr. Rhodes to the Moules, made himself a mortgagee, not only without any authority to do so, but without any legitimate reason for doing so. He was, of course, not a mortgagee. He had told Mr. Rhodes that the mortgagees would require some collateral security, that he thought they would take the De Beer shares. He had no communication on the subject with the Moules at all. They never required further security. They never told him they were not satisfied with the security of the freehold, and he never communicated with them on the subject. He told Mr. Rhodes it was by arrangement with them that the shares were to be left in the custody of the firm. No such arrangement had been made, and again there was no communication, as I have said, on the subject. We know that Rew had commenced those Stock Exchange transactions which ultimately led to his ruin at a date prior to this—viz., in January of this year—and he ultimately did dispose of those shares as his own. Under these circumstances I cannot say, in the absence of any evidence that he ever identified the shares as theirs, put them in an envelope, wrote their name on them, or did anything to earmark them as the Moules'; and, in my view of the falsehoods and irregularities to which I have referred, I cannot be satisfied that at the time he received these shares he ever meant to hold them really for the Moules. But, even if he did, is there evidence that he had authority to receive and hold these shares on behalf of the Moules so as to make them liable? It is not suggested that he received any express authority, that they ever heard anything of the transaction; but it is said that he had a general authority, that the whole of the business in connection with the estate in which they were interested was left so entirely to Rew that he was intended by them to be absolutely master of the situation, taking what he pleased and doing what he pleased. Now I have read the correspondence, and it conveys to my mind precisely the opposite impression. I do not find Mrs. Moules leaving everything to him in that blind way at all. She requires to know about everything. He professes to tell her about everything. He asks her approval at every step, and that approval was conveyed, and doubts were sometimes suggested, and, seeing that she never learned, and neither of the Moules ever learned, that these shares had been taken for them by Rew, or rather held for them by Rew, or the firm, it seems to me it would be somewhat extravagant to arrive at the conclusion, notwithstanding all that, that they were held by the firm or Rew for the Moules, or that, having been in effect handed to them, they had become responsible for them. For these reasons I am unable to come to the conclusion that the defendants, the Moules, are liable.

I do not think the firm, who undoubtedly received these shares from Mr. Rhodes, have discharged themselves of liability. It follows in the result, I think, as regards the Moules, that the appeal should be dismissed with costs, and, as regards the other defendants, the decision must be reversed with the usual result, and judgment entered for the plaintiff.

LINDLEY, L.J., read the following judgment:—The plaintiff seeks to make four defendants liable for the loss of certain share certificates transferable to bearer and given by him to one Rew and misappropriated by Rew. Rew is said to have obtained these share certificates from the plaintiff as agent for the defendants the two Moules and as partner of the defendants Hughes & Masterman. All four defend-

ants are sought to be made liable as Rew's principals; but, although the plaintiff relies on the law of agency in order to establish liability on the part of all the defendants, the plaintiff's case against Rew's clients, the two Moules, is so different from his case against Rew's partners that it is necessary to examine the two cases separately.

I will first take the case made against Hughes and Masterman, who were Rew's partners. The law applicable to the case against them is thus stated in section 11 of the Partnership Act, 1890:—"In the following cases—viz., (*a*) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and (*b*) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss." The facts bring this case within this enactment. Rew, Hughes, and Masterman were partners; and Rew certainly was acting in his transtions with the plaintiff as a member of the firm. The plaintiff wanted to borrow money on some property in Northamptonshire, and he applied to Rew as a solicitor to assist him to effect the necessary mortgage. Some clients of the firm—viz., the two Moules—were said to be willing to lend the money; but, the plaintiff's interest in the land being subject to an annuity, Rew said that the rents were not sufficient to cover the interest, and that the plaintiff's shares might be brought in as further security. Accordingly, on the 28th of August, 1891, the plaintiff obtained the shares from his brokers and lodged them with Rew. At the same time the plaintiff executed a mortgage of the land referred to, and left that also with Rew. So far the transaction was an ordinary business transaction, and such as solicitors are in the daily habit of conducting. It is everyday practice for a solicitor to act for both borrower and lender in a mortgage transaction, and to receive from the lender the money to be lent to the borrower in order to hand it to him, and to receive from the borrower the deeds and other securities on which the money is raised, and to keep those deeds and securities for the lender until he wants them or until the loan is paid off. What Rew did was neither more nor less than to receive the plaintiff's share certificates as part of an ordinary business transaction of this description.

It is said that the ordinary course of business does not extend to the receipt of securities payable to bearer; but there is no authority for this proposition, nor is there any evidence to show that this is so in fact. Moreover, there is evidence to show that this firm, at all events, received such securities for the plaintiff and other clients. The only conclusion at which I can arrive is, that the plaintiff's certificates came into Rew's hands when acting within the scope of his apparent authority. The case is thus brought within the first half of section 11 of the Partnership Act, 1890. But it is, I think, brought within the second half also. The letters of the 22nd of December, 1890, and the 11th of October, 1892, and other letters, the ledger account and other evidence, coupled with the facts to which I have already alluded, justify the inference that the plaintiff's certificates were received by the firm in the course of its business. I should not hesitate to draw this inference myself.

The case of *Cleather* v. *Twisden*, on which the defendants so much relied, is clearly distinguishable from the present. The securities there were deposited for safe custody only. They did not come into the hands of the firm (or of any of its members) as part of a transaction which was being conducted by the firm (or any of its members) in the ordinary course of business. There was no business being conducted, except the deposit itself. But in the very same case it was conceded that the firm was liable for money received by one of the partners for investment on mortgage and misapplied by him.

I pass now to the case of the two Moules. It is contended that Rew obtained the plaintiff's share certificates for them, and with their authority, and that his receipt was their receipt, and that they are consequently liable for their value. It is abundantly plain that Rew purported to act for them in this matter. Kekewich, J., appears to have thought that the Moules could not have ratified what he did. I cannot agree with the learned judge on that point. In my opinion the Moules could have ratified Rew's acts and have held the certificates as part of their security if they had been so minded. But they never did, and, of course, they disclaimed all interest in the certificates when they knew the facts. Rew's authority to act for them in this matter is not proved; and my own conclusion from the evidence is that he had no such authority. The Moules never knew anything about the shares until Rew absconded. They had agreed to lend money on the plaintiff's Northamptonshire estates; and they authorized Rew to act for them in that matter. When he got the plaintiff's certificates no document was ever signed to show that they were part of the Moules' security. It is said that the Moules left everything to Rew; but "everything" is a large and vague word. No doubt they left him to manage everything incidental to carrying out the mortgage which they authorized, but they never left him free to accept as a security anything more than, or different from, the mortgage which they had approved. The agency in this case is not, in my opinion, established, and, there having been no ratification, there is no liability.

The appeal must therefore be dismissed, with costs as against the Moules; but it must be allowed, with costs both here and below, as against Masterman and Hughes, and they must be declared jointly and severally liable for the value of the shares the certificates of which Rew misappropriated, and there must, if necessary, be an inquiry as to that value, and Masterman and Hughes must be ordered to pay it.

A. L. SMITH, L.J., read the following judgment:—It is unnecessary for me to recapitulate in detail the facts of this case, for those which are material have been fully dealt with by the Lord Chancellor and Lindley, L.J.; but as I am differing from part of a judgment of the learned judge in the court below it is right that I should state the grounds upon which I arrive at the conclusion I do. The error which, in my opinion, Kekewich, J., fell into was in assuming, as he did, that the case of *Cleather* v. *Twisden*, upon its facts, was the equivalent of the present, and that therefore the questions formulated by Bowen, L.J., in that case were those which were to rule in this case, and, if answered in one way, should settle this case in favour of the defendant solicitors. It is true that the present case and *Cleather's case* are similar in this: that in each bonds payable to bearer were deposited by the owner with one member of a firm of solicitors, who afterwards misappropriated them; but when the facts of each case are ascertained it will be seen that, although there is this *primâ facie* likeness between the two cases, there are yet radical differences between them. In the first place, in the present case it was proved that at the time when the bonds the subject of this action were deposited with Rew, the delinquent partner, for the purposes of the loan, the plaintiff was a client of the defendant firm to the knowledge

of the partners therein, and also, as found by Kekewich, J., that the plaintiff, throughout the transactions relating to the procurement of the loan, dealt with Rew as a member of the firm. No such facts were proved in *Cleather's case*, but on the contrary it was contended by the defendant that the plaintiff in that case had dealt with Parker, the delinquent partner, only in the character of a private friend, and not as member of the firm. In the next place, it is not conceded in the present case, as it was in *Cleather's case*, that it was not within the ordinary scope of the business of a solicitor to receive and hold bonds of a client payable to bearer, and it was proved in the present case that upon two occasions, prior to the occasion out of which this action arises, the firm, through Rew, had received from the plaintiff bonds payable to bearer, in order that they might obtain loans of money thereon, on behalf of their client, the plaintiff, and had been paid by the plaintiff for so doing. The deposit of the bonds in the present case was made by the plaintiff with Rew for the purpose of procuring a loan which the firm, through Rew, had undertaken to procure, if possible, for the plaintiff; whereas in *Cleather's case* it was found by the court that the bonds were not deposited with Parker for the purposes of any business the firm was then transacting for the plaintiff, but were deposited with Parker for safe custody. Again, evidence in the present case was given that the defendant firm were in the habit of receiving from, and holding for, clients, bonds payable to bearer, as well as cash; whereas in *Cleather's case* it was shown that the defendants were not in the habit of so doing. The letters to the plaintiff, for which the defendant firm are responsible, in my judgment are such as to justify the plaintiff in concluding that Rew's custody of the bonds was that of the firm, whereas the letters in *Cleather's case* were held by the court not to do so; and, lastly, in *Cleather's case* there were no dealings by the firm with the coupons of the bonds as in this case, and no accounts were sent to the plaintiff, whereas accounts were sent to the plaintiff by the firm in the present case. That these constitute radical differences between the cases cannot be denied, and, in my judgment, *Cleather's case*—which the learned judges who decided it in this court declared to be a case upon the border line—by no means governs the present.

Now what have we in this case? We have it proved that the position of solicitor and client existed between the defendant firm and the plaintiff, in relation to the proposed loan of £6,000 to the plaintiff; that on two previous occasions the defendant firm had also acted as his solicitors in obtaining loans of money for him; that upon all these occasions Rew, on behalf of the firm, had transacted the plaintiff's business; that upon all these occasions shares to bearer were deposited by the plaintiff with Rew to be utilized in obtaining the loans negotiated by the firm through Rew; that the plaintiff believed, and was well warranted in believing, from letters and accounts received by him, and for which the firm were responsible, that Rew was acting on behalf of the firm, both in negotiating the loan and receiving and holding the bonds for that purpose. It is true that the partners did not know of the deposit of these bonds to bearer with Rew, but in my judgment this is immaterial if the firm were the solicitors of the plaintiff in negotiating the loan for the plaintiff, and Rew was acting upon the firm's business within the scope of his authority when he negotiated the loan and received the bonds for the purpose. I cannot myself see what ground there is for holding, upon the proved facts of this case, that Rew was acting outside the scope of his apparent authority in the said transactions when he was acting within the scope of the authority in the two prior transations, and for which the firm had sent in bills and been paid. In my judgment, these prior transactions, the proved fact that the defendant firm did receive and hold securities of their clients, whether bonds payable to bearer or not, as also cash, the letters and accounts received by the plaintiff, constitute evidence from which only one inference can be drawn, which is, that Rew was acting within the authority granted to him by his partners, in negotiating the loan for the plaintiff, and in receiving and holding the bonds for that purpose, and it cannot be maintained that he was not. It is clear from the last passage in the judgment of Fry, L.J., in *Cleather's case* that the learned judge, even upon the facts proved in that case, was of opinion that, if the bonds had been deposited with Parker upon the firm's business, the firm would have been responsible.

In my judgment, upon the facts of this case, the innocent partners of Rew are liable to the plaintiff to make good Rew's defalcations as regards these bonds, and consequently the appeal of the plaintiff as to the case of the defendant solicitors must be allowed, and judgment entered for the plaintiff against them. As to the plaintiff's appeal against the Moules, I agree that it should be dismissed, for the reasons given by the Lord Chancellor and Lindley, L.J., and that the learned judge was correct in the judgment he arrived at.

Order of Kekewich, J., varied.

Solicitors for the plaintiff, *Bridges, Sawtell, Heywood, Ram, & Dibdin.*

Solicitors for the defendants Moules, *Hempson & Elgar.*

Solicitors for the defendants Hughes & Masterman, *Janson, Cobb, & Pearson.*

High Court of Justice.

Chan. Div. } Nov. 1.
Chitty, J. }

In re GRAHAM.
GRAHAM *v.* NOAKES. (*a.*)

Practice—Receiver—Rents and profits of real estate—Recognizance—Default—Liability of sureties—Extent—Fire policy-moneys—Income of real estate sold—Personalty received for repairs of real estate—R. S. C., 1883, *Appendix L., Form* 21.

A surety for a receiver is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal and of the appointment of a new receiver in his place.

Dawson *v.* Raynes, 2 *Russ.* 466, *followed.*

A receiver of the rents and profits of real estate having made default,

Held, that the sureties were liable to the above extent for (a) *money received on a policy of fire insurance on buildings forming part of such real estate;* (b) *dividends on funds in court, being proceeds of sale of real estate liable to be reinvested; and* (c) *pure personalty paid out of court to the receiver for repairs of real estate, and not so applied.*

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

A receiver's recognizance under the hands of the receiver and two sureties, after reciting as the fact that the receiver had been appointed in the above-mentioned administration action receiver of the rents and profits of the real estate of the testator, James Graham, bound them jointly and severally in the penal sum of £3,500.

The condition of the recognizance was that if the receiver "do and shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the real estate of the testator, James Graham, at such periods as the court or judge shall appoint, and do, or shall duly, pay the balance that shall from time to time be certified to be due from him as the said court or judge hath directed, or shall hereafter direct," then the recognizance shall be void.

The receiver having made default, the question arose in taking the account whether the sureties could be charged with certain items received by him. The sureties submitted to the jurisdiction of the court in the administration action as fully as if they had been sued on their recognizance. The items were as follows:—

Item 35.—£329 paid on a fire insurance policy on farm buildings forming part of the above-mentioned real estate, insured by the receiver in his own name, and subsequently burnt down. The premiums had been allowed in passing former accounts.

Items 11, 28 and 42.—£110, being dividends on sums of Consols in court representing proceeds of sale of real estate sold by the court during the action, such proceeds being subject to a trust for reinvestment in land. The dividends were paid to the receiver under orders of the court.

Item 37.—£21, being the unapplied balance of £220 paid out of court to the receiver from the personal estate account for repairs of the real estate.

Byrne, Q.C., and *T. L. Williamson*, for the sureties.—None of these items are within the scope of the recognizance or the receivership order. Item 35 is a receipt of capital. Items 11, 28, and 42, though the profits of personalty notionally reconverted into realty, are not the rents and profits which the receiver was appointed to receive, nor could he have received them without a special order subsequent to the recognizance. Item 37 is pure personalty, paid under an order subsequent to the recognizance.

Levett, Q.C., and *Bramwell Davis*, for the plaintiffs.—The bond is forfeit at law, as admittedly the receiver has not accounted for all the actual rents and profits. The penalty of £3,500 is therefore due from the sureties. They can only be relieved from this penalty on the terms of paying all that the receiver would himself have been chargeable with on passing his accounts: *Dawson* v. *Raynes*, 2 Russ. 466; *Maunsell* v. *Egan*, 3 Jo. & Lat. 251; *In re Lockey, a Lunatic*, 1 Ph. 509; *Smart* v. *Hood*, 49 L. T. 467, 32 W. R. Dig. 160; *Watters* v. *Watters*, 11 Ir. Eq. 336.

Byrne, Q.C., in reply.—That is too wide. The sureties are liable on their bond for the rents and profits that the receiver was originally appointed to receive, with interest or other incidental expenses, such as removal or new appointment, directly connected therewith. The condition of the bond is satisfied if the sureties account for that amount, which is all they became sureties for. The receiverships in the cases cited had a much wider scope.

CHITTY, J., after mentioning that the recognizance was founded on R. S. C., 1883, App. L., Form 21, *mutatis mutandis*, continued:—The argument raises the question of the principle upon which the account is to be taken as against the sureties. Now it is clear that at common law, there having been default on the part of the receiver, the whole sum of £3,500 mentioned in the recognizance is recoverable as against the sureties, and if authority be required on that point it is furnished by the certificate that was given by the judges of the Court of King's Bench on the case submitted for their opinion in *Dawson* v. *Raynes*, 2 R., at p. 468, viz., "We are of opinion that if there has been any breach of the condition of this recognizance the penalty is the debt at law, and the question of interest does not arise at law."

When the recognizance is put in force at law the practice is for the sureties to apply to the court by whom the receiver has been appointed, to submit to the jurisdiction, and to offer to have the account taken by the court who appointed the receiver. On taking the account the court does not exact necessarily the full amount of the sum mentioned in the recognizance, but considers the nature of the receiver's appointment and the circumstances of the case, and applying, not a principle of contract, but a principle of equity, to the account, relieves the sureties against demands which it thinks, on consideration of the matter, ought to be allowed in their favour. Mr. Kerr states, in his book on Receivers, 3rd ed., p. 217, that the surety is answerable, to the extent of the amount of the recognizance, for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal and the appointment of a new receiver in his place; and, in my opinion, that is a correct general statement of the principle on which the court proceeds.

Now in *Dawson* v. *Raynes* the Lord Chancellor pointed out that, the penalty being forfeited by breach of the condition, the amount of the penalty was the debt due from the sureties at law; but he nevertheless considered the question whether interest should be charged, and, in the circumstances of that case—that is to say, upon equitable considerations—he relieved the sureties from the penalty of the recognizance to the extent of the demand made against them for interest. He says: "It seems to me that it would be difficult to say that where the principal debtor"—that is, the receiver—"would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal."

Now, having stated what I take to be the principle on which the court proceeds, I am in a position, I think, to deal with the particular items. The first item is No. 35. With regard to this insurance it appears that in the former accounts passed by the receiver he had been allowed by the court, and properly allowed, the premiums which he had paid. The policy itself is referred to in the former accounts, and I think I am, therefore, justified in saying the court sanctioned this insurance in his own name. I have inquired into the matter. It is, say my chief clerks, the practice for receivers to insure; but I am not satisfied one way or the other whether they insure in their own names. Of course they might insure in the names of trustees or otherwise, but this receiver was allowed to insure in the manner I have mentioned. In many cases when there are receivers appointed there is an insurance already on foot, and then he takes over the policy, pays the premiums, and is allowed them on passing his accounts. It appears to me that it was consistent with his duty as receiver to make this insurance, which the court has itself sanctioned, and to keep it on foot. I think that he received the money as receiver. The policy, on the face of it, was granted to him on that footing.

Of course the liability of the sureties is limited to the amount mentioned in the recognizance. It appears to me that what the receiver did with regard

to this insurance was done by him in his character of receiver; that he himself, of course, in accounting to the court—I say "of course" because I think it justifiable—would have been held liable to account for these moneys; and when I am considering the equities fairly applicable to a case of this kind it seems to me that if I had charged him, as I must have charged him, as between himself and the court, with the amount of this insurance money thus received, so I ought to charge the sureties. I think there is no equity on their part sufficient to justify me in saying that they ought to be relieved against the charge under item 35. Some cases, of course, may be put where possibly payments might be made which would be altogether outside the scope of the receivership. That is not the case that arises on this item 35, and any case of that kind may be considered when it arises. In my opinion the sureties are chargeable with the sum that the receiver received on the policy and did not duly account for.

The next items are 11, 28, and 42. The receiver as receiver received these dividends as part of the income of the real estate. In my opinion this, again, was within the scope of his duty, and I ought not I think—because this is the right way it appears to me of stating the proposition—to relieve the sureties who are liable at law to the full extent of £3,500 in respect of this income. which was income of real estate, seeing that the money in court was liable to be laid out in the purchase of other land. It was strictly income—that is to say, profits—of real estate.

Then the next item is item 37. Now repairs of real estate fall within the scope of the receiver's duty. He is allowed to do certain repairs without coming to the court. In fact, he may at his own risk execute repairs of a more extensive kind. There is no exact rule that I know as to the amount that he may do upon his own responsibility; but, of course, what he does upon his own responsibility is liable to be questioned unless he has obtained the previous sanction. Proper repairs of real estate appear to me, again, to be a matter which falls within the functions of a receiver appointed to receive the rents and profits. That being so, it seems to me, again, that I ought not to relieve the sureties from this sum with which the chief clerk has proposed to charge them.

Solicitors, *Indermaur & Brown*, for *C. Hamilton White*, Maidstone; *A. H. Arnould & Son.*

Chan. Div. Stirling, J. June 6, 1894.

In re BARNEY.

HARRISON *v.* BARNEY. (*a.*)

Local government—"Owner"—Trustees of settled land—Drainage expenses—Repairs—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 2.

The trustees of a will, whereby the testator settled certain messuages in trust for two persons jointly for life, with divers equitable remainders over, held to be "owners" within the meaning of the definition clause of the Public Health Act, 1848, *and to have properly incurred drainage expenses under that Act.*

The testator declared that "the parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair and properly insured from fire."

Held, that the drainage expenses were not repairs within the meaning of that declaration, but were to be considered as a charge upon the property.

Adjourned summons.

The testator, John Barney, by his will, dated the 14th of November, 1846, after making certain specific and pecuniary legacies and devising certain hereditaments upon trusts therein declared, devised and bequeathed to his trustees, their heirs and assigns, all his capital messuage or dwelling-place called Lysses House, in the parish of Fareham, with the appurtenances, upon trust to permit his wife, Eleanor Mary Barney, and his son, Stephen Barney, jointly and equally, and the survivor of them, to hold, occupy, and enjoy the same, and to take the rents and profits thereof, and after the decease of Stephen Barney, or the decease or second marriage of the testator's wife, if Stephen Barney should be then dead, in trust for the first and other sons of Stephen Barney in tail, with divers equitable remainders over. The testator gave all the residue of his estate to his wife and Stephen Barney, and appointed them, together with Thomas Fox, executors of his will. By the last clause of his will the testator declared that "the parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair, and properly insured from fire."

The testator died on the 15th of December, 1846, and Eleanor Mary Barney died on the 9th of August, 1864. Thomas Fox died on the 25th of September, 1876.

Stephen Barney died on the 29th of June, 1892, having by his will appointed his wife, Sarah R. O. Barney, executrix. Sarah R. O. Barney was also deceased, having appointed the plaintiff, H. F. E. Harrison, executor of her will. Between the years 1861 and 1869, during the life of Stephen Barney, the trustees of John Barney's will had expended a sum of £247 4s. 6d. for drainage expenses in respect of the above-mentioned premises. The expenses were incurred under the Public Health Act, 1848, section 2 of which defines "owner" as "the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

This was a summons taken out by H. F. E. Harrison, as legal personal representative of the estates of Stephen Barney, John Barney, and Sarah R. O. Barney, for the determination of the question whether the payment by the trustees of John Barney's will of the above-mentioned sum of £247 4s. 6d., or any part thereof, was a proper payment, or was unauthorized, and constituted a breach of trust.

Godefroi, for the plaintiff.

Beaumont, for the present equitable tenant for life and his infant son, tenant in tail in remainder.

J. A. Creed, for other parties.

STIRLING, J.—I think in this case that the trustees were the persons to receive the rack-rents of the premises, and that, therefore, they were "owners" within the meaning of section 2 of the Public Health Act, 1848. The drainage expenses were not, in my opinion, repairs within the meaning of the last clause of the will. The sums expended by the trustees must be treated as properly expended, and as constituting a charge on the property.

Solicitors, *Alfred Peachey*, for *Frank Gillson*, Fareham, Hants; *Prior, Church, & Adams; Wynne & Co.*

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Chan. Div. }
Kekewich, J. } June 15, 1894.

COLLINS v. NORTH BRITISH AND MERCANTILE INSURANCE CO. (a.)

Practice—Writ—Concurrent writ—Service out of the jurisdiction—Irregularity in service—Omission of word "concurrent"—Necessary or proper party—Different cause of action—R. S. C., 1883, *ord.* 6, *rr.* 1, 2; *ord.* 11, *r.* 1 (a) *to* (g).

In order to obtain leave to serve a defendant out of the jurisdiction with a "concurrent" writ under R. S. C., 1883, *ord.* 6, *r.* 2, *and ord.* 11, *r.* 1 (g), *it must be shown that the relief asked against him is connected with, though not of necessity the same as, the relief asked against the defendant within the jurisdiction.*

The defendant within the jurisdiction must be duly served before service can be allowed on the party out of the jurisdiction (Yorkshire Tannery and Boot Manufactory *v.* Eglinton Chemical Co., 33 *W. R.* 162, *followed*); *but omission of prior service on the defendant within the jurisdiction can be got over by the court allowing a fresh issue of a "concurrent" writ out of the jurisdiction, and thus beginning again* "de novo," *as can also irregularities in the service of the "concurrent" writ out of the jurisdiction, such as omission of the word "concurrent" in the copy served, or irregularities in the affidavit in support of the application for service out of the jurisdiction, such as its failing to state that in the belief of the deponent the defendant sought to be so served is a "necessary or proper party" to the action.*

Motion.

Frederick Wells, by his will, dated the 25th of September, 1876, gave his property to three executors and trustees therein named upon trust to divide the same equally between his children, George Frederick Wells and Nina Fredericka Wells, upon the latter attaining her majority.

The testator died in 1877, and his will was proved in the county of York, Canada, by two of the executors and trustees (the third having renounced probate), of whom Christopher Robinson was now the sole survivor.

George Frederick Wells, shortly after attaining his majority, mortgaged his interest under the testator's will to the North British and Mercantile Insurance Co. to secure advances made by them to him, and he also executed a second mortgage to other parties.

Subsequently, in August, 1891, he was adjudicated a bankrupt, and the plaintiff Collins was appointed trustee in the bankruptcy. Nina Fredericka Wells attained her majority on the 27th of January, 1894.

This was an action by Collins, as trustee in the bankruptcy of G. F. Wells, against the North British and Mercantile Insurance Co. as first mortgagees, and also against the second mortgagees, asking that accounts might be taken as to what was due to them respectively for principal, interest, and costs under their respective indentures of mortgage; and also against Christopher Robinson, as sole surviving executor and trustee of the will of F. Wells, asking that he might be directed to pay the sum found due to the mortgagees, and to pay and account for the value of the property to the plaintiff as trustee in the bankruptcy of G. F. Wells. The plaintiff Collins applied for leave to serve, under ord. 6, rr. 1, 2, Robinson, who resided at Toronto, Canada, with a concurrent writ, and by his affidavit stated that the defendant mortgagees could be served within the jurisdiction, and that the defendant Robinson resided out of the jurisdiction and was a British subject, and craved leave of the court to serve him with a writ in Toronto, Canada, out of the jurisdiction of the court. Leave was granted, and a "concurrent" writ was issued marked "concurrent," but the copy served upon Robinson was not so marked.

This was a motion by Robinson asking that the order giving leave to serve him with the writ might be discharged, and that the service of the writ and subsequent proceedings against him might be set aside, on the grounds that the action was not within the cases in which service out of the jurisdiction could be allowed under ord. 11, r. 1 (*a*) to (*f*), that the action was not properly brought against a party within the jurisdiction (ord. 11, r. 1 (*g*)), that leave to serve him had been granted before the defendants within the jurisdiction had been served, and that the plaintiff's affidavit did not satisfy the requirements of ord. 11, r. 4.

Warmington, Q.C., and *Redman,* for the motion.—The copy of the writ served on the defendant Robinson was not a true copy, not being marked "concurrent" (ord. 6, r. 1). When leave was granted to serve the writ on him, it had not been served on the defendants within the jurisdiction: *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Co.,* 33 W. R. 162. The affidavit in support of application to issue and serve the concurrent writ out of the jurisdiction did not satisfy the requirements of ord. 11, r. 4, inasmuch as it failed to state therein that plaintiff had a good cause of action. The cause of action against Robinson is entirely different from that against the defendants within the jurisdiction, and leave to serve out of the jurisdiction should not have been granted: *Witted* v. *Galbraith,* 41 W. R. 395, [1893] 1 Q. B. 431, 577.

Muir Mackenzie, for the plaintiff.—The irregularities as to the copy of the writ is of no importance—a fresh one can be issued. *Tassel* v. *Hallen,* 40 W. R. 221, [1892] 1 Q. B. 321, overrules *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Co.*

KEKEWICH, J.—It is a mere repetition of what has been said by other judges, and especially by Chitty, J., that these questions of service out of the jurisdiction are of essential importance, and whether an order has been made for service by a judge or not, they are open to review on application and argument by the proper parties. My practice is to have them laid before me by my chief clerk, and I consider them carefully at leisure; but sometimes it occurs on *ex parte* applications that I have not been sufficiently attentive. That was so here. My rule is to see that order 11 is fairly met in the affidavit, generally strictly, but in some cases in substance only.

Here, however, there is an omission of substance. The plaintiff has made in his affidavit a statement that the defendant Robinson is a British subject—so far he is right—but has made no statement that he is a necessary or proper party to the action. That is a fatal objection, and I cannot understand how it happened that it was not taken at the time. Fortunately, however, the practice does not make a slip of a judge irrevocable, and therefore now, on better materials, I will consider, as if it were for the first time, whether or not this defendant should be served out of the jurisdiction.

First, as to the more technical operations; it is objected that the copy of the writ served upon the defendant was not marked "concurrent." The order was that a "concurrent" writ should be issued, and a "concurrent" writ was issued, but the copy served upon the defendant was by a slip not marked "concurrent"; what purported to be a copy was not in fact a copy of the writ.

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Then there is the question, assuming the defendant to be a "necessary or proper party" under ord. 11, r. 1 (*g*), whether he can be properly served out of the jurisdiction as a proper party to an action brought against a third party duly served within the jurisdiction. That question came before Pearson, J., in the case of *Yorkshire Tannery and Boot Manufactury* v. *Eglinton Chemical Co.*, and he decided that the party within the jurisdiction must be served with the writ before service can be allowed on the party out of the jurisdiction. That has, I think, always been held to be the meaning of the rule, except that some doubt was thrown on it in the case of *Tassell* v. *Hallen*. It would be presumptuous on my part to criticise the language in that case of the Lord Chief Justice, who, though he took pains to show that he was not satisfied with the decision of Pearson, J., was not sure that it was wrong, while Collins, J., adopted the reasoning of Pearson, J., as right. These questions, however, are after all of a comparatively technical nature, and might be got rid of if I thought right, by my allowing a fresh issue of a concurrent writ out of the jurisdiction, and beginning again *de novo*.

I come, therefore, to the question, Is this a case in which service out of the jurisdiction should be allowed? That depends on ord. 11, r. 1 (*g*). Is Robinson a "necessary or proper party" to the action against the other defendants. As against them the plaintiff is technically right and has a good cause of action, but can he properly join Robinson with them as co-defendant because he is a "necessary or proper party" to "the action"? It cannot be the meaning of the rule to say that you can make A. and B. parties and ask one relief against A. and another against B., and because you have a good ground of action against A., that therefore, you can join B., who is out of the jurisdiction, and ask relief against him on a different cause of action. I do not say that the plaintiff must ask the same relief against both, but I think the kinds of relief must be connected together. That is what is laid down in *Witted* v. *Galbraith*, where Lindley, L.J., says you must have "a *bonâ fide* case of an action properly brought against a person who has been served within the jurisdiction," *i.e.*, a case of an action such as you bring against the person out of the jurisdiction. Here the cause of action against the defendant Robinson to administer the estate has no connection with that against the other defendants, which is to redeem the mortgages. It is an entirely different action, which the plaintiff can very possibly maintain against him, not here—where he is not—but in Canada—where he is. It is really two actions rolled into one in order to make two sets of defendants in one action. It is not a *bonâ fide* claim against Robinson in the action against the North British and Mercantile Insurance Co., and the order for service out of the jurisdiction must, therefore, be discharged with costs.

Solicitors, *Ralph Raphael*; *Jordan & Davis*, for *Henry O'Brian*, Toronto.

Chan. Div.
Vaughan Williams, J. } July 19, 20, 1894.

In re SOUTH AMERICAN AND MEXICAN CO. (LIMITED). (*a*)

*Estoppel—Judgment by consent—*Res judicata*—Action to recover an instalment of a debt—Proof—Company—Winding up.*

A judgment by consent upon which the court has not exercised its mind raises an estoppel between the parties just as much as in a case where the court has exercised a judicial discretion in the matter after hearing an argument. The principle being, that when once the parties have litigated a matter the judgment should put an end to the litigation, and if the parties agree on a judgment, that raises an estoppel just as much as if all the questions had been fought out.

Jenkins *v.* Robertson, *L. R.* 1 *H. L. Sc.* 117, 15 *W. R. H. L. Dig.* 7, *distinguished.*

A judgment by consent for the plaintiffs in an action against a company to recover an instalment of a debt under an alleged agreement, held to preclude the liquidator in the winding up of the company from denying the existence of the agreement upon a proof being sent in for the whole amount due under the agreement.

This was a summons, adjourned into court, by the Bank of England, asking that a decision of the official receiver and liquidator rejecting a proof might be reversed, and that the proof of the bank might be admitted in whole.

The winding-up order was made on the 2nd of August, 1893, and the bank claimed that the company was indebted to the bank at the date of the winding-up order in a sum of £402,111 16s. 2d., and was still indebted in a sum of £401,595 5s. 5d. (the sum of £519 10s. 9d. having subsequently to the winding-up order been received from interest of securities held and applied in reduction of the debt), with interest from the 9th of January, 1892, at the bank rate from time to time, but not under four per cent. The bank estimated the value of the securities held against the debt at £170,000.

The proof was made under the following circumstances:—In April, 1891, Murrieta & Co. owed the Bank of England a sum of £514,300. In June, 1891, negotiations took place between Murrieta & Co. and the South American and Mexican Co. (Limited), with the result that an arrangement was made under which the South American and Mexican Co. became liable for the debt which Murrieta & Co. owed to the Bank of England.

The debt was payable by instalments. The first instalment of £100,000 was paid by the South American and Mexican Co. in the early part of 1892.

In July, 1892, the bank sued the company for the second instalment, which, as they alleged, became due on the the 19th of June, 1892.

The company denied the agreement, and counter-claimed for a return of the instalment already paid.

By their reply the plaintiffs joined issue on the defence, and as to the counter-claim said that the sum of £100,000 was paid in part performance of the agreement, and without any condition or agreement, express or implied, to repay the same.

The judgment was, so far as material, as follows:—"This action . . . having been tried before Kennedy, J., without a jury (by consent), and the said Kennedy, J. . . . having, by consent, ordered that judgment should be entered for the plaintiffs on the claim for £100,000 and costs, and dismissed the counter-claim, with costs, and the said judge having also ordered, by consent, that execution should be stayed except as to costs, and that, if within three weeks from the . . . 30th of June, 1893, the sum of £60,000 were paid . . . the plaintiffs should accept it . . . as in full discharge of all claim of the defendants. . . . It is . . . adjudged that the plaintiffs recover from the defendants £100,000, and costs to be taxed. And

(*a*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

that the defendants' counter-claim be dismissed, with costs to be taxed."

Finlay, Q.C., H. D. Greene, Q.C., R. M. Bray, and *Howard Wright*, for the Bank of England, cited *In re Flatau*, 41 W. R. 529, [1893] 2 Q. B. 219; *Flitters* v. *Allfrey*, 23 W. R. 442, L. R. 10 C. P. 29.

Moulton, Q.C., and *G. P. C. Lawrence*, for the official receiver and liquidator, argued that there was no *res judicata*, and that the judgment was merely a bargain between the parties.

They referred to *Newington* v. *Levy*, 19 W. R. 473, L. R. 6 C. P. 180; *Jenkins* v. *Robertson*, L. R. 1 H. L. Sc. 117, 15 W. R. H. L. Dig. 7; *Howlett* v. *Tarte*, 9 W. R. 868, 10 C. B. N. S. 813; *Alison's case*, 22 W. R. 113, L. R. 9 Ch. App. 1, 25; *Reg.* v. *Hutchins*, 29 W. R. 724, 6 Q. B. D.300, 304; *Carter* v. *James*, 13 M. & W. 137; Smith's Leading Cases, vol. 2, 9th ed., p. 847.

Finlay, Q.C., in reply.

VAUGHAN WILLIAMS, J.—I am of opinion that my decision must be given in favour of the Bank of England, and against the official receiver. The reason why I have had any doubts has been that I could see so little reason for doubting that I was afraid that I must be overlooking something. I must now give judgment according to my own view of the matter.

There are two questions which arise in this case. One question is, What would be the effect of the judgment if it had been arrived at in the ordinary way instead of being by consent? The second question is whether it makes any difference in this case that the judgment was by consent. I will deal with the second point first. On this question I am of opinion that the fact that the judgment was by consent makes no difference whatever. It is quite true that the judgment by consent was based upon an agreement between the parties, and that if it is not in accordance with that agreement it should be altered so as to be made in accordance with it. The ordinary course would be a proceeding to reform the judgment if it was not in accordance with the agreement. I do not know whether, in an action between the official receiver and the Bank of England, I should think it necessary to compel the official receiver to resort to such a roundabout method. It seems to me the proper course would be, as he represents the creditors, to allow the official receiver to go behind the judgment if its terms differed from those of the agreement which is the basis of the judgment. But I have not to decide that, because it is not suggested that the judgment was drawn up otherwise than according to the agreement between the parties. In these circumstances it seems to me that the only question left to me as to the first point is whether a judgment by consent upon which the court has not exercised its mind, can or cannot create an estoppel between parties. I am of opinion that it can. I have never heard it suggested that it could not. It has always been the law that a judgment obtained by consent raises an estoppel just as much as in a case where the court has exercised a judicial discretion in the matter after hearing an argument. The basis of the law of estoppel in these cases is that, when once the parties have litigated a matter, the judgment should put an end to the litigation, and if the parties agree on a judgment that raises an estoppel just as much as if all the questions raised had been fought out. One of the authorities cited to me was *Jenkins* v. *Robertson*. That, however, is not a decision on the general law. It was an action in which, according to the law of Scotland, one person is allowed to represent the public, the result of it binding the public at large. All that the House of Lords decided was that the decision in such an action would not bind the public if the result was arrived at by consent, and, *à fortiori*, if it was arrived at by a purchased consent. That does not touch this matter at all. Under these circumstances I come to the conclusion that I must treat this judgment, although by consent, as being binding upon the parties to the action in just the same way as if it were a judgment arrived at after the case had been fought out.

That being so, the other question which I have to consider is as to what matters it is conclusive. The action was for £100,000, which was an instalment of a debt of £514,300 alleged by the statement of claim to have been agreed to be paid by the defendants to the plaintiffs at certain specified dates, the identity being established by the particulars delivered with the statement of claim. It seems to me impossible that the plaintiffs could have recovered in that action without establishing that agreement. Then what is the judgment? It is this. [His lordship stated the judgment, and continued:—] It seems to me that that is a judgment for the £100,000 claimed in the statement of claim. I should have no doubt even if there had been no counter-claim, but that makes it to me all the more clear that the £100,000 mentioned in the judgment is the £100,000 claimed under the same agreement, the non-existence of which was the basis of the counter-claim. I think it is plain what was done in the action. The plaintiffs alleged the existence of an agreement, and claimed £100,000 as due under it. The defendants said that no such agreement existed, and the plaintiffs ought to pay them back the money. That being so, it seems plain to me that the effect of the judgment was that there was such an agreement, and therefore judgment for £100,000 must be entered for the plaintiffs, and the counter-claim for the return of the first £100,000, which was based on the non-existence of the agreement, must be dismissed. Under these circumstances it is abundantly clear that the existence of this particular agreement was of the essence of the plaintiffs' claim in the action. It would have been impossible that the plaintiffs should have recovered the £100,000 in the action unless they had established that the agreement existed. It is said that it is a mere coincidence that the amount for which judgment was taken by consent was the same as the amount which was claimed in the action, and that there was no judgment on the claim itself, but that it was only intended that that amount should be paid, but not under the claim, or in respect of it, and that the existing action was only used as machinery for securing the amount. If that was the intention, there was a very simple mode of carrying it out, and that mode was not followed. The judgment on the claim and counter-claim affirms the existence of the agreement, and under these circumstances the official receiver cannot be allowed to question the claim of the applicants. I give judgment accordingly, in the terms of the summonses. The applicants must have their costs.

Solicitors, *Freshfields; Hollams, Sons, Coward, & Hawkesley.*

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Nov. 30.

DENVER HOTEL CO. v. ANDREWS.
SAN PAULO RAILWAY CO. v. CARTER. (a.)

Inland revenue — Income tax — Foreign possessions — English company owning and managing a business abroad—Profits earned abroad and not remitted to England—Constructive receipt in England—5 & 6 Vict. c. 35, s. 100, Schedule D, fifth case—16 & 17 Vict. c. 34), s. 2, Schedule D.

The D. Co., a company registered under the Companies Acts, and having its office in London, was formed to acquire and carry on a business in America. A manager looked after the business in America, but the board in England controlled him. The profits were all made in America, and when a dividend was declared by the directors in England, those shareholders of the company who resided in America were paid by the manager out of the funds in America, and the balance only was remitted to England.

In the case of the P. Co. the board in England had larger powers of control, and actually transacted portions of the company's business in England — namely, the making of contracts for the supply of materials.

Held, that the companies were liable to pay income tax under the fifth case, Schedule D, of 5 & 6 Vict. c. 35, s. 100, in respect of so much only of the profits as were actually remitted to England, and not upon the sums retained and distributed as dividends abroad.

Bartholomay Brewing Co. v. Wyatt, 42 *W. R.* 173, [1893] 2 *Q. B.* 499, *followed.*

Held, also, that the principle of the constructive receipt of profits in England is not applicable to the fifth case, Schedule D.

DENVER HOTEL CO. v. ANDREWS.

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners of Income Tax for the City of London.

The appellants were a limited company registered in England under the Companies Acts, having a registered office in the City of London. The company was formed for the purpose of acquiring and carrying on an hotel in the city of Denver, called the Windsor Hotel. The hotel was managed by a manager in Denver, but he was a servant of the company and under the orders of the board, and in other respects the business, though carried on in Denver, was directed, administered, and managed from the registered office of the company in London. The balance-sheets were prepared and issued, and the dividends were declared, in England, but the company, in addition to a banking account in England, had a banking account in Denver, and the dividends of persons resident in Denver were, for convenience, paid by the manager out of funds standing to the company's credit in the bank at Denver instead of being remitted from England.

For the year ending the 5th of April, 1890, the profits of the company were £5,743, of which £1,038 was distributed in Denver to shareholders resident there, and was never remitted to England.

The assessment was made under Case 1, Schedule D to section 100 of 5 & 6 Vict. c. 35, to the whole amount of £5,743. Against this assessment the appellants appealed, on the grounds that the assessment ought to be reduced by the sum of £1,038, and that it should have been made, under the fifth case, on such profits only as were received in the United Kingdom.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The fifth case is as follows:—

"Fifth Case.—The duty to be charged in respect of possessions in Ireland, or in British plantations in America, or in any other of Her Majesty's dominions out of Great Britain and foreign possessions:

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain, and arising from property which shall not have been imported into Great Britain, or from money or value so received on credit or account in respect of such remittances, property, money, or value brought, or to be brought, into Great Britain, computing the same on an average of the three preceding years as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

The questions for the opinion of the court were:—

1. Whether the appellant company was assessable to income tax at the registered office of the company in London in respect of all the profits or gains from the trade or business carried on by the company?

2. If the court should be of opinion that the company was not so assessable, then

(*a*) Whether all the dividends on the shares or stock of the company, wherever and to whomsoever paid, were not, for the purposes of the charge of income tax, to be deemed to have been paid at the registered office in London, and the company was not assessable in respect of the aggregate amount thereof as part of the profits or gains of the company? or

(*b*) Whether the company was not free from assessment in respect of such portion of its profits or gains as was not actually remitted to the United Kingdom, but was distributed out of the United Kingdom as dividends to shareholders of the company resident abroad?

Bremner, for the appellants.—The case is within the fifth case, Schedule D. The test is whether all the operations of the company are carried on abroad: *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493; *Bartholomay Brewing Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499. Here the profits are entirely made abroad, and if the hotel at Denver were burnt down the whole business of the company must necessarily come to an end: *London Bank of Mexico* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378. Though, in this case, the English company have a wider control than in the *Bartholomay case*, yet the question of control does not affect the decision in *Colquhoun* v. *Brooks* at all.

Sir R. T. Reid, A.G., and *Danckwerts*, for the respondent.—The rule in *Colquhoun* v. *Brooks* is that the exemption was limited to cases where the business was entirely carried on abroad. And *Bartholomay Brewing Co.* v. *Wyatt* was no exception; for there the English company merely invested in shares of the American company. But where the management and control is carried on and exercised in England—meetings held, books and papers kept, dividends declared, &c., in England—the profits are taxable under Schedule D. Secondly, though dividends were paid to American shareholders in America, yet the profits they represent were constructively received in England: *Scottish Mortgage Co. of New Mexico* v. *McKelvie*, 2 Tax Cas. 165, 24 Sco. L. R. 87.

Bremner replied.

SAN PAULO RAILWAY CO. v. CARTER.

Case stated by the Commissioners of the Income Tax for the City of London.

The circumstances of the company were similar to those of the Denver Hotel Co., but the board of direction in London had larger direct powers of management and control. The business was carried on in Brazil under the management of a superintendent appointed by the board and removable by them. But the board had power directly to enter into contracts for, and to purchase in England and send to Brazil, the materials for the improvement, extension, and repair of their property, and for plant, such as engines, wagons, &c. The accounts were kept and dividends declared in England. The assessment was made under the first case, Schedule D, s. 100, 5 & 6 Vict. c. 35, on the sum of £370,122, and it was admitted that if the assessment had been made under the fifth case it ought to have been made on the sum of £295,070.

Finlay, Q.C., and *Bremner*, for the appellants.—This is a foreign possession within the fifth case. The property must be looked on in the same way as if it were owned by a single individual. The board in England are only rendered necessary by the fact that it is owned by a corporation. The business is entirely carried on abroad, not, as in the *London Bank of Mexico* v. *Apthorpe*, partly in England with branch establishments abroad.

Sir R. T. Reid, A.G., intimated that the same arguments applied as in the previous case.

The following judgments apply to both cases.

VAUGHAN WILLIAMS, J.—In my judgment these two cases are governed by the decision in the *Bartholomay case*. Two points are made here. It is said that this case does not come within *Colquhoun* v. *Brooks*, because the management in this case is wholly carried on in London, and it is suggested that the decision in *Colquhoun* v. *Brooks* is based on the fact that Mr. Brooks was a sleeping partner. But though Lord Esher mentioned the fact, it does not seem to me that the judgments in the House of Lords went in the slightest degree on that basis, and, from observations in Lord Macnaghten's judgment, it is abundantly clear that the decision would have been the same whatever part Mr. Brooks had taken in the management. In *Bartholomay's case* also it seems to me that the judgments are wholly irrespective of the place where the ultimate management and control of the company was conducted.

The other point is that in the present case, although the dividends were not remitted to England *in specie*, yet they were constructively remitted, because it was only after the profits had been accounted for to the board in London and a dividend declared thereon that the officers in Denver were permitted to retain a portion of the profits and distribute them in America instead of sending them forward *in specie* to England. It is admitted, that if a similar accounting had to be taken into consideration with regard to the fourth case, the case would be governed by the decision in *McKelvie's case*, and that there would have been a constructive remittance of the dividends in England. The answer is that, as Wright, J., has pointed out, the decision in *Bartholomay's case* was a decision that the principle of constructive remittance has no application to the fifth case—as I understand—upon the ground that the fifth case was intended originally to deal with the cases of sugar plantations, and such like property, abroad, and that with regard to such property it would be clear that the tax would not be payable unless there had been a remittance of the profits of the plantation to Great Britain.

So, it having been held that the fifth case applies also to cases of foreign trading, the same principles must be applied. I confess that, had I not known the intention of the court, I should have thought the conclusion arrived at in *Bartholomay's case* might well have been arrived at without binding us in this case, and for this reason: in *Bartholomay's case* the proceeds of the trading never were, even as a matter of bookkeeping, constructively received in England. The profits took the shape of dividends before there was any constructive remittance to England, and if anything was constructively remitted to England it was the dividends. In point of fact, the character which the money had assumed in America—namely, dividends—was never altered by any bookkeeper entry in England, whereas, where you have no American company interposed, the case seems to me to be different, because, the character of the money in America being merely the proceeds of the trading, it does undergo a change by reason of something that takes place in London—that is to say, it becomes a dividend, and it is as a dividend that it is distributed to the shareholders in America.

But at the same time I am not prepared to say that *Bartholomay's case* does not bind us here, because I think I ought to take it that that case was intended to decide absolutely that a constructive remittance and receipt, on the principle laid down in *McKelvie's case*, has no application whatever to the fifth case, and only applies to the fourth.

WRIGHT, J.—I am of the same opinion. I think the *Bartholomay case* governs both these cases, although certainly there is room for doubt, especially in the case of the Brazilian company. A substantial part of the Brazilian company's business is undoubtedly transacted here; but I think the answer to that is that the profit-earning part of the business is exclusively carried on in Brazil. If that is so, it is more consistent with the judgments in the *London Bank of Mexico* v. *Apthorpe* to hold that the mere fact that a subsidiary part of a business which really belongs to one country is done in another, does not affect the law.

I wish to say a word about the *Bartholomay Brewing Co.* v. *Wyatt*. It is true there was a dividend declared in America, but that was only a *pro formâ* declaration following on a request made by the English board. No dividend warrants were issued on it. The whole of the dividends went to the shareholders constituting the English company. It seems to me that under these circumstances all the dividends retained in America for the benefit of American shareholders were constructive payments in England of a debt in England, and that it is only because the language of the fifth case will not hit that, that the amounts are not taxable in England.

Appeal allowed.

Solicitors for the Denver Co., *Mellor, Smith, & May.*

Solicitors for the San Paulo Co., *Clements & Williams.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Q. B. Div.
(Mathew and Charles, JJ.) Nov. 3.

WALFORD v. HACKNEY BOARD OF WORKS. (a.)

Metropolis management—Local government—"Owner"—"Occupier"—Intermediate tenant—"The person

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

. . . *receiving the rack-rent*"—"*Agent or trustee*"—"*Beneficial owner*"—*Liability for paving—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250.

Where a lessee sub-lets the premises at the same rent as he was liable for to his landlord, and though collecting the rent from the sub-lessee pays it over to his own landlord, and derives no benefit or profit therefrom for himself, he is not liable to contribute as "owner" to the expense of paving the street by the district board.

Case stated by a metropolitan police magistrate.

This was an appeal from an order made by a magistrate of the North London Police-court, who had directed that Walford as "owner" of certain premises should pay to the Hackney Board of Works the sum of £110, as the apportioned amount due from him towards the cost of paving a new street upon which his premises fronted.

The question to be determined by the court was whether, under the circumstances, Walford, the intermediate tenant, was the owner of the premises within the meaning of the 250th section of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120).

The material facts are as follows:—In 1886 Harper let the premises to Walford for a term of years unexpired, at the rent of £25 a year, which was subsequently increased to £31. Walford occupied, and in 1889 sublet the premises to Wright, agreeing to accept the same rent of £31 a year as he himself paid. Wright took possession of the premises and paid the rent to Walford quarterly, who regularly paid it to Harper. It was alleged by counsel for the appellant that Walford negotiated with Harper to accept Wright as his tenant, and that Harper consented to accept Wright as such, but no fresh lease from Harper to Wright was actually executed.

F. Low, for the appellant Walford, showed cause against the order. There is evidence from the correspondence to show that an arrangement was made between Harper and Wright, by which the latter became really the tenant, and Walford, in collecting the rent, acted merely as a conduit between the two parties. [MATHEW, J.—Do I understand that there was a surrender of the premises by Walford in favour of Wright?] Yes, that was the substance of the arrangement. From that time Walford received no benefit whatever from the rent he collected, and could not be held to be the "owner" who received—*i.e.*, who was beneficially entitled to—the rack-rent. He was, in fact, only a bare trustee, and Wright, although he handed the rent to Walford, was really paying rent directly to Harper.

Beven, for the respondent board of works.—Walford is the person who receives the rack-rent. He either receives it for himself or as agent for Harper. The board can call upon him to pay in either case, in the same way as the Income Tax Commissioners can summons a bare trustee of a fund to pay the income tax. That was held in 1864 in *Peek* v. *Waterloo Local Board of Health*, 12 W. R. 252, 27 J. P. 807, and has never been challenged. *Cook* v. *Montagu*, 20 W. R. 624, L. R. 7 Q. B. 418, was decided on different grounds. He also cited *Bowditch* v. *Wakefield Local Board of Works*, L. R. 6 Q. B. 567, 19 W. R. Dig. 66; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379; *Truman* v. *Kerslake*, *post*, p. 111, [1894] 2 Q. B. 774, and *In re Christchurch Inclosure Act*, 42 W. R. 614.

MATHEW, J.—In this case I think the order of the magistrate is wrong and must be set aside. Section 105 provides that where the vestry deem it necessary to pave a street, the "owners" of the houses forming such street shall, on demand, pay to the vestry the amount of the estimated expenses of providing and laying such pavement. The question, therefore, that we have to decide is whether Walford is the "owner" of the premises within the meaning of the term as used in the 250th section, which says that the word "owner" shall mean "the" person for the time being receiving the rack-rent of the premises, whether on his own account or as agent or trustee for any other person. The facts of this case are peculiar, for although Walford in a certain sense received the rack-rent from his sub-tenant, and could certainly enforce his right to do so by law, yet, as a matter of fact, he did not receive any rent from him at all. The question is one of extreme importance to local authorities, for if the magistrate's decision were upheld they would often have put upon them a mere "man of straw," not really responsible, the real benefit being enjoyed by the owner actually in receipt of the rent. The charge was laid upon the owner of the premises, and the question was—Walford clearly not being the "owner" in the ordinary sense of the term—whether the court was coerced by the statute to declare that he was the "owner" because he happened to be in receipt of the rack-rent. It would, indeed, be an extraordinary state of things if we had to hold that a man paying the whole of the rent over to another person was really the owner of the premises. If he paid over a less sum than he actually received it might alter the case, for then he would be the only person in receipt of the full rack-rent, and, therefore, the only person that would satisfy the definition of "owner," but here he pays over the whole amount of the rent he receives to Harper. It cannot be supposed that it was the intention of the Legislature that a person in such a position should be liable as "owner," for as a matter of fact he is not the actual receiver of the rack-rent, and is not, therefore, the "owner" within the meaning of the 250th section of the statute. For these reasons the appellant must succeed.

CHARLES, J.—I am of the same opinion. I confess, however, that it strikes me as strange that if the appellant had paid over 5s. less than the actual rent he received from his sub-tenant he might in that case have been held liable, although he is not now, because he pays over the exact amount. The reason for this apparent anomaly has been explained by my learned brother—namely, that in that case the appellant would be the only person in receipt of the rack-rent, whereas in the present case he is not.

Order set aside. Leave to appeal refused.

Solicitors for the appellant, *Marsden & Sons.*

Solicitor for the respondent, *H. T. Tiddeman.*

Q. B. Div. (Dvsnl. Ct.). (Lawrance and Kennedy, JJ.) July 12; Aug. 8, 1894.

TRUMAN, HANBURY, BUXTON, & Co. (LIMITED) v. KERSLAKE. (*a.*)

Local government—Sanitary authority—Abatement of nuisance—"Owner" of premises—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 141.

A lessee of certain premises sub-let them for the whole term of the lease less a few days. The sub-lease contained the same covenants and conditions, and reserved the same rent (not a rack-rent), as the lease. The lease and the sub-lease were subsequently assigned to different persons.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

Held, that the assignee of the sub-lease was, but the assignee of the lease was not, "owner" of the premises within the meaning of the Public Health (London) Act, 1891, s. 141.

Case stated by the court of quarter sessions for the administrative county of London.

On the 21st of September, 1874, George Hastings leased No. 73, Wyndham-road, and the adjoining premises, No. 71, Wyndham-road, to Gurney Hanbury, for a term of thirty-nine and a half years, less ten days, from the 24th of June, 1885, at a yearly rent of £50, payable quarterly. The lessee covenanting to pay all land tax, sewers rate, tithes, or rent-charges, or payments in lieu thereof, and all other rates, taxes, assessments, and impositions whatsoever, parliamentary or parochial, during the term of the lease, and also at all times during the term to insure and well and sufficiently repair, and keep in good order and condition, the premises and all walls, privies, sinks, &c.

On the 29th of March, 1881, Gurney Hanbury sub-let the premises to Thomas Aslett for the term of thirty-nine and a half years, from the 24th of June, 1885, less twenty-one days. The sub-lease contained the same covenants and conditions, and reserved the same rent, as the original lease. A premium of £525 was paid by the sub-lessee.

On the 7th of February, 1883, Thomas Aslett assigned the sub-lease to Brighton Bishop, who paid a premium of £790; and in the same year Gurney Hanbury disposed of his business to the appellants, and assigned the original lease to them. In December, 1893, a summons was granted against the appellants, as "owners" of the premises (on the application of the respondent, the sanitary inspector), under section 4 of the Public Health Act, 1891 (54 & 55 Vict. c. 76). The existence of the nuisance was admitted. Bishop, the assignee of the sub-lease, was in December, 1893, in occupation of the premises.

The magistrate convicted the appellants, and the conviction was confirmed by the court of quarter sessions, who stated a case.

By the Public Health Act, 1891 (54 & 55 Vict. c. 76), s. 4: "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the . . . owner of the premises on which such nuisance arises, requiring him to abate the same within the time specified in the notice. . . ."

By section 141: "The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent. The expression 'rack-rent' means rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises; and the full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises, if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses (if any) necessary to maintain the premises in a state to command such rent."

Bigham, Q.C., and *Bodkin*, for the appellants.—The appellants are not "owners" within the meaning of the Act. The assignee of the sub-lease (Bishop) is the only person who could receive, or let the premises at a rack-rent. The premises are not let at a rack-rent.

They relied on *Bowditch* v. *Wakefield Local Board*, 6 Q. B. 567, 19 W. R. C. L. Dig. 66; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379.

Biron, for the respondent.—If the premises were let at a rack-rent the appellants would be the persons entitled to receive the same. The rent, in fact, received by them was a rack-rent. The object of the interpretation section was to make the owner, as distinct from the tenant, liable.

He cited *Parker* v. *Inge*, 17 Q. B. D. 584, 35 W. R. Dig. 141.

Cur. adv. vult.

Aug. 8.—The judgment of the COURT was read by

KENNEDY, J.—The only question in this case is whether or not the court of general quarter sessions for the administrative county of London was right in holding the appellants, Messrs. Truman, Hanbury, Buxton, & Co. (Limited), to be "owners," within the meaning of the Public Health (London) Act, 1891 (54 & 55 Vict., c. 76), s. 141, of certain premises, No. 73, Wyndham-road, Camberwell. The court, holding them to be such owners, upheld on an appeal this conviction of one of the metropolitan police magistrates under the said statute for having certain structural nuisances upon the above-mentioned premises after notice to abate the same. [His lordship stated the facts, and proceeded:—] The definition of "owner" and of "rack-rent" in the 141st section of the statute above referred to is as follows:—[His lordship read the section, and proceeded:—] It appears to us to be clear from the facts stated in the case that none of the parties interested in these premises, could be said to be receiving a "rack rent" within the meaning of the 141st section, and the counsel for the respondent did not seriously dispute this. What he did contend, and what the county quarter sessions held, was that the appellants were "owners" of the premises, because they were the persons who, in the terms of the latter part of the same section, "would so (*i.e.*, either on their own account or as agent or trustee) receive the same (*i.e.*, the rack-rent) if such lands or premises were let at a rack-rent"; and therefore the single question for our determination is whether or not this contention is well founded. In our opinion the court (of quarter sessions was wrong in holding the appellants to be "owners" within the meaning of this enactment. It appears to us to be impossible to treat as the persons who would receive the rack-rent, if the premises were let at a rack-rent, persons who, at the time when the "owner" of premises as defined by the 141st section has to be found, have not such an interest in the property that if it was let at a rack-rent they would receive it. The words of the section, in our judgment, in the case of there being no one who in fact receives a rack-rent from the actual occupier, designate as "owner" the person who, *rebus sic stantibus*—that is to say, with the interests on the premises as they are—would, if they were let to an occupier at a rack-rent, receive that rack-rent.

In this case, whilst the sub-lease to Aslett subsists—that is to say, for the next thirty and a half years, and until a date only eleven days anterior to the expiring of the appellants' own interest—the appellants could not let to any one. The only person who could let the premises at a rack-rent, the only person whose interest in the premises places him in a position to receive a rack-rent, is Bishop, the assignee of the sub-lease to Aslett. His interest as assignee of the sub-lease gives him the power of so letting; and if the

premises were so let he is the person who would receive the rack-rent. He chooses, it is true, to occupy the premises himself, but we see nothing to prevent the same person being both occupier of the premises and the "owner" within the meaning of this section.

The cases referred to in the course of the argument before us of *Bowditch* v. *Wakefield Local Board* and *Wright* v. *Ingle*, in which questions as to the meaning of the term "owner" in similar provisions of the Public Health Act, 1848, and the Metropolis Local Management Act, 1855, are raised, are not decisions directly in point, but there are passages in some of the judgments in the cases which appear to us, to some extent at least, to support the conclusion to which we have come in this case. The decision of the Court of Queen's Bench (Blackburn, Quain, and Archibald, JJ.) in *The Poplar Board of Works* v. *Love*, 29 L. T. N. S. 915, 22 W. R. Dig. 144, which was not referred to in the argument before us, also, in our judgment, supports that conclusion.

For the reasons which have been stated we are of opinion that the decision of the quarter sessions was not correct, and that the question of law raised in the case must be answered in favour of Messrs. Truman, Hanbury, Buxton, & Co. (Limited), and the judgment of the quarter sessions and the conviction of the justice will be quashed.

Conviction quashed.

Solicitors for the appellants, *Clapham, Fitch, & Co.*

Solicitors for the respondent, *Marsden & Son.*

House of Lords.

From C. A. (England). } Aug. 3, 1894.

SMURTHWAITE *v.* HANNAY. (*a.*)

Practice—Parties—Joinder of plaintiffs—Breaches of contracts with different plaintiffs—Action by shippers upon similar bills of lading—Ord. 16, *r.* 1; *ord.* 18, *rr.* 1, 8; *ord.* 70, *rr.* 1, 2.

Ord. 16, *r.* 1, *which provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative," does not authorize the joining under one writ of different and distinct causes by various plaintiffs.*

Where, therefore, goods were shipped for a particular voyage on the same vessel, the holders of similar bills of lading cannot combine as plaintiffs in one action against the shipowners for damages for short delivery, since the causes of action arise out of separate and distinct transactions.

Decision of the Court of Appeal (42 *W. R.* 133, [1893] 2 *Q. B.* 412) *reversed.*

This was an appeal from the judgment of the Court of Appeal (Lord Esher, M.R., and Kay, L.J.; Bowen, L.J., dissenting) reported 42 W. R. 133, [1893] 2 Q. B. 412, where the facts are set out; they sufficiently appear in the judgments.

Bigham, Q.C., and *Joseph Walton. Q.C.* (*Pickford, Q.C.*, with them), for the appellants, the defendants.—The causes of action are really different, though they were all caused by the non-delivery of the goods. *Booth* v. *Briscoe*, 25 W. R. 838, 2 Q. B. D. 496; ord. 16, r. 1; ord. 18, r. 1; *Burstall* v. *Beyfus*, 32 W. R. 418, 26 Ch. D. 35; *Sandes* v. *Wildsmith*, [1893] 1 Q. B. 771; and *Gort* v. *Rowney*, 34 W. R. 696, 17 Q. B. D. 625, were referred to.

Finlay, Q.C., and *T. G. Carver*, for the respondents, the plaintiffs.—The court by its inherent power would prohibit the joining of actions of a different character. Here the relief is the same, and arose out of the same transactions, and depends upon the same evidence: see *Devaynes* v. *Robinson*, 5 W. R. 109, 24 Beav. 86; ord. 18, r. 6; ord. 16, rr. 3-8. *Booth* v. *Briscoe* is a decision in favour of the respondents. See *Spence* v. *Union Marine Insurance Co.*, 16 W. R. 1010, L. R. 3 C. P. 427.

Bigham, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL, L.C.—The appellants are the owners of a vessel called *The Castleton*. The respondents shipped certain cotton on board that vessel for carriage from a foreign port to Liverpool. On arrival at that port it was found that the marks of eighteen bales had been obliterated, and that, taking these into account, the total number which arrived was less by thirty-three than the number which, according to the bills of lading, had been shipped. Thereupon the present action was brought, the plaintiffs being the several holders of the bills of lading, either as shippers or as indorsees from shippers, who had not received delivery of the number of bales specified in their bills of lading respectively. Upon the question whether such an action can be maintained there has been a great difference of judicial opinion. Mathew, J., refused to stay the action. Day, J., and Collins, J., in the Queen's Bench Division, took a different view, but their judgment was reversed by the Master of the Rolls and Kay, L.J., the late Bowen, L.J., dissenting.

It is admitted that the claims of the plaintiffs are several, that they have no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action as the present; but it is contended that ord. 16, r. 1, justifies the course which has been pursued in making them co-plaintiffs. The argument of the learned counsel for the respondents went this length, that the rule sanctions the joinder of any number of plaintiffs, however distinct the causes of action in respect of which they are suing, subject only to this, that any defendant alleging that several causes of action have been united which cannot conveniently be disposed of together may, under ord. 18, r. 8, apply for an order confining the action to such of the causes of action as can be conveniently disposed of together. If the argument be a sound one it cannot, in my opinion, stop short of the point to which the learned counsel pressed it. The Master of the Rolls thought a more limited construction might be put upon the rule, that, large as the words of the rule were, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions, then the plaintiffs could not join in one action in respect of them. I am unable, with all deference, to find anything in the language of the rule to justify drawing such a line, nor can I see how it could in practice be drawn. Take the facts of the present case as an illustration. In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

Whether the goods, the non-delivery of which is complained of, were in fact shipped depends in each case upon a different set of circumstances. The several consignments may have been and probably were delivered to the shipowner by different persons, at different times, and under different circumstances. They were, it is true, delivered for carriage in the same ship and were goods of the same description. But I cannot see that this makes the transaction one, any more than if goods consigned by different persons had been intended for carriage by different ships and had been of a different description. Precisely the same controversy, requiring just the same proof, might have arisen in the one case as in the other. And if the one case be within the rule, I see nothing in its terms to exclude the other. Ord. 16, r. 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in order 18. Yet, if I correctly understand the argument of the respondents, the construction they put upon order 16 necessarily deals with the joinder of several causes of action, and confers, without reference to any other order or rule, the right "to unite in the same action several causes of action." For if it sanctions the joining of plaintiffs having separate and distinct causes of action, this involves of necessity the union in one action of several causes of action. The rule provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." This conveys, to my mind, the idea that the relief claimed by the plaintiffs who are joined is to be the same relief, especially when I consider that the rule only relates to the parties to an action, and that the right to join more than one cause of action is regulated by another rule.

But for the use of the word "severally" I do not think any doubt would have been entertained that this was the true construction. There was naturally much discussion as to the meaning and effect of that word. In construing these rules it must always be borne in mind that before the passing of the Judicature Act the practice and procedure of the Court of Chancery and the courts of common law differed in many respects. It was a leading object of the rules framed under that Act to formulate a code of procedure which should in general be applicable to the Common Law and Chancery Divisions of the High Court alike. Now there can be no doubt that in the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief, and might, before the Judicature Act, have been properly joined, although their claim was neither joint nor alternative. There is, therefore, no difficulty in satisfying every word of the rule by the construction which I have suggested, and which, I confess, appears to me the natural one. It cannot be doubted that whatever construction is put upon the rule I have been considering must be applied equally to rule 4 of the same order. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants. There are other rules of order 16 which seem to me to militate against this contention. It is difficult to understand how there could ever be a "misjoinder" if such procedure were authorized. And what is the use of rule 6, which enables a plaintiff, "at his option, to join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract," if the previous rules have the effect contended for? I do not pause to discuss the question whether the construction contended for by the appellants or by the respondents would be found to provide the more convenient procedure. I have endeavoured to construe the rule apart from such considerations, but this much I may say, that I am far from satisfied that the balance of convenience is, as the respondents contend, on their side. I cannot accede to the argument urged for the respondents, that, even if the joinder of the plaintiffs, in one action was not warranted by the rule relied on, this was a mere irregularity of which the defendants, by virtue of order 70, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity.

Before concluding I ought to refer to the case of *Booth* v. *Briscoe*, which was much relied on by the respondents. The plaintiffs who were joined in that action sued in respect of a libel impugning the management of an institution of which they were the trustees. No objection was taken to the constitution of the action. They recovered joint damages. In the Court of Appeal Lord Bramwell intimated an opinion that their causes of action were several, and that the damages should have been several also. But he thought that they might, nevertheless, under the circumstances, properly be joined. It is not necessary to determine whether that case was rightly decided. It is enough to say that it was a very different one from the present. I think that the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs, here and below.

Lord RUSSELL OF KILLOWEN.—In this case the respondents, the plaintiffs below, sue the appellants, the defendants below, for non-delivery of certain bales of cotton shipped in the defendants' steamship *Castleton* at Galveston for carriage to Liverpool. The plaintiffs consist of sixteen firms or persons, nine of whom are alleged to have been shippers and seven consignees of the cotton in question. The defendants have pleaded several defences, the principal defence apparently being that the bales of cotton claimed were never shipped, or received for shipment, on board the defendant's ship. The facts alleged in the pleadings, so far as they are material, are as follows:—Each of the nine shippers shipped bales of cotton, in various quantities, on board *The Castleton*, receiving separate bills of lading therefor. The facts common to all the shipments were: that the shipments consisted of bales of cotton; that they were laden on board the same ship (which was a general ship); that they were consigned to the same port; and that the bills of lading were similar in all respects material in this case. When the ship arrived at Liverpool it was found that the total number of bales landed fell short of the total number in the bills of lading by eighteen. Further, it was found in the case of fifteen of the landed bales that their distinctive marks and numbers had been obliterated, and that they were unidentifiable. Those fifteen bales have been sold, and it is stated that their proceeds have been distributed proportionately amongst the several consignees.

In this state of things the plaintiffs joined in bringing the present action. The defendants objected to the joinder of the plaintiffs in one action, and claimed that each plaintiff was bound to bring a separate action in respect of his shipment or consignment, as being a separate and distinct cause of action. On the 1st of June, 1893, Mathew, J., made an order refusing an application to stay the action; but on appeal from that refusal Day, J., and Henn Collins, J., on the 30th of June, 1893, made an order that all further proceedings should be stayed, or the

action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to the claim to be proceeded with. Upon appeal had from the last-mentioned order, the Master of the Rolls and Kay, L.J. (Bowen, L.J., dissenting), gave judgment reversing the order of the Divisional Court, and thereby allowed the action to proceed. From that judgment the present appeal is brought.

The question thus raised before your lordships turns upon the proper construction of ord. 16, r. 1. That rule provides that: [His lordship read the rule.] The Master of the Rolls thought that, grammatically construed, the rule was wide enough in its terms to permit of the joining of any number of plaintiffs, although their causes of action related to entirely distinct and different transactions; but he thought that, in order to prevent the absurdity which he considered might arise from that wide construction, the rule ought to be construed with this limitation—namely, that although several plaintiffs with different and distinct causes of action might be joined together in one action, their causes of action must arise out of the same transaction. Further, he arrived at the conclusion that, although the plaintiffs in this case have different causes of action, they are causes of action which did arise out of the same transaction, and that therefore the plaintiffs were here properly joined.

It seems to me that a serious ambiguity lies in the use of the words "same transaction" as here applied. I think that the causes of action here did not arise out of the same transaction. They arose out of similar but entirely distinct transactions, creating similar but entirely distinct legal liabilities. The goods of the several plaintiffs were, no doubt, sent in the same ship from the same port of shipment to the same port of discharge, and in that sense the plaintiffs may be said to have been parties to the same transaction, but in that sense only. The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another. Kay, L.J., was of opinion that if ord. 16, r. 1, stood alone, the joining under one writ as here attempted of several plaintiffs with distinct and separate causes of action was not authorized by the rule; but he thought that ord. 18, r. 1, did authorize such joining, subject to the power of the court or of a judge to intervene where considerations of convenience justified it. I cannot assent to this view. Order 16 is conversant with a subject-matter different from that dealt with by order 18. Order 16 (principally in rules 1 and 4) deals with the parties to an action; but, in my judgment, order 18 deals and deals only with the causes of action which may be joined together in an action properly constituted, as to parties, under order 16. Bowen, L.J., dissented from the view taken by the other members of the court, and I concur both in the reasons of that learned judge and in the conclusion at which he arrived. I cannot agree with the Master of the Rolls in the limitation which, to avoid an absurdity, he introduces in the construction of rule 1 of order 16 — namely, the limitation that the plaintiffs shall have been concerned in the same transaction. I find no such words of limitation either in rule 1 of order 16, dealing with plaintiffs, or in rule 4 of the same order, dealing with defendants; and, therefore, it seems to me that the only two possible constructions are those which were, in fact, the contentions of counsel at the bar for the appellants and for the respondents respectively. For the respondents it was broadly contended that any number of plaintiffs, with any number of distinct causes of action, might join in one action within the meaning of the rule, subject only to the control of the court or of a judge. I must dissent from this view. Indeed, if rule 1 is to have this wide construction, rule 4 must receive an equally wide construction. That rule provides as follows:—"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities, without any amendment." According to this broad contention, therefore, it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability.

On the other hand, it was contended for the appellants that the plaintiffs who alone can be joined in one action under ord. 16, r. 1, are plaintiffs in whom or in some of whom, not any, but the right to any relief claimed is alleged to exist. In my judgment, this is the true construction. In other words, the rule applies to cases where it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists, and also to cases (more frequent in the Chancery than in the Common Law Courts) in which several plaintiffs having separate rights claim the same relief. This view is strengthened by the fact that several of the rules, following rules 1 and 4 of order 16 and rule 1 of order 18, would have been unnecessary were the true construction the wide one contended for by the respondents. It is not unimportant to observe that rule 11 of order 16, which deals with misjoinder, only enables the court or a judge to deal with the names of parties "improperly joined"; but it is difficult to see, if the construction of rule 1 contended for by the respondents be right, how there could be a misjoinder of plaintiffs. On the other hand, ord. 18, r. 11, dealing with joinder of causes of action, gives the court or a judge power to limit the joinder of causes upon considerations of convenience alone.

It was suggested at the bar that, if this action were not allowed to proceed as now constituted, each plaintiff suing separately would be placed in a position of difficulty, because, it was urged, the defendants might attribute the unmarked bales, or a sufficient number of them, to the particular plaintiff suing, and so meet his claim. But this is not so. When the bales became unidentifiable, the several owners of cotton became in point of law owners in common of them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: *Spence* v. *The Union Marine Insurance Co.* (*Limited*).

The argument of convenience was strongly pressed upon your lordships. I am by no means certain that that argument has, in the facts of this case, much weight; but whether it has or has not, it cannot be regarded if, as I think, the orders and rules do not authorize that joinder of plaintiffs which has been here attempted.

A brief reference to the authorities is sufficient. As to the case of *Booth* v. *Briscoe*, it is only necessary to say that, assuming that case to have been rightly decided, which it is not necessary to determine here, it differs widely from the present one, and it is no authority for the respondents' contention. That was a case in which the plaintiffs,

managers of an asylum, brought an action in respect of a libel which did not reflect upon them individually or by name, but upon the management. They brought a joint action, and recovered joint damages. No objection was taken to the constitution of the action until the matter came before the Court of Appeal after trial, and Lord Bramwell came to the conclusion, in the circumstances I have mentioned, that as the complaint was of one and the same wrong they might be joined as co-plaintiffs. In *Gort* v. *Rowney* two plaintiffs suing together claimed relief in respect of separate and distinct causes of action. No objection was taken to the constitution of the action, which was referred to arbitration upon the terms that the costs were to abide the event; and the sole point to be determined was the question, What was the event upon which the costs depended? Certain *dicta* of the Master of the Rolls in that case were relied upon by the respondents before your lordships. But those *dicta* were not assented to by Bowen, L.J., and were, in fact, not necessary for the decision of the question at issue. A further point was taken at the bar on the part of the respondents—namely, that the joinder of the plaintiffs in a way not authorized by order 16 was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well founded. In my judgment such joinder of plaintiffs is more than an irregularity; it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure; and, apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process. On the whole, therefore, I come to the conclusion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellants, with costs.

Lord ASHBOURNE concurred.

Lord HERSCHELL, L.C., stated that Lord Watson and Lord Macnaghten, who heard the case argued, concurred in the judgment of the House.

Order of the Court of Appeal reversed, with costs both in this House and below.

Solicitors for the appellants, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, Dickinson, & Hill*, Liverpool.

Solicitors for the respondents, *Wynne, Holme, & Wynne*, for *H. Forshaw & Hawkins*, Liverpool.

Court of Appeal.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 3.

FOSTER v. LONDON, CHATHAM, AND DOVER RAILWAY CO. (*a*.)

Railway company—Land taken by the company for the purposes of their undertaking—User of land for purposes compatible with their undertaking—Adjoining owner.

Where a railway company carry their railway upon arches, the leasing of those arches to tenants for short terms as shops, warehouses, and the like is not a user of the company's property incompatible with the purposes of their undertaking; and an adjoining owner, who sold to the company the land on which the arches are built, cannot restrain the company from such user.

Decision of Malins, V.C., *in* Norton v. London and North-Western Railway Co., 27 *W. R.* 352, 9 *Ch. D.* 623, *overruled.*

This was an appeal by the plaintiff from a judgment of Mathew, J., in an action against the defendant company to restrain the company and their tenants from using certain arches, upon which their railway was carried, for the purposes of shops, warehouses, and the like, and from building on or obstructing a strip of land, previously used as a footpath, and situated between land belonging to the plaintiff and the said arches.

The plaintiff sought in addition for a *mandamus* ordering the company to restore the land to its original purpose — *i.e.*, that of a footpath. The plaintiff in his statement of claim stated that the company had bought certain lands from him under compulsory powers contained in their special Acts and also in the Lands Clauses Consolidation Act, 1845, and that at the time of the purchase the company declared that they required these lands, as to part of them, for the purposes of their railway, and as to the remainder, to make a footpath.

The company made this footpath, and it was used by the plaintiff and his tenants to approach houses built on the plaintiff's land. On the remainder of the land bought from the plaintiff by the company were built arches which carried the company's railway. These arches were leased by the company to various persons, who had converted them into shops and the like, and, acting with the consent of the defendant company, had encroached on the said footpath, either by actually building thereon or by placing buildings, sheds, or chimneys so as to overhang the said footpath.

The case was tried before Mathew, J., and a special jury, who found that the land used as a footpath belonged to the company absolutely under the terms of the purchase, and that there was nothing to show that it was to be used only as a footpath and for no other purpose. Mathew, J., agreed with the verdict of the jury, and he further decided that the user of the arches and the footpath by the railway company in the manner complained of by the plaintiff was not a user which was incompatible with the purposes of the company's undertaking, as the company could, if they wished, resume possession of the premises thus leased within a very short period of giving notice to the tenants to quit, the leases all being for short terms.

From this decision the plaintiff appealed.

Lawson Walton, Q.C., and *G. M. Freeman*, for the plaintiff.—The company bought this land for a special purpose, and can use it for no other purpose. The user of which we complain was never authorized by their incorporating Acts. With respect to the footpath, the company on purchasing the land declared they wanted the land for a footpath, and they cannot now convert it to any other purpose.

They cited *Norton* v. *London and North-Western Railway Co.*, 27 W. R. 352, 9 Ch. D. 623; *Bayley* v. *Great Western Railway Co.*, 26 Ch. D. 434, 32 W. R. Dig. 227; *Bostock* v. *North Staffordshire Railway Co.*, 4 E. & B. 798, 3 W. R. Dig. 151; *Riche* v. *Ashbury Carriage Co.*, 24 W. R. 794, L. R. 7 H. L. 653; *Colman* v. *Eastern Counties Railway Co.*, 10 Beav. 1; *Attorney-General* v. *Great Eastern Railway Co.*, 27 W. R. 759, 5 App. Cas. 473; *Mulliner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611; *Reg.* v. *Leake*, 5 B. & Ad. 469; *Grand Junction Canal Co.* v. *Petty*, 36 W. R. 795, 21 Q. B. D. 273.

(*a*.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

Kemp, Q.C., Mansel Jones, and *Croft*, for the company.—The company is not bound to use its land merely for the carrying of goods and passengers; it can also use it for ancillary purposes, with the object of raising revenue, so long as those purposes are of a temporary character. The company rely on *Reg.* v. *Leake; Grand Junction Canal Co.* v. *Petty; Mulliner* v. *Midland Railway Co.; Attorney-General* v. *Great Eastern Railway Co.;* and *Bayley* v. *Great Western Railway Co.* In any event the court cannot grant an injunction in this matter, as the proper parties (*i.e.*, the company's tenants) must first be joined as defendants.

Freeman replied.

Lord HALSBURY.—I think Mathew, J., was right. I am afraid of giving an opinion here on points which do not really arise, owing to the way in which the plaintiff's case has been stated, but I do not wish to avoid expressing an opinion on the one point that has been fully argued. Broadly speaking, the company are entitled to use this land in any manner they please, so long as such use does not prevent them from carrying on their undertaking. If such use were outside their powers, as granted by Parliament, any shareholder could restrain them from so using the land. The Attorney-General, acting for the public, could likewise restrain the company from doing anything in excess of those powers. With these exceptions the position of a railway company is like that of a private individual in respect of their land. There is never an express authority given to a company to use their land for purposes ancillary to their undertaking. In this case it is said that the company cannot use these arches for any other purpose than that of carrying the railway. I know of no case that decides that; in fact, I think the authorities are the other way. *Bostock* v. *North Staffordshire Railway Co.* was decided on the peculiar wording of the statute. The judgment of Malins, V.C., in *Norton* v. *London and North-Western Railway Co.* is, perhaps, in the appellant's favour, but I should entirely disapprove of that case if the decision is based upon the proposition that a railway company is only entitled to use its property strictly for the purposes of carrying goods and passengers, and for no other purposes whatsoever. The decision of the Court of Appeal in that same case is certainly not based on that proposition. Beyond that case there is no authority for the proposition, and hence we must depend on the language of the statute. I do not see that there is anything to prevent the company from letting these arches, so long as such leases do not interfere with the proper working of the line, and there is no authority for saying that these arches must be used for the sole purpose of carrying passengers and goods. It would be unreasonable to bind the company down to such a limited use of their own property. I do not undervalue the damage to the plaintiff, but, at the same time, I cannot see that any legal right of his has been infringed. I am, therefore, of opinion that this appeal must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. I think the plaintiff is clearly wrong. The question is, Have the company exceeded their statutory rights, and in order to decide this we must inquire what is the measure of those rights? The best answer to this latter question is to be found in the judgment of Lord Selborne in *Attorney-General* v. *Great Eastern Railway Co.* His lordship says (5 App. Cas., at p. 478): "I assume that your lordships will not now recede from anything that was determined in *Ashbury Carriage Co.* v. *Riche.* It appears to me to be important that the doctrine of *ultrà vires*, as it was explained in that case, should be maintained. But I agree with James, L.J., that this doctrine should be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultrà vires*. In the present case I think with the court below that the acts which the information was filed to restrain are not *ultrà vires* of the defendant company. But I come to that conclusion, not on the ground that they are such acts, on the border line between authority and no authority, as may be reasonably thought incidental to the exercise of powers expressly given, but because I think they are expressly authorized by the 14th section of the Companies Act of 1863." With respect to the case of *Norton* v. *London and North-Western Railway Co.*, I do not think that the learned Vice-Chancellor's decision was warranted by the authorities, and I cannot see any authority for it. The plaintiff's case, therefore, in my opinion, fails.

A. L. SMITH, L.J., concurred.

Solicitors, *Rowcliffes, Rawle, Johnstone, & Gregory; J. Lewis Morgan.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Nov. 21.

In re RAILWAY TIME TABLES PUBLISHING CO. (*a.*)

Company—Winding up—Shares issued at a discount—Distribution of assets—Adjustment of rights of contributories inter se—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A limited company, having under its articles power to issue shares at a discount, increased its capital by the creation of additional shares, and issued some of the additional shares at a discount to W., an original shareholder. The company having been ordered to be wound up, and all the creditors and the costs of the winding up having been paid before the whole of the share capital had been called up, the liquidator took out a summons to make W. liable, as the holder of discount shares, to pay up the whole amount of those shares under section 25 of the Companies Act, 1867.

Held, that the issue of shares at a discount was void altogether, even though the company purported by its articles to have power to do so; and therefore that the discount shares were liable to be called up in full for the purpose of adjusting the rights of the various shareholders in the company inter se.

In re Almada and Tirito Co., 36 *W. R.* 593, 38 *Ch. D.* 415, *and* In re Weymouth and Channel Islands Steam Packet Co., 39 *W. R.* 5, 49, [1891] 1 *Ch.* 66, *followed.*

Appeal from a decision of Kekewich, J.

The company was incorporated in January, 1886, with a nominal capital of £30,000 in 6,000 shares of £5 each, 5,990 of which were issued as fully paid to the vendors or their nominees. By a special resolution passed in June, 1886, the capital was increased from £30,000 to £40,000 by the creation of 2,000 additional shares of £5 each, of which 600 were issued and paid for in cash, and of the remainder 500 were issued as bonus shares and 900 as discount shares. The capital was further increased from time to time by the creation of

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

additional ordinary and preference shares. By the articles of association the directors were authorized to issue the company's shares at a discount, and by article 140 it was provided that if the company should be wound up, and the surplus assets should be insufficient to repay the whole of the paid-up capital, the surplus assets should be distributed so that, as nearly as might be, the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up, but without prejudice to the rights of the holders of shares issued upon special conditions.

The appellant, Welton, was an original shareholder, and also the holder of some of the discount shares. The company having been ordered to be wound up, and all the creditors having been paid in full, as also the costs of the winding up, before all the share capital had been called up, the question arose whether contributories to whom shares had been issued at a discount could be compelled to pay up the full amount of those shares for the purpose of adjusting the rights of contributories *inter se*, or whether those contributories could insist that a contract existed as between themselves and the holders of the ordinary shares for creating a lesser liability in the one case than in the other.

Section 38 of the Companies Act, 1862, provides that "in the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following (that is to say): (4) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member.

Kekewich, J., held that Welton must pay up his discount shares in full.

Welton appealed.

Eve, for the appellant. This case is distinguishable from *In re Weymouth and Channel Islands Steam Packet Co.*, 39 W. R. 5, 49, [1891] 1 Ch. 66, by the absence of any article in its articles of association corresponding to article 140 here. The wording of that article points to the time when it is merely an adjustment of the rights of the shareholders *inter se*. The distribution must be on the basis that the list of contributories is ascertained at the date of the commencement of the winding up, and that, therefore, the appellant ought not to be charged with any further liability. In the *Weymouth case* there was a contract between the parties embodied in the articles. I also rely upon the *dictum* of Lord Herschell, L.C., in *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, that the company were not entitled to call upon the preference shareholders for any further payment beyond that agreed upon, except in the case of a winding up, and then only so far as necessary for the discharge of the obligations of the company and the costs of the winding up.

He also cited *Lion Mutual Insurance Association* v. *Tucker*, 32 W. R. 546, 12 Q. B. D. 176; *McKewan's case*, 25 W. R. 857, 6 Ch. D. 447; *Maxwell's case*, 23 W. R. 646, L. R. 20 Eq. 585; and *In re Hodges Distillery Co., Ex parte Maude*, 19 W. R. 113, L. R. 6 Ch. App. 51.

Renshaw, Q.C., and *Whinney*, for the liquidator, were not called upon.

Lord HALSBURY.—I wish to keep myself perfectly free to consider this question when it arises elsewhere, when it can be argued under circumstances where the authorities now cited will not be binding, except so far as *The Ooregum Gold Mining Co. of India (Limited)* v. *Roper* deals with this case; but sitting here, I am bound by the authorities, and I am unable to distinguish the point raised in this case from that which was raised in *In re Almada and Tirito Co. (Limited), Allen's case*, 36 W. R. 593, 38 Ch. D. 415, and in *In re The Weymouth and Channel Islands Steam Packet Co. (Limited)*. I designedly avoid entering into the argument in this case, because, as I say, I desire to preserve my judgment perfectly free when the case comes, if it ever does, before the ultimate court of appeal for decision. At present it is enough for me to say that I have looked at the following three cases—namely, *The Ooregum Gold Mining Co. of India (Limited)* v. *Roper* in the House of Lords, which is binding on everybody; *In re Almada and Tirito Co. (Limited), Allen's case*, which was affirmed in the House of Lords; and *In re The Weymouth and Channel Islands Steam Packet Co.*, in the Court of Appeal, which, with all respect to Mr. Eve, I think does deal with the very question now before us, and, therefore, sitting in this court, I am bound by that decision. By saying that, I do not in the least mean to say that I disagree with it: so far as I am at present advised, I should agree with it, but whether I agree with it or not, sitting here, I am bound by it. The result of that is that we must affirm the judgment of the learned judge in the court below in the present case, and the appeal must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. I do not think that by any process a share can be issued at a discount so as to render the holder of it not liable to pay calls under any circumstances. I do not think it can be done consistently with the Acts of Parliament. I think that that principle has been sanctioned, and will be found to have been made the ground of decision in a great number of cases. Those which have been referred to by Lord Halsbury are the most recent and the best known, but if you take them all, adding *Trevor* v. *Whitworth*, 36 W. R. 145, 12 App. Cas. 409, in which the principle of the whole question was very carefully discussed in the House of Lords, my view is that it cannot be done; and if it is to be done, the House of Lords must say so.

A. L. SMITH, L.J.—I really have nothing to say except that I feel myself bound by authority here.

Appeal dismissed.

Solicitors for the appellant, *Slaughter & May*.

Solicitor for the respondent, *C. T. Whinney*.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — Nov. 15.

ATTORNEY-GENERAL v. WORRALL. (a.)

Inland revenue—Account duty—Voluntary disposition—Gift inter vivos—*Release of mortgage debt—Covenant to pay annuity to releasor—"Benefit to the donor by contract"—Customs and Inland Revenue Acts*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 2 (a), *and* 1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-section* 1.

A mortgagee of freehold hereditaments obtained an

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

order for foreclosure, but before the order was made absolute a deed was made, in 1886, *between the mortgagee, the mortgagor, and the defendant (the mortgagee's son), by which, after reciting that the defendant had agreed to purchase the mortgaged hereditaments from the mortgagor, it was witnessed that in consideration of a sum of money (the difference between the price agreed to be paid by the defendant to the mortgagor and the sum due on the mortgage) paid by the defendant to the mortgagor, and of the covenant by the defendant thereinafter contained, such covenant being accepted by the mortgagee in satisfaction of his mortgage debt, from which he thereby released the mortgagor and the defendant, the mortgagee and the mortgagor conveyed the hereditaments to the defendant in fee simple discharged from the mortgage; and the defendant covenanted to pay an annuity to the mortgagee during his life. Upon the death, in* 1890, *of the mortgagee account duty was claimed upon the amount of the mortgage debt under section* 38, *sub-section* 2 (a), *of* 44 *&* 45 *Vict. c.* 12 *and section* 11, *sub-section* 1, *of* 52 *&* 53 *Vict. c.* 7.

Held, that there was a "gift" of the mortgage debt by the mortgagee to the defendant within the meaning of section 11, *sub-section* 1, *of* 52 *&* 53 *Vict. c.* 7, *and by reason of the covenant by the defendant to pay the annuity there was a "benefit to the donor by contract" within the meaning of that sub-section, such "benefit" not being confined to a benefit or reservation out of the subject-matter of the gift, and that, as the mortgage debt was personal property, account duty was payable.*

Appeal from the judgment of the Queen's Bench Division (Mathew and Cave, JJ.) in favour of the Crown upon an information by the Attorney-General to recover account stamp duty and estate duty under the provisions of 44 & 45 Vict. c. 12, s. 38, sub-section 2 (*a*), and 52 & 53 Vict. c. 7, s. 11, sub-section 1.

By an indenture of mortgage, dated the 13th of May, 1881, certain freehold hereditaments were conveyed to James Worrall, the father of the defendant, to secure a sum of £26,150. A foreclosure action was subsequently brought by James Worrall, in which the usual order was made directing an account to be taken of what was due under the mortgage, and, upon the mortgagors paying the amount certified to be due within six months after the certificate, the hereditaments were to be reconveyed to them, and in default of such payment the mortgagors to stand thenceforth absolutely foreclosed of all equity of redemption. Before the expiration of the six months allowed for redeeming, an indenture, dated the 12th of January, 1886, was made between James Worrall, the mortgagors, and the defendant, by which, after reciting that in the foreclosure action it had been found that £23,924 15s. 2d. remained due on the mortgage security, and that the defendant had agreed to purchase from the mortgagors the mortgaged hereditaments for the sum of £24,500, and that James Worrall had agreed to join in the conveyance for the purpose of releasing the hereditaments from the mortgage debt in consideration of the covenant thereinafter contained, it was witnessed that, in consideration of £575 4s. 10d. (the difference between the price agreed to be paid by the defendant and the sum due on the mortgage), paid by the defendant to the mortgagors, and of the covenant by the defendant thereinafter contained, such covenant being accepted by James Worrall in satisfaction of his mortgage debt of £23,924 15s. 2d., from which he thereby released the mortgagors and the defendant, James Worrall and the mortgagors conveyed the mortgaged hereditaments to the defendant in fee simple, discharged from the indenture of the 13th of May, 1881, and from the principal moneys and interest secured thereby; and the defendant covenanted that he would, during the life of James Worrall, pay to him or his assigns the yearly sum of £735 by half-yearly payments.

James Worrall died in 1890.

The Commissioners of Inland Revenue claimed account stamp duty on the sum of £23,924 15s. 2d., under section 38, sub-section 2 (*a*), of 44 & 45 Vict. c. 12 and section 11, sub-section 1, of 52 & 53 Vict. c. 7,* and also estate duty under section 5, sub-sections 2, 4, 5, of the latter Act, alleging that the transaction carried out by the deed of the 12th of January, 1886, as between the defendant and James Worrall was one of gift, and not of purchase, and that James Worrall thereby gave the defendant the mortgage debt belonging to him, reserving a benefit by way of contract to the extent of the annual sum of £735 during his life.

The Divisional Court gave judgment for the Crown.

The defendant appealed.

Byrne, Q.C. (*T. W. Chitty* and *F. Newbolt* with him), for the defendant.—By the deed of the 12th of January, 1886, the defendant obtained the land from his father. The father did not transfer the mortgage debt to the defendant, but released the land from it, and then the land was conveyed to the son. It being land, the Acts of 1881 and 1889 did not render it liable to duty. [But now, by the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-sections 1 (*c*), 3, land is included.] Secondly, even if the defendant took personalty from the father, it was not a "gift." The defendant bought the father's right of action against the mortgagors. There cannot be a gift where there is a substantial consideration. The covenant by the defendant to pay the father the annuity was a substantial consideration for the transfer of the mortgage debt. The amount of the consideration cannot be looked at, as, if so, every sale for an undervalue would be within the Act. The words in section 11, sub-section 1, of the Act of 1889, "to the entire exclusion of the donor or of any benefit to him by contract or otherwise" mean exclusion from all interest in the property. There must be a reservation of some right over or interest in the property. The test is, Can the donee do what he pleases with the property? Here the defendant could have disposed of the property at once, his covenant being merely personal. The duty, therefore, claimed is not payable.

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* Section 38 of the Inland Revenue Act, 1881, (44 & 45 Vict. c. 12), provides that stamp duties shall be charged upon accounts of personal property, including, sub-section 2 (*a*), "any property taken . . . under a voluntary disposition, made by any person dying on or after the 1st day of June, 1881, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise which shall not have been *bonâ fide* made three months before the death of the deceased."

Section 11, sub-section 1, of the Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), amends section 38, sub-section 2, of the Act of 1881, and provides that "the description of property marked (*a*) shall be read as if the word 'twelve' was substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

Sir R. T. Reid, A.G. (*Vaughan Hawkins* with him), for the Crown.—The property transferred was personalty. A mortgage debt is personal property, and this was what the father transferred to the defendant, the latter at the same time buying the equity of redemption from the mortgagors for £575 4s. 10d. Again, this was a "gift." A collateral covenant to pay an annuity does not make it the less a gift. There was, too, a benefit reserved to the donor by reason of the defendant's covenant. The Act was intended to strike at any benefit, either in the property itself or by contract or otherwise, being reserved to the donor. Here there was a benefit reserved to the donor by contract. The Acts therefore apply.

Byrne, Q.C., replied.

Lord ESHER, M.R.—In cases of this kind the court has to determine what is the real transaction between the parties, apart from any legal phraseology used and the forms of conveyancing. The father here lent £26,150 upon mortgage of certain real estate. The result was that he obtained the legal estate in the land, while the mortgagors retained the equitable estate—namely, the equity of redemption. The father then obtained an order for foreclosure, and the mortgagors had six months within which to redeem, during which time the father would only have a right to be paid the mortgage debt by the mortgagors, and would not have the equitable estate in the land. Supposing the father had died at any time during the six months, there is no doubt that his executors would have been entitled to this money. Therefore the mortgage debt was personal property. The father wished to give this mortgage debt to the son, and the transaction was carried out in this way: the son purchased the equity of redemption from the mortgagors for £575 4s. 10d., and the father released the land from the mortgage debt—in other words, he gave the mortgage debt to the son—and thus the son became possessed of the land freed from the mortgage debt, and the son covenanted to pay to the father an annuity of £735. That was the true nature and substance of the transaction. Does the statute cover such a case? It seems to me that the case comes within section 11, sub-section 1, of the Customs and Inland Revenue Act, 1889. The property, being personal property, comes within section 38, sub-sections 1, 2 (*a*), of the Customs and Inland Revenue Act, 1881, and there was a "gift" of this property within the meaning of section 11, sub-section 1, of the Act of 1889 made by the father to the son, and the son did not assume and retain *bonâ fide* possession and enjoyment of the property to the entire exclusion of the father or of any benefit to him by contract. The covenant to pay the annuity to the father prevented it being a pure and simple gift—that is, without any benefit to the father. The duty claimed is therefore payable on this sum, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. We must in these cases look at the substance of the transaction, but in the present case, whether we look at the substance or the form of the transaction, the case comes within the Acts. There are three questions to be determined. First, Is this a gift at all? It is said that it is not, because of the collateral covenant by the son to pay the annuity to the father. It seems to me that it is not the less a gift because of this covenant to pay the annuity. The second question is, Is this a gift of personalty? We must look at the state of things at the time of the deed of 1886. There was a mortgage debt due to the father, and an order had been obtained for foreclosure, but that order had not been made absolute. Therefore the mortgagors were entitled to the equity of redemption, and the father was entitled to the legal estate, and to be paid the money secured by the mortgage. The son then paid £575 4s. 10d. to the mortgagors for the equity of redemption, and the father joined in the deed and conveyed the legal estate to the son, and also released the mortgage debt. The father merely transferred to the son the right to receive the mortgage debt, the equity of redemption being in the mortgagors, and the father having only the legal estate to transfer. If the father had died before the deed was executed his executors would have been entitled to the mortgage debt. It was therefore personal property. The third question is, Did the property so pass as to become subject to account duty? Section 38, sub-section (2), of the Act of 1881 was passed to prevent evasion of the probate duty, and section 11, sub-section 1, of the Act of 1889 was passed to cure defects and omissions in section 38, sub-section 2, of the former Act. Under the later Act it is not necessary that the "benefit to the donor" should be reserved out of the property itself, but it extends to any benefit to the donor. To my mind the covenant by the son to pay the father the annuity is such a benefit to the father by contract as to bring the case within the section.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Byrne & Blakiston*, for *Slater, Healis, & Co.*, Manchester.

Solicitors for the Crown, *Solicitor of Inland Revenue.*

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Nov. 3, 9.

TAYLOR v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. (*a*.)

County court—Costs—Contract or tort—Action in High Court—Misfeasance—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action which can be maintained for misfeasance, contract or no contract, is "founded on tort" within the meaning of section 116 *of the County Courts Act,* 1888, *and a verdict for* £20 *will, therefore, carry costs on the High Court scale.*

This was an appeal from a taxing master's order referred to the Court of Appeal by Wright, J.

The statement of claim in the action (which was brought in the High Court) set out that the plaintiff was on the 6th of May, 1894, a passenger on the defendants' railway, and was entering a compartment of a train at the defendants' station of Levenshulme, when a porter of the defendants' negligently shut the door of the compartment upon and crushed the plaintiff's thumb, and that by the defendants' negligence the plaintiff suffered great pain and was prevented from following his employment. The plaintiff claimed £100 damages.

The plaintiff obtained a verdict for £20, and judgment was given for that sum, with costs, no special order being made as to the costs.

Upon taxation the master only allowed costs on the county court scale. From this decision the plaintiff appealed, asking that costs should be taxed on the High Court scale.

The question as to costs depended upon whether

(*a*.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

the action was "founded on contract" or "on tort" within the meaning of the County Courts Act, 1888, s. 116, which runs as follows: "With respect to any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply: (1) If in an action founded on contract the plaintiff shall recover a sum less than £20, he shall not be entitled to any costs of the action, and if he shall recover a sum of £20 or upwards, but less than £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in the county court. (2) If in an action founded on tort the plaintiff shall recover a sum less than £10 he shall not be entitled to any costs of the action, and if he shall recover a sum of £10 or upwards, but less than £20, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court."

Morton Smith, for the plaintiff.—The action is founded on the tortious act of the defendants' servant apart from any contract.

He relied on *Marshall* v. *York, Newcastle, and Berwick Railway Co.*, 11 C. B. 655; *Austin* v. *Great Western Railway Co.*, 15 W. R. 863, L. R. 2 Q. B. 442; *Bryant* v. *Herbert*, 26 W. R. 898, 3 C. P. D. 389; *Foulkes* v. *Metropolitan District Railway Co.*, 28 W. R. 526, 5 C. P. D. 157, 159.

C. A. Russell, for the defendants.—In this particular case, the plaintiff alleges he was a passenger on the defendants' railway and that the railway company had undertaken certain duties arising out of that contract. His action, therefore, is founded on contract. It is immaterial that he might have had a cause of action, supposing there were no contract, founded on tort.

He relied on *Alton* v. *Midland Railway Co.*, 13 W. R. 918, 19 C. B. N. S. 213, 237, and referred to *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway Co.*, 27 W. R. 481, 4 Q. B. D. 81; *Powell* v. *Leighton*, 2 N. R. 370; *Tattan* v. *Great Western Railway Co.*, 8 W. R. 606, 2 E. & E. 844; *Pontifex* v. *The Midland Railway Co.*, 26 W. R. 209, 3 Q. B. D. 23; and *Boorman* v. *Brown*, 3 Q. B. 511.

Cur. adv. vult.

Nov. 9.—LINDLEY, L.J., after stating the facts above set out, continued:—Now comes the question about costs. Is the plaintiff entitled to his full costs or not? That depends on section 116 of the County Courts Act, 1888, which runs thus: [His lordship read the section, and continued:—] Now, if this action falls within the first clause, if it ought to be regarded as an action founded on contract, then the plaintiff can only get county court costs. If, on the other hand, the action falls within the second clause—that is to say, if it is an action founded on tort, then there would be nothing to qualify the plaintiff's right; he would get his full costs, the learned judge having made no certificate, nor done anything to deprive him of them. We are driven, therefore, to consider whether, adopting the language of the Act, this action brought by the plaintiff is an action founded on contract or an action founded on tort. The language of the Act is a little peculiar. I need not go into the history of it. I merely observe that the classification which is made by the Legislature is confined to actions brought in the High Court, which might have been commenced in the county court, and those two sub-divisions exhaust the whole of that class of actions, and each excludes the other. That gives rise to the difficulty here. We no longer have to consider forms of actions, but we are compelled by the Legislature to put every action which can be brought in the county court, but is brought in the High Court into one or the other of those two categories. Every one who has studied the English law with any care will know perfectly well there is a debateable ground between torts and contracts. There are what are called *quasi*-contracts and *quasi*-torts; and it is sometimes not easy to say whether a cause is founded on contract, or on tort. Very often you can put it either way; but here we are compelled to draw the line hard and fast, and put every one of the actions in one class or the other. I have looked into the authorities, but it is only necessary, as I propose to do, to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think anything would be gained now by going into the old learning about the forms of actions. We have to consider this Act of Parliament, and the only cases which are of any importance and assistance as enabling us to construe the Act are those cases which have been decided upon it, or upon the similar Acts which this Act has replaced. First and foremost there is the case of *Bryant* v. *Herbert*; secondly, there is a case decided in the same year, of *Pontifex* v. *The Midland Railway Co.*, and then in the next year there is the case of *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway*. Having studied those cases with care (I do not think it necessary to go into them), it appears to me that this is an action founded on tort, and the conclusion at which I have arrived is based upon these reasons. That which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking such care of the plaintiff, as by the contract the defendants were bound to take, but it was an act of misfeasance, it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible, without running contrary to the reasoning of the Court of Appeal in the case of *Bryant* v. *Herbert*, which reversed the decision of Denman, J., and myself in the same case, to hold that, within the meaning of the County Courts Act, this is an action founded on contract as distinguished from tort.

The case to which Mr. Russell referred, of *Alton* v. *The Midland Railway Co.*, at first sight appears to present some difficulty, but the observations I have to make upon that case are these: in the first place that case was not like this; and, in the next place, it has been criticized and commented upon somewhat adversely; I do not say it has been overruled, that is quite another matter, but it is not a case on the construction of this Act of Parliament; and therefore I prefer to base my decision on what I consider to be the true construction of the Act of Parliament in this case.

Therefore I come to the conclusion that this appeal ought to be allowed, and the plaintiff will have his costs here and below.

A. L. SMITH, L.J.—The question here is whether, when a passenger contracts with a railway company, that is, takes a ticket entitling him to be carried upon a given journey, and he is injured thereon by a misfeasance for which the company is liable, and he brings an action therefor in the High Court of Justice, such action is founded upon contract, or founded upon tort, within the meaning of section 116 of the County Courts Act of 1888; for by that section different consequences arise as to costs if the action is founded upon contract, or if founded upon tort.

It has been held by this court that, in considering a matter of costs under sections similar to the

present, the substance of the action, and not its form, is to be looked at, and it should be ascertained whether the real substantial complaint is for breach of contract or for a tort: see *Bryant* v. *Herbert*.

It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in either contract or tort; but this is not the governing consideration. It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not: see *Marshall* v. *Newcastle and Berwick Railway Co.*, *Austin* v. *Great Western Railway Co.*, and *Foulkes* v. *Metropolitan Railway Co.*; and he need not allege or prove any contract at all. He need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants; for this is sufficient to show a breach of that duty on the part of the defendants which is implied by law.

It is equally clear that, whether the plaintiff in such an action sets up a contract or not, to succeed he must prove active negligence—that is, a misfeasance of the company's servants—and that, without proof of this negligence, he will undoubtedly fail. The fact that the plaintiff happens to have a contract—that is, a ticket—is of use in such an action, it is true, for the purpose of showing that the plaintiff was lawfully where he was when he sustained the injury; but proof of this fact can be given *aliunde*, and proof of a contract is by no means vital to success. Lord Bramwell, in *Bryant* v. *Herbert*, says (and in this I agree) that the foundation of an action is those facts which it is necessary to state and prove to maintain it, and no others.

On the other hand, if the action be brought against a common carrier for non-delivery of goods, this is founded upon contract as held by this court in *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway Co.*, and negligence need not be averred or proved. So also if brought for a non-feasance; for then the plaintiff cannot succeed without proof of a contract and its breach.

The case of *Alton* v. *The Midland Railway Co.*, so much relied upon by the respondents, was decided upon demurrer to a declaration, in which it was expressly averred that the rights of the servant for whose injuries the master was therein suing the company were founded upon contract, and this was taken as the premise upon which the case had to be decided; and it was then held that the master could not sue for injury to his servant caused by breach of a contract entered into between the servant and the company. No question was, or could be, raised as to what would have been the result if the servant's remedy against the company had been founded upon tort; for the case, as before stated, was decided upon demurrer in a declaration which expressly averred that the servant's rights against the company were founded upon contract. This case, when looked into, not the authority which it was supposed to be, and in no way decides that an action against a company by a passenger who has taken a ticket is necessarily an action founded upon contract and not upon tort.

The judgments of Brett and Bramwell, L.JJ., in the before-mentioned case of *Bryant* v. *Herbert* are very pertinent to this case; and having considered them and the other cases cited therein (especially *Pontifex* v. *Midland Railway Co.*), and for the reasons given above, I hold that an action against a railway company for personal injuries by reason of the active neglect of the company's servants, even though such person has taken a ticket, is an action founded on tort, and not upon contract, within the 116th section of the County Courts Act, 1888.

I may add that, having consulted the senior master of the Common Law Division, I find that this judgment is in accord with the mode of taxation hitherto adopted in the division.

Appeal allowed.

Solicitors for the plaintiff, *Indermaur & Brown*, for *Gardner & Son*, Manchester.

Solicitors for the defendants, *Cunliffes & Davenport*, for *R. Lingard Monk*, Manchester.

(1898, 2 Ch. 622.

High Court of Justice.

Chan. Div. } Nov. 8, 20.
Chitty, J. }

BELL v. EARL OF DUDLEY.
CONSETT WATERWORKS CO. v. RITSON.* (a.)

Inclosure—Construction of Act—Separate ownership of surface and minerals—Right to work minerals—Right to let down surface—Compensation clause—General canons of construction of Inclosure Acts.

In the construction of Inclosure Acts, where the ownership of the surface and minerals is severed, regard must be had to the following rules:—

(1) Primâ facie *the surface owner has the common right of support from the subjacent minerals.*

(2) *The surface owner can only be deprived of this right of support* (a) *by unequivocal words, or* (b) *by implication from the general context.*

(3) *In case* (b) *the absence or inadequacy of any provision for compensation tends strongly against such implication.*

Motion.

The plaintiff was the owner of certain premises

From Q. B. Div. } May 1, 1889.
(Lord Esher, M.R., and Lindley and Lopes, L.JJ.) }

* CONSETT WATERWORKS CO. v. RITSON.

This was an appeal by the defendant in an action to recover damages for injury caused by the acts of the defendant in working coal mines; and it raised a question as to the interpretation of the Lanchester Inclosure Act, 1773 (13 Geo. 3, c. lxvii.). That Act gave the Bishop of Durham, his successors and assigns, power to work the mines as fully and freely as he might have done in case the Act had not been made, and that without paying any damages or making any satisfaction for so doing; and after reciting that "whereas great inconveniences may happen and damage be done to particular persons" by reason of such working by the Bishop of Durham "without paying any damages or making any satisfaction for so doing," the Act went on to provide that the annual rental of 500 acres of the inclosed land should be set apart to provide compensation for the allottees in such cases, the deficiency, if any, to be made up by a rate on the allottees.

Sir R. E. Webster, A.G., Rigby, Q.C., and *Danckwerts*, for the appellant, the defendant, who claimed under the Bishop of Durham.

Sir Henry James, Q.C., and *H. F. Manisty*, for the respondents, the plaintiffs.

The Court of Appeal held, on the construction of

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

erected on land which had been allotted to his predecessors in title under the Kingswinford Inclosure Act, 1784. This Act reserved to the lord of the manor the right of working the mines and minerals under the land, and conferred on him and his successors the fullest powers of working such mines and minerals, "together with full and free liberty to him and them to do any other reasonable and necessary acts and things in and upon the same lands for the discovery, getting, working, &c., of the said mines and minerals in such manner as he or they shall think proper and expedient, without any molestation or interruption, and without paying or making any satisfaction to any person whomsoever for the same

the above Act, that the right of the bishop and his assigns to work the mines so as to let down the surface without compensation to the surface-owners was clearly implied. Those portions of the judgments which lay down the general principles of construction of Inclosure Acts are here subjoined.

Lord ESHER, M.R.—This Inclosure Act is passed, and we have to construe it; and although much has been said about what would be the effect of this Inclosure Act under the circumstances of the present times, we have to construe that Act (as we have so often said) as if we were construing it a day after it was passed.

Now these Inclosure Acts are not like a contract which may be casually made between individuals—*i.e.*, a contract unlike any other contract which has been made by anybody else. Inclosure Acts are of a common form which has existed for years. Whenever you have such a common form as that, where there have been decisions as to the mode of construing those Acts, it is not true, in my view, to say that the mode of construing them which has been adopted by one court is not to be afterwards noticed by other courts. When you have a casual agreement, the terms of which may never be repeated, the decision about its construction cannot give any help in construing another one which is different. But when you have documents which are ordinary documents, though not exactly alike, then the mode of construing them, or any rule or canon of construction applied to that species of document which is a common one should be followed; for it seems to me the courts would be doing wrong if, after such a canon of construction has been laid down with regard to such documents, it should not be followed.

Now, has there been a rule of construction or a mode in which you are to primarily or *primâ facie* look at Inclosure Acts laid down? It seems to me there has been such a rule laid down in the case of *Bell* v. *Love*, first of all in the Court of Appeal, and afterwards, as I think, adopted in the same case in the House of Lords. Therefore, in my opinion, we have a rule of construction laid down with regard to these documents in the House of Lords, and we are bound to follow that. I take it the rule does not apply where the words of the Act are clear; in that case you are to construe them according to their clear construction and obvious intention. But a rule has been laid down for the case where the words used in such documents are capable of one or two constructions. I take the rules as laid down by my brother Lindley in *Bell* v. *Love*, as it seems to me that they were really adopted by Baggallay, L.J., in his judgment in the same case; but I do not think that in his judgment you will find the rules laid down as rules of construction so obviously as they are by my brother Lindley. Now in *Bell* v. *Love* my brother Lindley speaks of all the cases: *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348, 8 W. R. H. L. Dig. 4; *Smith* v. *Darby*, 20 W. R. 982, L. R. 7 Q. B. 716 (which has been quoted to us); *The Duke of Buccleuch* v. *Wakefield*; and *Hext* v. *Gill*, 20 W. R. 520, 957, L. R. 7 Ch. App. 699, and others, and then he says:—"These cases appear to me to establish two propositions—viz., first that an Inclosure Act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them unless the language of the Act is clearly and unmistakably to that effect." That is a rule of construction. Then his second rule is: "That the absence of all provision for compensation for injury sustained by letting down the surface tends strongly to indicate that the Legislature did not intend by general words to reserve to, or confer upon, the lord of the manor the right to work his mines so as to let the surface down." That is a negative proposition—that the absence of all provision for compensation tends strongly to show that the intention was that he was not to be allowed to let down the surface without paying for it. Now it is clear that with regard to those two propositions neither of them negatives what I have said before—viz., that if there were clear words giving to the lord the power to let down the surface without payment of compensation, although there is no compensation at all given, the court is bound to give effect to the clear words. That is quite consistent with both those propositions; but if the words are not clear to the effect that the lord can let down the surface without paying compensation—if they are capable of two constructions—then this question of whether there is or is not compensation becomes a very material indication or context. Now recollect those propositions were laid down in *Bell* v. *Love* in order to consider whether that case was governed by the *Duke of Buccleuch* v. *Wakefield* or not, and they were applied in this way, that although the words in *Bell* v. *Love* were very large words, quite large enough to give to the lord the power of working the mines so as to let down the surface without paying compensation, yet it was consistent with them that he was not to let down the surface; and then the fact of there being no compensation to any persons whose land was let down, authorized or required the court to say that the generality of the words was to be construed, not in their larger sense, but in a limited sense. As it seems to me, those rules were adopted by the House of Lords, and this question of the effect of the absence of compensation, or the presence of compensation, was distinctly alluded to by each of the lords who gave judgment—very particularly by Lord Watson, where, alluding to the case of *Hext* v. *Gill*, he adopted and approved of what had been said by Mellish, L.J., in *Hext* v. *Gill*, which was to this effect, that in the *Duke of Buccleuch's case*, in which (as has been pointed out by Mr. Rigby) the words were nearly as large as those which are present in this case, yet Mellish, L.J., says if the court, or the House of Lords in that case, had not found there was compensation, his view was that the decision would have been the other way, and that the words, although so large, and in one sense so clear, would have been construed to a limited extent only. Lord Watson says: "I adopt that view of Mellish, L.J." In my opinion, the other judges in the House of Lords took the same view. Now we must see how we are to apply the rules laid down in that case to the present. [The rest of the judgment, being an examination of the Lanchester Act at great length, is here omitted.]

LINDLEY, L.J.—I have come to the same conclusion. The principles applicable to this case are those which were laid down in *Bell* v. *Love*. That was three times argued, and there was no difference of opinion

or for the damage to be done thereby, he and they doing as little damage thereby as may be."

The next clause, commencing with a recital, "And whereas great damage may be done to some of the said allotments" by such working, provided in effect that the damage caused to any particular allotment by the working of the mines or the exercise of any of the powers reserved to the lord should be borne rateably by all the allottees, including the owner for the time being of the allotment damaged. The lord was himself one of the allottees.

The defendant, who was the present lord of the manor, having proposed to work the mines under the plaintiff's premises, with the probable result of letting them down, the plaintiff now moved to restrain him from so doing.

Levett, Q.C., and *Ashton Cross*, for the plaintiff.—There is no absolute or unqualified clause of compensation or provision for payment of compensation by the lord, and the word "damage" must be restricted so as not to include injury by subsidence: *Bell* v. *Love*, 10 Q. B. D. 547, 31 W. R. Dig. 33, 32 W. R. 725, 9 App. Cas. 286.

Byrne, Q.C., and *W. F. Hamilton*, for the defendant.—The right depends on the special Act. The narrowness or inadequacy, or, indeed, the complete absence, of a compensation clause is immaterial if the empowering words of the Act are otherwise clear. It is only when they are susceptible of two meanings that the presence or absence of a compensation clause tells for or against the lord: *Duke of Buccleuch* v. *Wakefield*, L. R. 4 H. L. 377, 18 W. R. H. L. Dig. 10, and *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318, 702 (*vide* note*).

CHITTY, J.—The question which arises on this motion is simply one of right, depending on the true construction of the Inclosure Act of 1784. Questions of this kind, turning on Inclosure Acts, have often come before the courts in recent years. The Acts which have thus received judicial interpretation have not been drawn on the same model. When compared one with another they have presented points of resemblance and of difference leading to different results. The Act before me in some respects resembles, in others differs from any of, the Acts the meaning of which has been ascertained by the courts. Each Act has to be interpreted by its own provisions. The leading authority relied on for the plaintiff is *Bell* v. *Love*, a decision of the Court of Appeal which was affirmed by the House of Lords. The leading authorities cited for the defendant are *The Duke of Buccleuch* v. *Wakefield* and *Consett Waterworks Co.* v. *Ritson*, where the decision of the Divisional Court was reversed by the Court of Appeal. In the *Law Reports* there is merely a note of the decision of the Court of Appeal. A shorthand note of the judgments delivered was produced and read in court on the hearing of this motion (*vide* note *). These authorities afford great assistance, and serve as guides in travelling through the various clauses of the Act of Parliament.

The result appears to be that the method adopted in construing such Acts may be stated as follows:—Where, as here, the ownership of the minerals and of the surface is severed, the *primâ facie* inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement. This inference is strong; in order to rebut it the burden lies on the owner of the minerals to show affirmatively and by clear words that he has the right of letting down the surface. When clear words are spoken of it is not meant that the Act must say in express terms that the mineral owner may let down the surface. That such express words are not required is shown by *The Duke of Buccleuch* v. *Wakefield*, and also by the decision of the House of Lords on a Scotch instrument in *Buchanan* v. *Andrew*, L. R. 2 H. L. Sc. 286, 21 W. R. Dig. 72. The presence or absence of a compensation clause is an important element. The *primâ facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation; the presence of a limited compensation section is not of itself sufficient to rebut the inference. There was such a limited clause in *Bell* v. *Love*, where the right to compensation was given, not to the person entitled to the allotment, but merely to the

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between the judges before whom it came. It was first argued before Manisty, J., and Williams, J.; and Manisty, J., in a judgment which I recollect—I do not know whether it is reported—pointed out that upon the true construction of that Act there was no right to set down the surface of the allottees. The case was argued before this branch of the Court of Appeal, and when the arguments were finished time was taken to look into the authorities, and the result of that will be found in the report of the judgment of this court in 10 Q. B. D. 547. This court took the same view as Manisty, J., that upon the true construction of the Inclosure Act then before the court there was no right to let down the surface. Then the case went to the House of Lords. The House of Lords took the same view, and, so far as I can discover, adopted the same principle which had guided all of us. The cardinal principle is to put the true construction on the Act with which you have to deal. That, of course, is a very general proposition, and these Inclosure Acts have been examined and discussed so often that there may be said to be now some subordinate rules to assist one in arriving at a true construction; but after all one must not lose sight of the fact that their true construction is what we must get at in each particular case. [His lordship then examined the arguments in *Bell* v. *Love*, and continued:—] It was held by all the courts that, notwithstanding the reservation of the lord's right in that case, the lord of the manor would have no right to let down the surface of the allotments unless the right so to do could be found expressly conferred upon him or necessarily implied in the Act of Parliament which authorized the inclosure. [His lordship then dealt with the special Act before him.]

LOPES, L.J.—It is perfectly clear law that the burden of making out a right to let down the surface lies here upon the appellant. Unless he can make out that right clearly the presumption is that the allottees, the owners of the freeholds, have a right to the support of the subjacent soil. Now to remove this presumption and make out this right to let down the subjacent soil the language must be unequivocal whether it is used in an agreement, or deed, or Act of Parliament. Here we have to deal with an Act of Parliament, and if the language of the Act of Parliament is definite and unequivocal I take it there is an end of the question. I mean if it is clear and definite in this way, that the right to let down the soil was intended to be conferred, then the presumption is gone and the right to let down that soil is beyond all question. Again, if the language in the Act of Parliament is large and general, but there is nothing in the context to imply or point to a right to let down the surface, then the presumption of the right to support prevails. If, on the other hand, the context indicates a right to let down the surface, then full effect is to be given to the general words, and the *primâ facie* presumption is negatived. [His lordship then dealt with the special Act.]

person in possession for the time being, and the amount was not to exceed the sum of £5 yearly. Such, stated shortly, appears to be the method pursued in interpreting Acts of this class.

Whether the propositions I have stated ought to be called a method of interpretation, or be termed canons or rules, or (as Lindley, L.J., said in the *Consett Waterworks case*) subordinate rules for construing the Act is a matter of no moment; the object is the same whatever be the correct phrase. That object is to ascertain the intention of the parties to the contract embodied in the Act of Parliament. [His lordship here read the first clause above referred to, and continued:—] This is a strong clause in favour of the defendant. Although it was known at the time when the Act was passed that the working of the coal had caused subsidence, and, indeed, that it was impracticable to work the thick seam of coal without such subsidence, the words import that the lord may work the mines without making any satisfaction to any person or persons whomsoever; the latter words, of course, including the allottees. This clause is itself immediately followed by a long compensation clause. The effect of it is that, by means of contribution, the damage caused to any particular allotment by the working of the mines or the exercise of any of the powers reserved to the lord is borne rateably by all the allottees, including the owner for the time being of the allotment damaged, and the allotment specially made to the lord. The lord himself is thus required to make a substantial contribution to the damage sustained by his mining operations. There is no limit to the amount of the damage to which contribution has thus to be made by the allottees. It was argued for the plaintiff that it could not have been intended that this compensation clause should extend to damage caused by subsidence. But I cannot accept this argument. The words of the enactment are sufficient to include all damage; and I can find no sufficient ground for excluding this important and (as I think) obvious head of damage. The preamble of the clause is, moreover, of great significance, running, as it does, "whereas great damage may be done to some of the allotments." Great damage is thus expressly mentioned and directly contemplated, and a special scheme is provided for relieving by compensation the allottee suffering the damage from all but his aliquot proportion of the loss sustained. It is impossible to say that great damage does not include damage caused by subsidence. Putting, then, the various parts of the Act together, and reading the Act as a whole, I come to the conclusion that the defendant has made out his claim, and that the plaintiff is not entitled to the injunction he asks for.

Solicitors, *Stanley, Attenborough, & Tyer; Saltburn, Tryon, & Saltburn.*

1902, 2 Ch. 739.

Chan. Div. } Dec. 1.
Stirling, J. }

EHRMANN v. EHRMANN. (a.)

Partnership—Practice—Parties—Dissolution—Rights of persons nominated to succeed to shares in the partnership.

Five persons carried on business in partnership under partnership articles which contained a clause empowering each partner to nominate a son to succeed to his share in the partnership, but no son so nominated was to succeed until he attained twenty-one. The power was exercised, and an action having been brought by four of the partners against the fifth, seeking a dissolution, the defendant applied to stay all proceedings until the nominated sons (who were all under twenty-one) were made parties.

Held, that the clause in question did not prevent the partners from dissolving the partnership, and that as a son would only succeed to his father's actual interest at the time the son became a partner, the sons were not necessary parties.

The observations of Cotton, L.J., *in* In re Flavell, 25 *Ch. D.* 89, *discussed.*

This was a summons by the defendant asking that all proceedings in the action might be stayed until all proper persons were made parties.

Five persons had been for some time in partnership as wine and spirit merchants. The affairs of the partnership were regulated by deeds of the 6th of December, 1879, and the 16th of May, 1882, as modified by a deed of the 25th of June, 1885. The ninth clause of the last-mentioned deed of 1885, upon which the present question arose, was in the following terms, so far as the same are material:—"Each of the said partners may during his lifetime nominate any son of his or in the alternative may nominate any two or more sons of his successively in such order as he may think fit to succeed, as to one of them, as a partner to any of the nominating partner's share in the partnership not exceeding one-half part of such share, but no son of any partner shall succeed to the nominated share until he shall have attained the age of twenty-one years, and in the event of the death of any partner so nominating any son or sons under the age of twenty-one years as aforesaid, the profits of the nominated share from the death of such a partner until such son who succeeds to a share shall have attained the age of twenty-one years shall belong to the continuing partners, and upon signing such deed or deeds as hereinafter mentioned respecting the admission of a new partner the son so nominated and succeeding as aforesaid shall be and become a partner in the partnership concern in respect of such share and interest of his father therein to which he has been nominated, and be entitled thereto upon the same terms and conditions and under and subject to the same advantages, powers, provisions, regulations, journeys, and agreements in all respects and in the same manner as the father would have been entitled to."

The action was brought by four of the partners against the remaining partner, and sought a dissolution and all proper accounts and inquiries.

Several of the partners (including the defendant) had exercised their power of nominating their sons to succeed them under the said 9th clause of the deed of 1885, the eldest of such sons being less than twenty years of age.

The defendant by the summons sought to have the sons so nominated made parties to the action.

Buckley, Q.C., and *H. Terrell*, for the defendant.—In the absence of the persons having contingent interests a decree for dissolution cannot be made. Here there is a trust for the persons nominated: *In re Flavell, Murray* v. *Flavell*, 32 W. R. 102, 25 Ch. D. 89; *Page* v. *Cox*, 10 Hare, 163.

Graham Hastings, Q.C., and *Solomon*, for the plaintiffs, were not called upon.

STIRLING, J.—[His lordship referred to ord. 16, r. 11, and read the 9th clause of the deed of June 25, 1885, and proceeded:—] In pursuance of that power nominations have been made by various of the partners. The defendant made his nomination on the

(a.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

26th of June, 1885, and nominated his son to succeed to one-half of his share in certain events. I have to determine whether the sons so nominated (all of whom are at present under twenty-one) are necessary parties who ought to be defendants to this action. It is admitted that the sons are not at present partners; that is quite plain from the deed. A son does not become a partner until (1) he has attained twenty-one, and (2) he has executed a deed. He is to become a partner in respect of such share and interest as his father has therein.

It is said that this creates a trust in favour of the son, and there is authority that it creates a trust; but it seems to me that there is no authority to show that it creates an immediate trust in favour of the son (see the judgment of Turner, L.J., in *Page* v. *Cox*). But the question which I have to consider here is whether such a trust prevents a dissolution of the partnership, either by agreement of the partners *inter se* or by the judgment of the court. It is clear to my mind that Turner, L.J., considered that the agreement did not prevent a dissolution by the partners. He says (10 Ha., p. 169): "It might, indeed, have been put an end to by a dissolution of the partnership during the joint lives, but it subsisted until so determined." Therefore, although the Lord Justice held that in that case a trust was created, it was a trust to arise at a future time, and was to attach upon property as it would then exist.

In re Flavell contains some observations in the judgment of Cotton, L.J., which give some colour to the argument before me that there was a present trust created. The Lord Justice says: "It is said that he could have released the covenant. But if he could have done so it would only be on the ground that the 35th article did not create a trust, but was only a contract between the partners to create a trust a contract from which either could release the other" (25 Ch. D., p. 102). [The WEEKLY REPORTER report differs from this.] Now no doubt the Lord Justice appears to indicate his opinion to be that neither partner could release the other from this covenant; but it is to be observed that the Lord Justice abstains from saying that the contract could not be put an end to by the parties. I apprehend that the Lord Justice means that the parties could not have put an end to the covenant in question without determining the contract of partnership altogether. Lindley, L.J., says nothing which gives rise to any difficulty.

In my opinion I have authority for holding that, notwithstanding the existence of this clause and the nominations made under it, it is competent for the partners to put an end to the agreement by a dissolution. If the trust only arises when the son attains twenty-one and attaches only to the property of the partnership then existing, there will then be nothing to which the son can succeed. The present action is an action which seeks to have the partnership dissolved on the ground of the misconduct of the defendant. There is every reason to hope that this action will be tried and settled long before the eldest son attains twenty-one. If the action is decided in the defendant's favour no question will arise, and if the action is decided against the defendant the defendant's interest will have ceased and there will be nothing for the son. The clause points, not to a defunct partnership, but to a partnership which is going on. It seems to me that there is nothing which makes it necessary that these sons should be joined. It is suggested that another question may arise between the present plaintiffs and the son of the defendant—namely, that it may be possible for the partnership to go on with the son of the defendant instead of with the defendant. It seems to me that I should be altering the deed if I held that. The son succeeds to nothing but the interest of his father, and if the father has so conducted himself that the father's interest is gone the son's right is gone also, for, in short, the son's interest depends on his father.

Summons dismissed.

Solicitors, *Wild & Wild; Goldberg, Langdon, Barrett, & Newall.*

Chan. Div. Stirling, J. — July 26, 31, 1894.

HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING CO. (*a.*)

Infant—Contract—Company—Agreement to take shares—Repudiation—Failure of consideration—Right to recover money paid up on shares.

The plaintiff, while an infant, agreed to take, and was allotted, shares in the defendant company, but before attaining her majority repudiated the agreement. No dividend on her shares had been paid, nor had she taken any part in the management of the company or attended any meetings, the only consideration for her contract being that her name remained for a time on the register of shareholders.

Held, that the plaintiff was entitled to repudiate the agreement, and to recover the money she had paid in respect of the shares.

Corpe *v.* Overton, 10 *Bing.* 252, *followed.*

Summons.

The plaintiff, Miss Hamilton, applied for shares in the defendant company, paying £20 on such application. On the 6th of October, 1890, twenty shares were allotted to her, and on the 18th of October she paid £40 on such allotment. At the time of the application for, and allotment of, the shares the plaintiff was an infant of the age of eighteen years, and on the 18th of November, 1890, she wrote a letter to the secretary of the company claiming repayment of the money which she had paid to the company. No further steps were taken in the matter till the 19th of May, 1892, when the plaintiff issued the writ in this action. By the writ she claimed "(1) a declaration that the allotment of the twenty shares now standing in her name in the register of shareholders of the defendant company was void; (2) that the register of the defendant company might be ordered to be rectified by striking out the name of the plaintiff as a shareholder in respect of the said twenty shares; (3) that the defendant company might be ordered to repay to the plaintiff the sum of £60 paid by her to the defendant company in respect of the said twenty shares, together with interest at £5 per cent. from the 10th day of May, 1892; (4) that the defendant company might be restrained by injunction from enforcing any calls made, or to be made, on the plaintiff in respect of the said twenty shares."

On the 10th of June, 1892, the company went into voluntary liquidation, and on the 27th of June the liquidator removed the plaintiff's name from the register of shareholders. No dividend had been received by the plaintiff in respect of her shares in the company.

This was a summons in the action taken out for the purpose of deciding the question whether the plaintiff was entitled to the return of the £60 paid by her to the company in respect of her twenty shares.

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a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Reginald Hughes, for the plaintiff.—The infant repudiated these shares within six weeks of allotment. She never received any dividend, and there has been a total failure of consideration. The case is covered by *Corpe* v. *Overton*, 10 Bing. 252.

Percy Wheeler, for the liquidator.—The point is entirely a new one. The cases of *Holmes* v. *Blogg*, 8 Taunt. 508, and *Ex parte Taylor*, 4 W. R. 305, 8 De G. M. & G. 254, which are founded on a *dictum* of Lord Mansfield in *Earl of Buckinghamshire* v. *Drury*, 2 Eden, 72, would seem to show that an infant to whom shares have been actually allotted cannot repudiate them. *Corpe* v. *Overton* is distinguishable, because there the contract was executory. Here there was actual legal consideration passing to the plaintiff in the right to receive dividends. The fact that no dividend was in fact paid and that the shares had no market value is immaterial. [STIRLING, J.—The simple question is whether the fact of the infant having been on the register for a certain period amounts to her having received a benefit.]

Reginald Hughes, in reply.—The *dictum* of Lord Mansfield was considered in *Corpe* v. *Overton*, and was held not to have such a large meaning as that attributed to it. In all previous cases there has been something in the nature of part performance. Here the consideration is entirely illusory.

STIRLING, J., stated the facts, and continued:—The action is based on the ground that there has been a total failure of consideration. Three cases have been cited. The first is *Holmes* v. *Blogg*. There the plaintiff, who was an infant, brought an action to recover a sum paid by him to the defendant, who had leased certain premises to the plaintiff and a person named Taylor, with whom the plaintiff was in partnership. The lease was granted to the plaintiff and Taylor, and the sum of £157 10s. was paid by the plaintiff as a premium, and the plaintiff and Taylor actually occupied the demised premises for three months. The plaintiff, after he became of age, avoided the lease and brought his action. Gibbs, L.C.J., in delivering the judgment of the court, referred to a passage in the judgment of Lord Mansfield in *Earl of Buckinghamshire* v. *Drury*, where he said: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back," and held that the action could not be maintained. The next case, *Ex parte Taylor*, was of a similar character. There the infant entered into an agreement for a partnership and paid a premium. After the date of the partnership articles of the 31st of July, 1854, he devoted nearly all his time and attention to the business of the partnership, and received therefrom, for his subsistence, up to the 28th of July, 1855, an allowance, generally paid weekly, amounting altogether to £172 6s. 4d., but he never received any other share of the profits of the business or derived any other advantage therefrom. There, again, it was held that the infant could not recover back his premium, the ground of the decision being that the consideration had not wholly failed.

The former of these two cases was considered in *Corpe* v. *Overton*. There the plaintiff, while he was an infant, signed a written agreement to enter into partnership with the defendant, the partnership to commence not at once, but at a future date, and he paid to the defendant a deposit of £100. Between the date of the agreement and the date at which the partnership was to commence the infant rescinded the contract and brought an action to recover the £100 he had paid. *Holmes* v. *Blogg* was relied on in opposition to that claim, but the whole of the court distinguished that case. [His lordship read the judgments of the court, and continued:] It is, therefore, to be observed that all the judges distinguished the case before them from *Holmes* v. *Blogg*, on the ground that in the latter case there had been actual enjoyment under the lease. They did not say that a mere demise would have been sufficient, and it seems to me that the true rule is to consider whether the infant has derived any advantage under the contract. In the present case no dividend has been declared, and the plaintiff never took any part in the management of the company or attended any meetings. The only advantage she got was the allotment of the shares, and the fact that for a certain period her name remained on the register. That is not an advantage within the meaning of the judgments of *Corpe* v. *Overton*. There has been a total failure of consideration, and the infant is entitled to recover.

Solicitors for the plaintiff, *Hughes & Masterman*.

Solicitor for the liquidator, *John B. Purchase*.

Q. B. Div.
(Mathew and Charles, JJ.) Oct. 31.

REG. v. PATTERSON. (*a*.)

Tithes — Recovery of redemption-money — Valuer employed by the commissioners — Tithe rent-charge — Jurisdiction of the county court — Tithe Act, 1891 (54 & 55 *Vict. c.* 8), *s.* 10, *sub-section* 4—*Tithe Commutation Act*, 1860 (23 & 24 *Vict. c.* 93), *s.* 39.

A county court judge has jurisdiction, under section 10, *sub-section* (4), *of the Tithe Act*, 1891, *to hear applications by a valuer duly appointed by the commissioners under the Tithe Acts for the recovery of sums due in respect of redemption-money.*

Rule *nisi* for a *mandamus* directed to his Honour Judge Patterson, the judge of the Southend County Court.

Mr. Grelier, who was the valuer appointed by the Tithe Commissioners for the purpose of the apportionment and recovery of redemption-money under the Tithe Commutation Act, 1860, s. 39, applied to recover in the Southend County Court against Clarke the sum of £59 claimed to be due in respect of tithe redemption-money chargeable on the lands of Clarke. The county court judge refused to hear the application, on the ground that he had no jurisdiction, and that section 10, sub-section 4, of the Tithe Act of 1891 did not include redemption-money.

The valuer is empowered to collect redemption-money by section 39 of the Tithe Commutation Act of 1860. That section, after empowering the commissioners to employ land surveyors and tithe valuers for the purpose (*inter alia*) of collecting any redemption-money which may have been fixed, goes on to enact that "all the powers and provisions of the said recited Acts concerning the valuers appointed for the purposes of an original apportionment of rent-charge, and concerning the assessment and recovery of the expenses of an original award of rent-charge or apportionment, so far as in the discretion of the commissioners shall seem fit, shall be, and the same are hereby, made applicable to the land surveyors, tithe valuers, or other persons employed, and to the assessment, collection, or recovery of any such redemption-money, and of all expenses incidental . . . to any such redemption." The expenses of

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

an original award are provided for by section 73 of the Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), and the payment is to be enforced by distress (section 76). The expenses of apportionments are by section 18 of the Tithe Act of 1839 (2 & 3 Vict. c. 62) directed to be recovered in the same way as rent-charge is recoverable—that is to say, under sections 81-85 of the Act of 1836, by means of distress, and, in default of distress, by a writ of *habere facias possessionem*.

The Tithe Act of 1891 provides (section 2, sub-section 1) for the recovery of sums due on account of tithe rent-charge through the county court; and section 10, sub-section 4, enacts as follows: "Any enactment in the Tithe Acts or in the Extraordinary Tithe Redemption Act, 1886, directing any expenses, rent-charge, or other sums to be recovered as tithe rent-charge shall, as respects any sum becoming due after the passing of this Act, be construed to refer to the recovery of tithe rent-charge under this Act, save that the owner of the lands shall not be entitled to obtain any remission under this Act."

S. T. Evans, against the rule.—The expression "other sums" in section 10, sub-section 4, does not include redemption-money, for it must be taken to be *ejusdem generis* with expenses and rent-charge. Under section 39 of the Act of 1860 the commissioners have no authority to sue, and the valuer only has authority to recover the expenses, not the redemption-money itself, which can only be recovered by the owner. Further, there is a distinction between recovering and collecting, the last of which is all the valuers have power to do, and section 10, sub-section 4, refers only to sums recoverable as tithe rent-charge, not as rent-charge. There is a distinction between the two terms.

Black, in support of the rule.—It is true that "other sums" must be taken *ejusdem generis* with rent-charge, but redemption-money is *ejusdem generis* with rent-charge. There is no material distinction between rent-charge and tithe rent-charge.

MATHEW, J.—This rule must be made absolute. The county court judge refused to hear the application for the recovery of redemption-money, on the ground that he had no jurisdiction to deal with the matter. He held that section 10, sub-section 4, of the Tithe Act, 1891, did not apply in the case of redemption-money. I am of opinion he was wrong. The Tithe Commutation Act, 1860, section 38, provides how redemption-money is to be paid, and, section 39, provides how it is to be dealt with by valuers and surveyors appointed by the commissioners. It is to be dealt with in the same way as the expenses of the award of a rent-charge and of apportioning. To find out what was intended we go back to 2 & 3 Vict. c. 62, s. 18. Thence we go back to the Act of 1836, which deals with the recovery of rent-charge. It is clear that they are to be recovered by means of distress. The analogy between the charge in question and ordinary rent makes it quite plain. The redemption-money is, therefore, one of the "other sums" referred to in section 10, sub-section 4, as being directed to be recovered as rent-charge or tithe rent-charge.

CHARLES, J.—I am of the same opinion.

Rule absolute.

Solicitors for the appellant, *Wordsworth, Blake, & Co.*

Solicitors for the respondent, *Rollit & Son.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Oct. 30.

In re ISAACSON.
Ex parte MASON. (*a.*)

Bankruptcy—Bill of sale—Assignment of hire agreement and of chattel let thereby—Registration—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 8.

The bankrupt had executed a deed of assignment of a piano, and of the hire agreement whereby it was let. The assignment was not registered under the Bills of Sale Act, 1878.

Held, that it was not void against the trustee in bankruptcy so far as concerned the hire agreement.

Appeal by the trustee in the bankruptcy against a decision of His Honour Judge Owen in the county court of Newport (Mon.), holding that an assignment of a piano and of the hire agreement under which the same was let was not void for want of registration under the Bills of Sale Act, 1878, as far as concerned the hire agreement.

The respondent was a piano manufacturer, and the bankrupt a dealer in pianos and other musical instruments, which he let out under hire agreements. The bankrupt had bought (but had not paid for) a piano from the respondent, let it out under a hire agreement, and gave the respondent, as security for its price, an instrument of assignment of the piano and of the hire agreement whereunder the same was let. This assignment was not registered. The trustee in bankruptcy applied to have the same declared void against him as being an unregistered bill of sale. The county court judge decided that it was a good assignment of the hire agreement, because the latter was a *chose in action*.

The trustee appealed.

Moulton, Q.C. (*F. C. Willis* with him), for the appellant.—I submit that the assignments of the piano and of the hire agreement are inseparable, and that the whole really amounts to an assignment of the piano, for by the hire agreement it remains the property of the lessor, who is described therein as the "owner," subject only to defeasance by the whole amount of the hire being paid. Therefore the assignee under this document stands in the position of the "owner" and the property in the piano vests in him. [VAUGHA WILLIAMS, J.—But the lessee has the general pr perty, the lessor only a special property in th chattel, I think it is the chattel of the lessee purchaser.] The agreement says that it is to be "t sole property of the owner" until all hire is paid. submit that this assignment is within the mischi which the Bills of Sale Acts are intended to preve

He cited *Ex parte Rawlings*, 37 W. R. 203, Q. B. D. 193.

Reed, Q.C. (*Johnston Watson* with him), for t respondent.—The property under a hire agreemen in the hirer: *Lee* v. *Butler*, 42 W. R. 88, [1893] Q. B. 318; *Helby* v. *Mathews*, 42 W. R. 514, [1894 Q. B 262. If the piano had been assigned witho the hire agreement the assignee would only have h a right of action against the hirer. [VAUGH WILLIAMS, J.—I think there are words here wh assign the property in the chattel.] Then I cont that there are two separate assignments here, of piano, and of the contractual right to receive ins ments of higher value than the piano, not arising

(*a.*) Reported by P. M. FRANCKE, Esq., Barrist at-Law.

of the piano, but out of the hire agreement. These two assignments are severable, and the latter, being of a *chose in action*, does not come under the Bills of Sale Acts: *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310.

Moulton, Q.C., in reply.—This is a mere assignment of a chattel fettered by a contract.

VAUGHAN WILLIAMS, J.—This appeal must be dismissed. There seems to have been some confusion as to the points intended to be argued here. I thought that the respondent was arguing that this assignment was merely of the rights under the hire agreement. I could not have assented to that, for, not only in form, but also in substance, there is more than an assignment of rights; it assigns the property in the piano, and if the appellant had asked us to declare the assignment void as to the chattel he would have been right. The respondent, however, does not ask us to hold that this document does not cover the assignment of the piano, but submits that there are two things assigned—the piano and the rights under the agreement—that these are severable, and that the assignment of the latter is good.

I have come to the conclusion, after considering the effect of *In re Burdett, Ex parte Byrne*, as explained by Lord Esher, M.R., in *Cochrane* v. *Entwistle*, 38 W. R. 587, 25 Q. B. D. 116, that we ought not to declare this document void if the rights under the hire agreement can be severed. The authorities are not quite clear, but I am not prepared to differ from the county court judge.

KENNEDY, J., concurred.

Solicitor for the appellant, *Sugden*.

Solicitor for the respondent, *W. Maskell*.

House of Lords.

From C. A. (England). } Aug. 14, 1894.

LOVELL *v.* BEAUCHAMP. (*a.*)

Bankruptcy—Partnership—Infant partner—Judgment against firm—Receiving order against firm—Amendment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 6, 105—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264—*R. S. C., ord.* 48a, *rr.* 5, 8.

An infant partner is not a debtor for goods supplied to his firm; judgment should therefore be entered either against the firm excepting the infant, or against the adult members alone. A judgment entered, and a receiving order made, against the firm simply, may be amended by the addition of words excluding the infant partner.

There is nothing to prevent an infant's trading or becoming partner with a trader, and until his contract of partnership be disaffirmed he is a member of the trading firm. Though the infant cannot contract debts by such trading, the adult partner is entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that, until these are provided for, no part of them shall be received by the infant partner; and, if the proper steps are taken, this right of the adult partner can be made available for the benefit of the creditors.

Judgment of the Court of Appeal (42 *W. R.* 110, [1894] 1 *Q. B.* 1) *varied.*

This was an appeal from the Court of Appeal (Lord Esher, M.R., and Lopes and Kay, L.JJ.), 42 W. R. 110, [1894] 1 Q. B. 1.

The facts sufficiently appear in the Lord Chancellor's judgment.

Finlay, Q.C., and *Cooper Willis, Q.C.* (*Alexander Wedderburn* with them), for the appellants the plaintiffs.—The appellants had no means of knowing that one of the firm was an infant. The fact that one of the members of a large firm is an infant should not paralyze proceedings.

They referred to Bankruptcy Rules, 1886, rr. 259-264; Bankruptcy Act, 1883, s. 111; see also ord. 48a, rr. 1, 2, 5, 8, of the Rules of the Supreme Court, and Bankruptcy Act, 1883, s. 4, sub-section (*g*), and Bankruptcy Forms, No. 6; *Ex parte Taylor*, 4 W. R. 305, 8 De G. M. & G. 254; *Ex parte Liddel*, cited by Lord Eldon in *Ex parte Adam*, 1 V. & B. 494; *Ex parte Blain*, 28 W. R. 334, 12 Ch. D. 522; and *In re Howes*, 40 W. R. 647, [1892] 2 Q. B. 628.

Sir H. James, Q.C., and *A. Powell*, for the respondent the infant defendant.—From the earliest times an infant's trading contracts have been held void: *Whittingham* v. *Hill*, 1 Cro. Jac., p. 494. He could not be made bankrupt: *Ex parte Henderson*, 4 Ves. 163, 6 Ves. 440; *Ex parte Layton*, 6 Ves. 434-439; Bankruptcy Act, 1883, s. 115; Lindley on Partnership, 6th ed., p. 82; *Goode* v. *Harrison*, 5 B. & Ald. 157; the law affecting him is still the same as that which is laid down in the case in Cro. Jac. Bankruptcy is strictly personal in its character, and arises out of an individual's acts.

They also referred to *Western National Bank of New York* v. *Perez*, 39 W. R. 245, [1891]1 Q. B. 304; *Worcester City Bank* v. *Firbank*, 42 W. R. 402, [1894] 1 Q. B. 784; and *Ex parte Kibble*, 23 W. R. 433 L. R. 10 Ch. App. 373.

Cooper Willis, Q.C., replied.

The House took time for consideration.

Aug. 14.—Lord HERSCHELL, L.C.—I do not think there can be any doubt as to the substantial rights of the parties in this case. The form which the proceedings have taken give rise to greater difficulty. The respondent, Gilbert Walter Beauchamp, was a partner in the firm of Beauchamp Brothers. He was and is an infant. Goods which had been supplied upon the order of the firm by the appellants not having been paid for, an action was brought against the firm in the firm's name. An appearance was entered for Ralph Beauchamp and for Gilbert Walter Beauchamp, the infant, by his guardian *ad litem*. The plaintiffs having applied to sign judgment under order 14, it was objected that Gilbert Walter Beauchamp, being an infant, was not liable. An order was, however, made on the 2nd of August, 1893, adjudging that the plaintiffs do recover against the defendants £358 8s. 10d., and costs to be taxed. A judgment having been obtained in the same terms by Harris, another person who had supplied goods to the firm and issued a writ against them, it was, on an appeal to the Divisional Court to set aside that order, ordered that the defendant's application be dismissed with costs. But it was also ordered that execution was not to issue against the separate property of George Walter Beauchamp, infant, or against his share, if any, in the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court. On the 7th of August, 1893, the plaintiffs in the action served a bankruptcy notice on Beauchamp Brothers founded on their judgment, intimating that if the requisitions of the notice were not complied with an

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

act of bankruptcy would be committed. The money not having been paid, the plaintiffs Lovell & Christmas presented a petition for a receiving order in respect of the estate of Beauchamp Brothers. Upon this petition a receiving order was made. This order was discharged by the Court of Appeal upon the ground that, one of the partners of Beauchamp Brothers being an infant, the receiving order could not properly be made against the firm. The Court of Appeal granted leave to appeal to this House, but on the terms that the order made by the Divisional Court on the 2nd of August, 1893, should be treated as affirmed in the Court of Appeal, with leave to the infant to lodge a cross appeal; and that has been done.

I proceed now to state what I conceive to be the true position of the parties. I think it clear that there is nothing to prevent an infant trading, or becoming partner with a trader, and that until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm, he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for, no part of them shall be received by the infant partner; and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors. It is also clear that, even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankrupt laws in respect of any debt contracted by the firm of which he is a partner.

The plaintiffs were no doubt entitled to issue a writ against the firm in the firm's name. But it is to be observed that the order which sanctions such a proceeding provides (ord. 48*a*, r. 5) "that persons sued as partners in the name of their firm shall appear individually in their own names." As soon as it appeared that a member of the firm was an infant I do not think that it was proper to sign judgment against the firm. The Divisional Court appear to have taken the view that, inasmuch as one of the parties was an infant, the firm might be treated for the purposes of the action as consisting only of the other partner; but I do not think this is so. Although an infant, he was a partner, and the firm name Beauchamp Brothers applied as much to him as to an adult partner. The Court of Appeal took the view that the judgment against the firm was good and might be made available against the partnership property, though it would be ineffectual as against the infant partner.

I have a difficulty in seeing how it can be supported. Although the judgment may be pronounced against the firm in the firm's name, it is in reality a judgment against all the persons who are in fact members of the firm; and it is because such a judgment exists that the right of execution follows. It cannot be regarded as a judgment merely against the assets of the firm. The right of execution, whatever it may be, arises from the fact that certain persons have been adjudged debtors. I have already said that in my opinion the infant could not be so adjudged. It is true that rule 8 of order 48*a*, which sanctions, in the case of a judgment against a firm, execution against the property of the partnership, restricts any further execution except in specified cases, without leave of the court or a judge. But I do not think this affords warrant for a judgment against a firm including a person who, though a member of the firm, was not a debtor. It appears to me, therefore, that the judgment should either have been against Ralph Beauchamp alone or against the firm, excepting Gilbert Walter Beauchamp. I shall have to say something further, on this point presently. If the judgment had been in either one or the other of these forms, a receiving order might, no doubt, have been obtained upon the petition of Lovell & Christmas against Ralph Beauchamp, and in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm. The respondent insists that the bankruptcy proceedings were properly set aside, inasmuch as the receiving order against the firm would operate under rule 262 of the Bankruptcy Rules, 1886, as if it were a receiving order made against each of the persons who, at the date of the order, was a partner in the firm, and therefore as a receiving order against him.

I agree with the courts below in thinking that the receiving order in the form in which it was made by the registrar cannot stand. The question is, under those circumstances, what ought to be done? I am most unwilling, if it can be avoided, to deal with the receiving order in a manner which would liberate Ralph Beauchamp (the adult partner) from its operation and render fresh bankruptcy proceedings necessary. If the judgment and receiving order stand as against him, he will certainly suffer no injustice; whilst if the receiving order be set aside absolutely, and a fresh petition is thus rendered necessary, transactions which might be avoided under the present receiving order in the interests of creditors, might become incapable of avoidance under a receiving order of a later date. I see no difficulty in amending the judgment by adding after the word "defendants," the words "other than Gilbert Walter Beauchamp." There is, I think, nothing irregular in a judgment against a firm in the firm's name excluding one of the partners. It may be, in many cases, of advantage to the plaintiff to obtain such a judgment where he fails to establish the liability of a member of the firm, inasmuch as the judgment would bind not only the partners who have appeared, but also any dormant partners who have not appeared. This might be a reason for taking the judgment in that form rather than as a judgment against the known members of the firm who were liable for the debt. Supposing the judgment thus amended, I think the bankruptcy proceedings may be amended in conformity therewith by adding throughout, after the words "Beauchamp Brothers," the words, "other than Gilbert Walter Beauchamp." The Bankruptcy Act gives ample powers of amendment. By section 105 the court may at any time "amend any written process or proceeding under this Act on such terms, if any, as it may think fit to impose." Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute as from its date a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors.

I think there should be no costs on either side of these proceedings. If any have been paid, they should be repaid or allowed in account as against costs due from the other party.

Lord ASHBOURNE.—I concur. It would be most unfortunate if the adult members of a partnership could evade liability because one of the partners was a minor. If this was laid down minors would be found in many partnerships.

The powers of amendment referred to by my noble

and learned friend on the woolsack enable a court to recognise adequately the position of the minor, without freeing any adult member of the partnership from any legal liability he may be under.

Lord HERSCHELL, L.C.—My noble and learned friends, Lord Watson and Lord Macnaghten who are unable to be present to-day desire me to say that they have read the judgment which I have pronounced, and entirely concur in what I have said.

Order appealed from discharged; the judgment in Queen's Bench Division of the 2nd of August, 1893, *varied by adding after the word "defendants," the words "other than Gilbert Walter Beauchamp"; the proceedings in bankruptcy and the receiving order to be amended by adding throughout after the words "Beauchamp Brothers," the words "other than Gilbert Walter Beauchamp"; each party to pay their costs of the proceedings here and in the courts below, but with liberty to the appellants to apply in the bankrutcy for the costs incurred by them in the courts below and here; if any costs have been paid by either party to the other, such costs shall be either repaid or allowed in account against any costs which may have been paid to that party by that other; cause and receiving order to be remitted to the Queen's Bench Division and the Court of Bankruptcy respectively.*

Solicitors for the appellants, *Godfrey & Webb.*

Solicitors for the respondent, *Harper & Battcock.*

Court of Appeal.

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Nov. 6.

In re SOUTH AMERICAN AND MEXICAN CO. *Ex parte* BANK OF ENGLAND. (a)

*Estoppel—Judgment by consent—*Res judicata*—Action to recover an instalment of a debt—Proof—Company—Winding up.*

A judgment by consent upon which the court has not exercised its mind raises an estoppel between the parties just as much as in a case where the court has exercised a judicial discretion in the matter after hearing an argument. The principle being, that when once the parties have litigated a matter the judgment should put an end to the litigation, and if the parties agree on a judgment, that raises an estoppel just as much as if all the questions had been fought out.

A judgment by consent for the plaintiffs in an action against a company to recover an instalment of a debt under an alleged agreement

Held to preclude the liquidator in the winding up of the company from denying the existence of the agreement upon a proof being sent in for the whole amount due under the agreement.

Decision of Vaughan Williams, J. (ante, *p.* 107), *affirmed.*

This was an appeal by the liquidator of the company from a decision of Vaughan Williams, J., reported *ante*, p. 107, where the facts are fully stated.

Moulton, Q.C., and *G. P. C. Lawrence*, for the appellant.—The liquidator is not estopped by the consent judgment from denying the existence of the agreement: *Jenkins* v. *Robertson*, L. R. 1 H. L. Sc. 117, 15 W. R. H. L. Dig. 7. Moreover, the judgment did not relate to the agreement, but was merely for a sum of £100,000.

Finlay, Q.C., H. D. Greene, Q.C., R. M. Bray, and *Howard Wright*, for the Bank of England, were not called upon.

Lord HERSCHELL, L.C.—I think that the judgment of the learned judge below in this case was right. An action had been brought by the plaintiffs (the respondents) against the defendants the appellant company claiming a sum of £100,000, as the second instalment of a larger claim, as a sum agreed to be paid by the defendants to the plaintiffs. Now that was the action—an action for a second instalment due on an agreement between the plaintiffs and the defendants. There was a counterclaim to recover back the sum paid as the first instalment, alleging that the agreement was only inchoate, or that it was conditional, and that the condition had not been performed. The case is partly tried, and thereupon, by consent of the parties, an order is made that judgment shall be entered for the plaintiffs on the claim for £100,000 and costs, and the counterclaim is dismissed with costs. Now it seems to me that a judgment for the plaintiffs on the claim is a judgment for them, not for a sum of £100,000 at large—but it is a judgment for them on a claim of £100,000, being part—namely, the second instalment—of a debt due. Then it is further ordered that execution be stayed, and that if within three weeks £60,000 should be paid—£20,000 in cash and £40,000 by a promissory note—and if the promissory note was duly paid, then the £60,000 should be taken in satisfaction of all claims—that is to say, all claims by the plaintiffs under the agreement. Then it is further ordered that if the promissory note is not paid (and that was the event that happened), the plaintiffs should be at liberty to issue execution for the full amount of the judgment debt, and to enforce the payment of the further instalments claimed by them under the agreement with the defendant company. Although it is said that those words, "under the agreement with the defendants," do not appear in the minute signed by counsel; at all events the words appear that they shall be at liberty to enforce further instalments.

Now what is the meaning of that? It is said that, notwithstanding the agreement that judgment should be given for the claim, it was open to the defendants to make default in paying the £60,000, and then to say to the plaintiffs: "As regards all but this one instalment, for which you have got judgment, the matter is at large. You have got judgment as for an instalment of a debt in respect of which you sue, but we are to be at liberty now to say there never was a debt at all. We cannot undo this £100,000, but we may dispute any liability to anything further." I do not think that is the meaning fairly to be gathered from the settlement arrived at or the order of the judge. I do not think the fair meaning is that the defendants were to be at liberty afterwards to dispute the existence of any debt at all, which is their present claim. It is to be observed that what the plaintiffs are to be at liberty to enforce is further instalments. What is the meaning of that? Instalments of what? Instalments of that debt, the existence of which is recognized, and which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due. The agreement of the defendants with the plaintiffs was that, "if we do not carry out our present arrangement with you, you are to be at liberty to enforce payment of these further instalments," and not, as it seems to me, "you are to

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

be at liberty then to take proceedings for payment of those further instalments or claims, and we are to be at liberty to insist that there never was any debt, and there never ought to have been any judgment, and that therefore there are no instalments due." I do not think that is the fair construction or the fair effect of an arrangement of this sort where a judgment is given by consent. The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the court after the matter has been fought to the end. Very often the object of it is to stop litigation, and I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action—questions which, if decided in favour of the party against whom judgment is given, would show that there ought to be no judgment at all—to be fought over again in a subsequent action after judgment has been agreed to. I think, therefore, the judgment should be affirmed, and the appeal dismissed, with costs.

LINDLEY, L.J.—I do not think this case is arguable in a lawyer's sense of that expression. It is impossible to read the compromise without seeing that the necessary result of it is, and I believe the intention of the parties to it was, that the dispute between them should be brought to an end. I do not say that was all, because there was the money; but to say after that, that it is competent to any person to reopen the litigation and dispute the validity of the claim is to say that which I think no lawyer could possibly for a moment assent to.

A. L. SMITH, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the respondents, *Freshfields & Williams.*

From Chan. Div. (Lindley, Lopes, and Davey, L.JJ.) — Aug. 9, 1894.

SOMERSET v. LAND SECURITIES CO. (a.)

Land Registry — Land securities company—Securities deposited with registrar—Power of court to order redelivery—Mortgage Debenture Act, 1865 (28 & 29 *Vict. c.* 78), *ss.* 10, 16, 41, 46—*Mortgage Debenture (Amendment) Act,* 1870 (33 & 34 *Vict. c.* 20), *ss.* 7-10.

The court has no power to direct the registrar of the Land Registry Office to deliver up securities deposited with him by a land securities company to a receiver appointed in a debenture-holder's action, or to a liquidator of the company, unless they have been redeemed in accordance with the provisions of the Mortgage Debenture Acts, 1865 *and* 1870, *or have been sold.*

Decision of Wright, J. (42 *W. R.* 623) *reversed.*

Appeal from Wright, J. (reported 42 W. R. 623).

The Land Securities Co. (Limited), under the Mortgage Debenture Acts, 1865 and 1870, lent money on mortgage, deposited with the registrar of the Land Registry the securities mortgaged to it, and issued debentures secured upon such mortgage securities. The plaintiff, a debenture-holder, commenced a debenture-holder's action against the company, and by a summons in that action dated the 9th of June, 1894, asked for an order that the registrar should deliver up to the receiver in the action (who was also the liquidator in the winding up of the company), all deeds and documents in his possession by virtue of the provisions of the Mortgage Debenture Acts. The registrar contended that in the events which had happened the court had no jurisdiction to make such an order.

On the 28th of June, 1894, Wright, J., directed that a summons should be taken out and an order obtained for the appointment of a receiver under the Mortgage Debenture Acts, and that the summons of the 9th of June, 1894, should be further intituled in the matter of those Acts, and subject thereto made the order asked for.

The registrar appealed.

Ingle Joyce (*Sir John Rigby, A.G.*, with him), for the appellant.—Neither Act confers any jurisdiction to make such an order as the learned judge has made. By section 10 of the Act of 1865 the securities deposited are to be retained by the registrar "until withdrawn as hereinafter provided." Section 7 of the Act of 1870 is to the same effect. Section 16 of the earlier Act and sections 8, 9, and 10 of the later contain the provisions for withdrawal, and none of those sections have any application to such a case as this.

Farwell, Q.C., and *Kirby*, for the plaintiff.—If you could only get your securities out on discharge, you would in many cases never get them at all, and therefore the earlier sections could never take effect. Sections 41 and 46 of the Act of 1865 deal with the appointment and duties of a receiver. The learned judge was right in holding that when a receiver is appointed, jurisdiction to order delivery of the deeds to him is impliedly given. That certainly is the most convenient construction, and will save considerable expense.

Rowden, for the defendant company and its liquidator (who was also the receiver already mentioned), supported the order of the learned judge.

Ingle Joyce was not called upon to reply.

LINDLEY, L.J.—In the present case the real difficulty arises from this, that the Land Registry is a public office, and the registrar is a public officer, and that in section 10 of the Act of 1865, which is still unrepealed, there is this clause: "Which deeds or documents shall be deposited with the registrar to be retained by him until withdrawn as hereinafter provided." What power has the court to direct the registrar to deliver these deeds unless they are "withdrawn as hereinafter provided"? I can understand that it would be right in principle to hold that when you have regard to the purposes of the Act and find that they are all satisfied, a necessary implication may arise that there is jurisdiction to order that the deeds be delivered up. But we are far short of that here, and we are asked to say that because there is a winding up and a debenture-holder's action, and because a receiver and liquidator has been appointed, he is entitled to have the deeds delivered up to him. It might be convenient or it might not to do that, but there is no necessary implication to the effect that this deposit of deeds has answered all the purposes for which it was made. I think the learned judge's order must be discharged.

LOPES, L.J.—I am of the same opinion. I see no way of getting over the words of section 10 of the

(a.) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

Act of 1865, which provides for the documents being retained "until withdrawn as hereinafter provided." Moreover, section 8 of the Act of 1870 contains express provisions for the redelivery of the deeds to the company in the case of redemption. But there is no provision for delivery applicable to the present case. I think the appeal must be allowed.

DAVEY, L.J.—I am of the same opinion. Mr. Ingle Joyce, in opening this case, very properly stated that he raised no question of form, and that if in any form of proceeding the order could be made he did not object to it. But I am of opinion that there is no form of proceeding in which this order can be made. The registrar is a public officer, and the only jurisdiction the court could have over him would be to enforce, by *mandamus* or otherwise, the performance by him of that which it is his duty to do. Where is the duty of the registrar to hand over these deeds to the receiver in a debenture-holder's action? I do not understand that in the receiver's affidavit or in the argument for the respondent it was put forward that there was any such duty on the registrar. The highest it was put at was that it would be extremely convenient that this order should be made, and that it is usual in cases like this, where there is no such Act of Parliament and the documents are not in the custody of a public officer, to hand over the documents to a receiver.

This Act is very peculiarly framed, for those who framed it apparently never contemplated the possibility of the company being wound up, or of a mortgagee finding it necessary to realize his security by exercising his power of sale, and there are no express provisions for such cases. But I think, inasmuch as the existence of that very ordinary and well-known state of circumstances must have been within the contemplation of the Legislature, whatever is by necessary implication—and I use the words deliberately—to apply to such a case ought to be implied, although it is not expressed. In section 46, for example, though it does not in terms contemplate realization by sale, I think it must be taken that the receiver might sell; and in that event I think, although there is no express provision, it necessarily follows from the provisions of the Act that the deeds, which would no longer be the deeds of the company or the mortgagor, but would, by the exercise of the power of sale, have become the property of the purchaser, ought to be delivered out to the purchaser. I should have no difficulty in such a case in making an order upon the registrar that he should deliver out to the purchaser from the company the deeds relating to property which had been so sold; but I am not at all disposed to imply any powers or any directions in the Act for the delivery up of the deeds where the implication of such powers or directions is not necessary to effect the purpose of the Act. Where Mr. Farwell wholly failed to satisfy my mind was when he argued that the delivery of these deeds was necessary for the purpose of enabling the receiver or liquidator, or whoever the officer may be, to realize the securities held by the company. On the contrary, I can see a great convenience in securities of this large value remaining in the custody of a public officer, and in a safe place. In my opinion the security of the debenture-holders, which was the primary cause of the Act, must be conceived to have been the principal object of the Legislature in directing these deeds to be deposited with the registrar. That protection is required just as much after winding up as before until the securities are realized or the debenture-holders paid off. It may occasion some small additional expense, but I am satisfied we ought not to make this order unless we can find something in the Act which authorizes and makes it the duty of the registrar to hand over the documents to the company.

Appeal allowed, without costs.

Solicitors, *Solicitor to the Treasury; Ashurst Morris, Crisp, & Co.; R. C. Ponsonby.*

From Chan. Div. (Lindley, Lopes, and Davey, L.JJ.) — Aug. 9, 1894.

In re DANIELL'S SETTLED ESTATE. (*a.*)

Settled land—Tenant for life—Building lease—Covenant by lessee to spend specified sum in repairs—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (10) (*iii.*), 6, 8 (*i.*), 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7 (1).

A lease which contains a covenant by a lessee to expend a fixed sum in doing specified repairs and improvements is a "building lease" within the meaning of sections 2 (10) (*iii.*) *and* 8 (*i.*) *of the Settled Land Act*, 1882.

Appeal from North, J.

Mrs. Daniell, under her marriage settlement, dated the 21st of October, 1893, was entitled for life to the income of the proceeds of sale of certain real estate. By virtue of section 63 of the Settled Land Act, 1882, Mrs. Daniell was deemed to be the tenant for life of the said estate.

By section 7 (1) of the Settled Land Act, 1884, the leave of the court is necessary in such a case to the exercise of any power conferred by the Settled Land Act of 1882.

On the 4th of May, 1894, Mrs. Daniell entered into an agreement, subject to the leave of the Chancery Division, to grant to James Dick a lease, the terms of which were set out in a schedule to the agreement. By the draft lease Mrs. Daniell purported to demise the settled property to Dick for a term of thirty years, at a yearly rent of £350 for the first seven years, £375 for the next seven years, and £400 for the rest of the term; the lessee covenanting to execute, at an expense of not less than £200, certain repairs and improvements to the demised premises which were specified in a schedule to the lease.

By section 6 of the Settled Land Act, 1882, no lease other than a building or mining lease can be granted by a tenant for life for a term exceeding twenty-one years.

By originating summons of the 8th of June, 1894, Mrs. Daniell asked for liberty to grant the lease. On the 16th of July North, J., at chambers dismissed the summons, being of opinion that the proposed lease was not a building lease within the Act. The learned judge having certified he did not require further argument, Mrs. Daniell appealed.

Howard Wright, for the appellant.—The proposed lease, though not ordinarily called a "building lease," yet purports to be granted in consideration of a covenant to repair. It is, therefore, a building lease within section 8 (1) of the Settled Land Act, 1882, which provides that "every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected or agreeing to erect buildings new or additional, or having improved or repaired, or agreeing to improve or repair, buildings," &c. By section 2 (10) (iii.) building includes improving and repairing buildings. What makes this

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

stronger is the fact that the Settled Estates Act, 1877, s. 4, distinguishes building and repairing leases, while the Settled Land Act, no doubt advisedly, classes them together. Moreover, the definition of building lease in section 2 (10) (iii.) is the same as that in section 2 (x.) of the Conveyancing Act, 1881, with the insertion of the word "any" before "building purposes." Compare with section 18 of the Conveyancing Act, 1881, section 8 (1) of the Settled Land Act, where the word "partly" is inserted. [DAVEY, L.J.—I am satisfied that an agreement to execute scheduled repairs is enough. Does "repairing" not mean putting the premises in repair generally?]

Henry Fellows, for the trustees of the will.

LINDLEY, L.J.—In this case I am disposed to think, on the true construction of the various sections of the Settled Land Act, 1882, to which we have been referred, and especially of section 8, that there is jurisdiction to give our sanction to the proposed lease. Section 8 runs thus: [His lordship read the section, and continued:—] Well, now, I think it would be rather a narrow construction to say that "agreeing to improve or repair buildings" does not include an agreement to lay out a fixed sum of money in repairs. The other construction must be that it applies only to an agreement to repair generally, and to expend such money on it as is necessary. I am not disposed to think that our power is so contracted. But then the Legislature has entrusted the court with a discretion, and this lease cannot be granted without our sanction. [The Lord Justice then dealt with the circumstances of the particular case, and refused to sanction the lease.]

LOPES, L.J.—The lease that we are asked to sanction is for thirty years, and a lease for thirty years cannot be granted without the sanction of the court. The question is whether we ought to give our sanction in this particular case. I have come to the conclusion that we ought not. It is a matter of discretion. I feel clear, having regard to the very general terms of the Act, and to the different parts of it that have been brought to our notice, that there is jurisdiction to grant a lease of this kind in a case where a substantial amount is to be laid out in repairs in the ordinary sense of the word, but then one has to look at the particular repairs it is proposed to do.

[The Lord Justice having considered the nature of the proposed repairs, said that the discretion of the court would be rightly exercised by refusing to sanction the proposed lease.]

DAVEY, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Freshfields & Williams.*

Solicitors for the trustees, *Rooper & Whately.*

High Court of Justice.

Chan. Div. North, J. } Oct. 25-27, 30; Nov. 6.

In re PIERCY.

WHITWHAM *v.* PIERCY. (*a.*)

Will—Land situate in Sardinia—Trusts invalid by Italian law—Proceeds of sale.

The proceeds of sale of land in a foreign country can be settled by an English testator in a manner valid by English law, even if such a settlement of the land itself is invalid by the foreign law.

Until a sale has actually taken place, a trust invalid by the lex loci *cannot be enforced in this country.*

Adjourned summons.

Benjamin Piercy, an Englishman, by his will, dated the 5th of December, 1883, devised and bequeathed all the real and personal estate whatsoever and wheresoever to which he should be beneficially entitled at the time of his decease to trustees upon trust to sell and convert and stand possessed of his residuary estate upon trust to pay the income of one-fifth to his wife during her widowhood, and of the remainder equally among all his children and his brother Robert and sister Jane, and after the decease or second marriage of his wife in trust for said children and his said brother and sister in equal shares; and as to one-half of each child's share upon trust to pay the income to such child for life, and at his or her death to divide the moiety among his or her children who should attain twenty-one, or such of them as he or she should appoint. If any child should die without issue, his or her share was to be divided amongst his other children (the children of a deceased child were to take their parent's share). The whole of the brother's share was to be held in trust for him for life, with remainder to his children. Power was given to postpone sale and conversion, to complete contracts, to raise money by sale or mortgage, and to lease and manage property until sale.

The testator died on the 24th of March, 1888, and his will and a codicil, not affecting the disposition of his property, were proved on the 3rd of September, 1888.

He left nine children, three sons and six daughters.

An originating summons was taken out for the administration of the testator's estate, and on the 21st of January, 1889, an order for the administration of the testator's estate was made and, *inter alia*, an inquiry directed "what was the testator's estate and interest in lands situate elsewhere than in England, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator possessed considerable landed property in Sardinia.

The heir-at-law contended that the will amounted to a *fiedecommesso*, and was therefore invalid, and the question was referred to the judge after various conflicting opinions of Italian advocates had been obtained.

Cozens-Hardy, Q.C., and *F. Thompson*, for the trustees.

S. Hall, Q.C., and *A. St. John Clerke*, for the heir-at-law.—The effect of the opinions of the Italian advocates is that a *fiedecommesso* is void. If the trustees are instituted heirs, they take absolutely for their own benefit. The trusts being void by Italian law, the heir according to the testator's nation is entitled to the land. The act of the trustees cannot change the destination of property. It is impossible to say that it goes to one set of persons so long as it remains unsold, and to another set so soon as the trustees exercise their discretion and sell.

Swinfen Eady, Q.C., and *Badcock*, for the children.—The question is, Are the trustees the instituted heirs? Even if they are not they may have powers as testamentary executors. The beneficiaries are the instituted heirs, and the substituted trusts being invalid they take absolutely, but are willing to elect to take under the will.

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Sir A. Watson and *J. Rolt*, for grandchildren.—The trustees have been able to sell part of the land, and their title has been recognized as perfectly good. The power of sale is good whether the trustees are instituted heirs or not. As soon as the land is sold, the proceeds cease to be subject to Italian law.

They cited *Fordyce* v. *Bridges*, 2 Ph. 497.

P. M. Walters for other parties.

S. Hall, Q.C., replied.

Cur. adv. vult.

Nov. 6.—NORTH, J., after stating the facts and referring at length to the conflicting opinions of the Italian advocates, said: The question is, What is the position of matters as regards the real estate in Sardinia? The conclusion I come to is this. It is not necessary for me to decide the question whether the trustees do or do not take as heirs, but the children and brother and sister of the testator take as heirs because *quacunque via* the will is good. If the trustees take as heirs, then everything behind is trust substitution, which would not be good according to Italian law, but the gifts to the heirs would remain. If, on the other hand, the trustees are not heirs, but the persons named, the children and the brother and sister, are heirs, then, according to the preponderating weight of opinion, coupled with the evidence of the acts which have actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in Italy without any interference on the part of the persons interested in that estate. Therefore the direction in the will to the trustees to sell the estate is perfectly good according to Italian law.

The next question is as to the application of the proceeds. With respect to that, the will is, in my opinion, perfectly good, because the application is not in any way inconsistent with the Italian law upon the subject. The Italian law relates to the land; it settles how the land is to go, and regulates the rights of the various persons interested in the land, but when an absolute sale has taken place the Italian law still applies to the land in the hands of the then owner or owners, but has nothing whatever to do with the beneficiaries after the land has passed outside the scope of the will by a disposition made by the trustees, which is valid according to Italian law.

As regards the proceeds of sale, Is there anything in Italian law which renders it illegal for the testator to do what he has done? The land is no longer the subject of disposition, because the land has become the property of somebody else. As to the dispositions made by the will, what the testator has done is to direct that the proceeds of the sale of the land is to be received by the English trustees and invested on English securities, and is then to be held upon the trusts declared by an English instrument in favour of English beneficiaries. No person says that there is anything in the Italian law in any way forbidding that.

There is an observation made by one of the Italian witnesses which, it was suggested, applied; it was to the effect that the land is the patrimony, and that when the land is sold the money—that is, the proceeds of sale of the land—is still the patrimony. What is the law as regards this? It depends altogether upon who the person is to whom this money belongs. No doubt if that money belongs to an owner who is subject to Italian law, whatever the Italian law says about trusts must be observed, and if a person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But there is nothing in Italian law to make money arising from land which belongs to other persons, and is subject in their hands to Italian law, subject to Italian law when in the hands of an English owner; and, therefore, I am of opinion that the proceeds of sale, when received by the trustees in pursuance of the valid exercise of their power of sale, which they have according to Italian law, passed entirely by the will of the testator, because it is a disposition which is good according to English law, and does not contain anything at variance with Italian law, meaning thereby, not merely anything at variance with the code, but anything at variance with "good custom," whatever that may mean, because Italian law does not profess to regulate what is to be done with regard to English money belonging to an English owner and going to English legatees. In my opinion, the trust for sale is perfectly good, and the application of the proceeds of sale by the will is good also.

The only question now remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains land, and so far it is subject to the law of Italy. The enjoyment of that land in the meantime, before it has been sold, is not in any way affected by the valid trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to see what the position of matters is as regards the right to enjoy the land in the meantime, before the sale has actually taken place. I will first take the case of the widow. It seems to me quite clear that according to Italian law she has a *usufruct*, in the sense that a disposition to her for life is perfectly good, and that a gift of the property to the children and brother and sister subject to that *usufruct* is a good disposition.

Then comes the question of the trust substitution, and as to that I come to the conclusion upon the bulk of the evidence that the property is unconverted during the limited period before sale. The Italian law applies, and there can be no trust substitution; and, that being so, the attempt to settle these shares on the children and the brother is invalid. There is no question as to the sister, because she takes absolutely in any case. That does not, however, quite exhaust the matter: as regards the children to the extent of one moiety of their shares, and as regards the brother to the extent of the whole of his share there is an attempt to settle. Leaving the heir-at-law out of the case, none of these persons raise any question. According to the Italian law they take absolutely, and the trusts over are ineffective. But they all come here and say, "We wish to give effect to the testator's will in this respect. We are desirous that the income of the property before conversion shall, so far as our interests may go, be applied in the same way as our shares of the income to arise from the conversion directed by the will are to go after the conversion has taken place." I should say there is nothing whatever in the Italian law to incapacitate these persons from coming here and saying that, for good reasons of their own, they wish these shares to be held on the same trusts as the income of the proceeds of sale after conversion has taken place. The only person I have left out is the heir-at-law, who does not come in and elect or waive any right he may have; and all I can say with respect to his share is that it is not necessary for me to decide the point at present. He will be entitled to the income whether the trusts in favour of his children are good or bad. It may be that all the land will be sold during his lifetime, and then the question will never arise; but I must say that any directions I give now are to be

without prejudice to any question between the heir-at-law and any person who may claim to be entitled to the income upon his death—that is to say, without prejudice to any question between those parties as to the right to one-eleventh of the income to arise from the Italian property before it is converted.

Solicitors for the trustees, *Field, Roscoe, & Co.*

Solicitors for the beneficiaries, *Crowders & Vizard.*

Solicitors for the heir-at-law, *Godden, Son, & Holme.*

Chan. Div.
Kekewich, J. } Nov. 21.

CHILTON *v.* PROGRESS PRINTING AND PUBLISHING CO. (LIMITED). (*a.*)

Injunction—Copyright—Sporting paper—Publication of "selections"—"Headings."

Where C. was the registered proprietor under the Copyright Act, 1842, of a weekly sporting paper, published on Monday in each week, in which appeared, under the heading "One-Horse Selections," the names of the days on which racing was to take place in that week, and opposite the name of each day was the name of the horse which, in C.'s opinion, was likely to win the race on that day for which it was entered. P., the proprietor of another sporting paper published on each day that racing took place, had systematically reproduced C.'s "selections," by inserting under a heading "One-Horse Final—'Specials'" C.'s name, and opposite C.'s name the name of the horse C. had selected.

Held, that P. had merely published to the world the fact that C. thought a particular horse would win a particular race; that P. had, under the circumstances, a right to do this; and that he had not infringed C.'s copyright.

Action.

This was an action brought by the plaintiff, Charles Chilton, to restrain the defendant company from infringing the plaintiff's copyright in a journal called *Chilton's Special Guide.*

The plaintiff, who was a journalist residing in Manchester, on the 24th of July, 1893, commenced to print and publish a sporting journal under the name of *Chilton's Special Guide*, which he, on the 9th of October, 1893, caused to be entered in the Book of Registry of Copyrights kept at Stationers' Hall, and a certificate of registration was granted him. From its commencement his journal was a successful one, and had been regularly printed and published on Monday morning each week, except during the months of December, January, and February, when, as usual with similar sporting publications, the issue was suspended. In each week's issue of the plaintiff's paper there appeared a statement as to what horses were, in the plaintiff's opinion, likely to win races during the week following the date of the particular issue, and in particular, under the heading "One-Horse Selections," there appeared the name of one horse which in the plaintiff's judgment was most likely to be the winner of the race in which it was to run on the day opposite which its name appeared, *e.g.*, on Monday, the 13th of August, he published under the heading "One-Horse Selections" "Tuesday — Keelson"; "Wednesday—Priestholme." In making his selections plaintiff employed both his own knowledge of the horses and their performances, and also information from agents employed by him for the purpose at considerable salaries at the various racing centres, in addition to paid travelling agents who attended the race meetings. The defendant company, who carried on business as publishers in London, published on every day on which a race meeting took place a publication called *Sporting Snips*, and about the beginning of August, 1894, began to insert in their paper, under the heading of "The 'Specials'—One-Horse Finals," a statement of the horse selected by the plaintiff as likely to win the race in which it was engaged on that day; *e.g.*, on Tuesday, the 14th of August, there appeared in *Sporting Snips*, under the heading "The 'Specials' — One - Horse Finals," "Chilton—Keelson," and in the issue for Wednesday, the 15th of August, under a similar heading, "Chilton—Priestholme."

The defendants' paper was published at the price of one penny, whereas the price of the plaintiff's paper was one shilling, and the plaintiff contended that the defendants' conduct was an interference with his business and an infringement of his copyright, and that the defendants were unfairly copying that which it had cost him much skill, labour, and expense to produce.

On the 3rd of October the matter came on as a motion before the Vacation Judge for an *interim* injunction, but his lordship considered that, although there was a novel and important question to be decided, an *interim* injunction must be refused, on the ground that no sufficient and immediate injury was shown. He, however, directed that the action should be set down for trial at once without pleadings.

It was subsequently agreed by the parties that the evidence should be taken by affidavit, and the case came on for trial.

The defendants' particulars of objection, dated October, 1894, were as follows:—(1) That the words published by the defendants and complained of by the plaintiff are not in law the subject of copyright. (2) That the publication of the said words is not any infringement of the plaintiff's copyright in *Chilton's Special Guide.* (3) That the defendant has not been guilty of any fraud or fraudulent misrepresentation. (4) That the plaintiff has not suffered any damage or injury.

The evidence showed that the circulation of plaintiff's paper from April to the end of July averaged upwards of 8,000 weekly, and for August and September and October less than 5,000 weekly.

Warmington, Q.C., and *Waggett*, for the plaintiff.—This is purely a point of law. Defendants' objection number one is no defence. The plaintiff's work is copyright. It is no defence to say that his is a "racing" work. [*Marten, Q.C.*—I do not argue that.] As to objection number two, the defendants have taken that which is the result of plaintiff's labour, expense, and reputation. If a cook invented a new recipe that is proper subject-matter for copyright. Objection three has nothing to do with the case, and objection four is a question of evidence: *Walter* v. *Steinkopff*, 40 W. R. 599, [1892] 3 Ch. 489; *Bramwell* v. *Halcombe*, 3 My. & Cr., 737, *per* Lord Cottenham; *Kelly* v. *Morris*, 14 W. R. 496, L. R. 1 Eq. 697, *per* Lord Hatherley; *Trade Auxiliary Co.* v. *Middlesbrough Tradesmen's Protection Association*, 37 W. R. 337, 40 Ch. D. 425; *Ager* v. *Peninsular and Oriental Steam Navigation Co.*, 33 W. R. 116, 26 Ch. D. 637.

Marten, Q.C., and *Gatey*, for the defendants, were not called upon.

KEKEWICH, J.—I entertain a strong opinion in this case, and I do not think the case presents any difficulty. The point is an extremely short one. The argument

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

of the plaintiff is really this, that the court ought to stay this publication if it infringes the plaintiff's copyright, although what is taken from the plaintiff's publication is exceedingly small by itself, and in proportion to the entire paper insignificant. To that argument I entirely accede. There are heaps of authorities on the subject, and I do not know that one can deal with it better than Mr. Waggett has dealt with it. It is not the number of letters or words that are copied. It is not the weight or intrinsic value that the court regards. There is this: The plaintiff claims a copyright, and says that the defendant seeks to infringe the plaintiff's copyright. I will assume, without further inquiry, upon the certificate of registration that the plaintiff has a copyright in this publication. That copyright he is entitled to have protected by means of proceedings and an injunction in a proper case. What is copyright? I read from the Act of 1842. It is construed to be "the sole and exclusive liberty of printing or otherwise multiplying copies of the said work to which the said word is herein applied." The defendants are not multiplying or printing or otherwise multiplying plaintiff's paper, or any substantial part of it, either in quantity or quality. They are publishing to the world the fact that the plaintiff, who may have a great reputation, and a well-earned one, for selecting the probable winners of horse races; prophesies that a certain horse will win in a certain race. What is the object of the plaintiff's publication! To tell all who pay for it, in the first instance, that his opinion is so-and-so on a given race. Is that private, or is it in a sense confidential? Is there anything to prevent the man who has paid his shilling reading it out at the club, telling everybody he meets in the train, or handing the paper one by one all round in a crowded carriage? Is there anything to prevent his writing to all his friends and suggesting their acting on this valuable advice? and may he not do that by the aid of a typewriter or private printing machine if he has one? It seems to me that there is nothing to prevent it. What is done, is done with a view to enable all those whom it may concern, and who get hold of this information, to avail themselves of it, and of course to have the advantage of the plaintiff's judgment in such matters, and to enable those who are anxious to know in good time what his view is, so as far as possible to anticipate, or if not anticipate to benefit by his paper as soon as possible after the plaintiff's issue. If they choose to wait, I see no reason why these defendants, or any newspapers, or any number of them, may not publish the fact that Mr. Chilton selects one particular horse, when as a matter of fact other persons, who may not be equally good judges, select other horses. The defendants do not even follow the form of the announcement. I have before me the plaintiff's publication of the 13th of August. The particular passage is headed, "One-Horse Selections" (I do not know whether anybody will suggest that there is any literary composition in the words "One-Horse Selections" which is entitled to protection), and then there come Tuesday, Wednesday, Thursday, and Friday in one column, with the horses against each in the next column. The defendants do not publish that, they have not even a "One-Horse Selection," if that was even a subject of copyright. They have a selection of certain horses, and instead of having the four days in one column, and the selected horses in the other column, they have the different papers, including Mr. Chilton's, in one column and the horses selected by the different people, including Mr. Chilton, in another column. This paper of the defendants was published on Wednesday, August 15, and I suppose it was intended to point to the probable winners in a particular race on that particular day; I do not know what race it was. That is a piece of intelligence which it was intended to publish, and which it seems to me might fairly be published. One may conceive a number of illustrations, but no great advantage can be attained by applying an analogy to any. Supposing that for "the event" [the School Board election], I believe that is the right term, which is to take place to-morrow, and which interests a good many persons in the metropolis, one of the papers of the day, being well-informed, choose, or thought it right to state, who were likely to be the candidates elected or successful, might not another paper of this evening or to-morrow morning say that such and such evening paper selected these candidates, and that, therefore, this party or the other party would be likely in that view to obtain the majority? I might multiply that to any number of instances with reference to events of less or greater importance as the case might be, but one instance shows the drift of my mind. I cannot conceive here that there is anything which is properly the subject-matter of copyright. It may or may not be worth while to criticize the exact form of the objection No. 1. It seems to me that the objection was a good one, at any rate when read with objection No. 2, and that it hits the point, and that there is here no case for copyright, and therefore there will be judgment in this case, with costs, including the reserved costs of the motion, for the defendants.

Solicitors, *Chester & Co.*, for *Crofton & Craven*, Manchester; *T. Amery Parkes.*

1903, 1 Ch. 465

Chan. Div. Kekewich, J. — Nov. 15

OLIVER v. ROBINS. (a.)

Practice — Costs — Taxation — Party and party — Immaterial witness—Discretion of taxing master—Ord. 65, r. 27, sub-rule 29.

The court will not interfere with the discretion of the taxing master as to allowing or disallowing the costs of a witness, unless it is satisfied that the taxing master has not properly considered the matter.

Summons to review taxation.

In this action judgment had been entered for the defendants, and upon the taxation of their bill of costs the plaintiff objected to any allowance for one of the defendants' witnesses, on the ground that the evidence given by him at the trial was wholly immaterial and useless, and that the defendant had incurred the expense of this witness through over-caution and mistake within the meaning of ord. 65, r. 27, sub-rule 29, and that it should not be allowed against a losing party. The taxing master by his answer overruled the objection, stating that, having regard to the circumstances set forth in his answer, he adhered to his opinion that the costs of the evidence ought to be allowed. This was a summons to review the taxation.

Eve, for the summons.

W. Baker, for the respondents.

KEKEWICH, J.—I do not think I have any jurisdiction in the matter, for by the rule it is left to the discretion of the taxing master. I think the rule

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

means that the taxing master is to do his best, and in that case his discretion is conclusive. Matters of detail must be left to his discretion. The matters referred to in the rule are just such as the taxing master had the requisite materials for inquiring into. The provisions of that rule are founded on good sense and convenience. The court can of course go into the question whether or not the taxing master has properly considered the matter, and if the court thought he had not, the matter would of course be returned to him for reconsideration. Even if I have jurisdiction I do not think that it is the province of the judge to go into matters of detail of this kind which had been settled by the taxing master in the exercise of his discretion.

Summons dismissed.

Solicitors, *S. Pilley*, agent for *J. M. L. Criddle*, Newcastle-upon-Tyne; *Williamson, Hill, & Co.*, for *Ingledew & Daggett*, Newcastle-upon-Tyne.

Chan. Div. } July 25, 1894.
Kekewich, J. }

FORTESCUE *v.* LOSTWITHIEL AND FOWEY RAILWAY CO. (*a.*)

Railway company—Transfer of undertaking—Covenants—Personal covenants—Dissolving company—New company—Specific performance.

A railway company in 1873 *took, under the powers of their Acts of Parliament, a conveyance of lands from trustees of a settlement, and, as part consideration of such conveyance, covenanted to make and maintain accommodation works, including the making and maintaining of a wharf or depôt, and also, at any time, on twenty-four hours' previous notice being given, to convey across their line, and deposit on the wharf or depôt, timber, poles, and wood—productions of an adjacent wood. The stipulations of the covenants were never performed, and the owners of the land had made no objection. By an Act of Parliament in* 1892 *the company was dissolved, and the undertaking was, subject to the contracts, liabilities, debts, and obligations of the dissolving company, transferred to a new company. In* 1893 *the tenant for life under the settlement brought an action against both of the companies for specific performance of the covenants.*

Held (without touching the question as between the two companies), that the covenants were to be specifically performed and carried into execution by the new company.

By the Lostwithiel and Fowey Railway Act, 1862, the Lostwithiel and Fowey Railway Co. were incorporated, and authorized to make and maintain a railway in Cornwall, and were empowered to take land for that purpose.

In 1873 certain land, including a portion of a wood known as Colvethick Wood, was conveyed by trustees of a settlement to the company for the purposes of their Act, the company covenanting to carry out, on part of the land so conveyed, certain accommodation works, including the making and maintaining, with proper fences and gates, of a road on the west side, and of a good and substantial wharf or depôt, with approaches on the east side of their line of railway, and also covenanting to "at all times, on receiving twenty-four hours' previous notice, take and safely convey all timber, poles, and faggot wood, and other produce of Colvethick Wood from the road on the west side of the railway, or from such other place at the foot of the wood by the side of the railway where the same respectively may be lying or stored, across the railway, and deposit the same where required on the said wharf or depôts," and that should the railway company, or their successors, fail to fulfil this covenant for a space of six days after such notice should have expired, it should be lawful for the covenantees, or persons claiming under them, to convey and deposit the said timber, &c., and charge the railway company with the expenses and interest at five per cent. per annum.

Prior to July, 1891 (as appeared from an Act of that date), the railway had been closed for some years, the capital being insufficient to work it, and in 1892 the Lostwithiel and Fowey Railway Act, 1892, was passed, which, by section 3, defined the undertaking of the company (thereinafter called the dissolving company) as meaning and including all property of the company, other than money or security for money, and all the powers thereof, except the powers of raising capital and internal management.

Section 6 provided that the undertaking, "subject to the contracts obligations debts and liabilties" of the dissolving company affecting the same, should be transferred to and vested in the Cornwall Minerals Railway Co. (thereinafter called the transferee company).

Section 14 provided that the dissolving company should, as soon as possible after the transfer had been effected, wind up its affairs, and when this was done should cease to exist.

Section 15 provided for advertisement by the dissolving company within a month after the transfer of their intention to wind up their affairs and distribute their assets, and that such advertisement should state that all persons (other than bond or stock-holders or mortgagees, &c.), should send particulars thereof in writing to the directors, who should forthwith discharge all debts and liabilities properly owing and that all claims or demands of which notice was not sent in within three months from the date of the company's advertisement should be barred, and the rights of all persons therein and thereunder should absolutely cease and determine. No objection had been made to the non-performance of the covenants until more than three months had elapsed after the publication of the advertisements pursuant to section 15 of the Act of 1892, but on the 12th of August, 1893, the plaintiff, who had become tenant for life under the settlement, brought this action against both companies, claiming specific performance of the covenant which had hitherto been unperformed.

Renshaw, Q.C., and *Medd*, for the plaintiff.—The plaintiff can maintain an action on the covenant; if not for specific performance, at least for damages: *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 41 W. R. 146, [1893] 1 Ch. 116; *Wilson* v. *Northampton and Banbury Junction Railway Co.*, 22 W. R. 380, L. R. 9 Ch. App. 279. An order was made enforcing such a covenant in *Earl of Jersey* v. *Great Western Railway Co.*, Times, April 24, 1893. Specific performance was decreed in *Greene* v. *West Cheshire Railway Co.*, 20 W. R. 54, L. R. 13 Eq. 44; Seton's Judgments and Orders, 5th ed., vol. 3, p. 1894; Fry on Specific Performance, 3rd ed., pp. 46, 47; *Todd* v. *Midland Great Western Railway of Ireland*, 9 L. R. (Ir.) 85, 30 W. R. Dig. 200. Both the companies are bound by the covenant.

Warmington, Q.C., and *C. Macnaghten*, for the Lostwithiel and Fowey Co.—By section 6 of the Act of 1892 the Cornwall Minerals Railway Co.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

are the parties liable. Any question between the two companies should not be decided in this action.

Cripps, Q.C., and *H. Ware*, for the Cornwall Minerals Railway Co.—No objection has hitherto been raised as to non-performance of these covenants. There has been waiver or at least *laches*. The covenant to convey and deposit timber is a personal covenant, and not enforceable against the transferees.

KEKEWICH, J.—The first question I have to consider, assuming the liability to perform these covenants still exists, is by which of these companies they should be performed in the first instance for the benefit of the plaintiff.

The case of the *Earl of Jersey* v. *The Great Western Railway Co.* decides that a railway company taking over the undertaking of another company subject to its contracts and liabilities, is liable to be sued directly on those contracts and liabilities. Comparing the Act on which that case proceeded with the Lostwithiel Railway Act, 1892—the one in the present case—there is at least as strong ground here as in that case for holding the transferee company liable. There is one similar fact in both of these cases. In each the company is to be dissolved—to cease to exist. The Legislature cannot have intended that a company which has been dissolved should be sued, or on the other hand that, where solemn covenants have been entered into, the covenantee should be left without remedy by action, as he would be here, unless an action lies against the Lostwithiel Railway Co. I therefore hold that the meaning of section 6 of this Act of 1892 is that the new company are liable to the contracts and liabilities of the dissolving company, not only by way of indemnity to the dissolving company, but directly to the persons with whom the contracts and liabilities were originally made and incurred.

Next, is this a continuing liability? The covenants are part of an agreement contained in a conveyance dated the 31st of December, 1873. There the Lostwithiel Railway Co., as part of the consideration for the conveyance of the land to them, covenant to construct and maintain certain accommodation works, to maintain works then existing, and to render certain services. It is objected that these covenants have for a long time not been enforced. The obvious answer to that is, there has been no company against which they could be enforced. The line of railway in connection with which the works were to be used has not been opened for traffic. The time for executing the works has not arrived.

Then comes the question, Can these covenants be enforced in an action for specific performance?

I asked for some authority, because there certainly are matters here which the Court of Chancery may well hesitate to say should be specifically performed, seeing that it could hardly take upon itself to see that these works were constructed, and still less to superintend their maintenance, but would probably have to enforce its decree by sequestration. In the last edition of Fry on Specific Performance, pl. 103, p. 46, it is said: "But whether the court will or will not interfere to enforce all such contracts when definite, it appears to be settled that it will assume jurisdiction when we have the following three circumstances: first, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution which cannot adequately be compensated by damages; and, thirdly, that the defendants have, by the contract, obtained from the plaintiffs possession of the land on which the work is to be done." The author then refers to the case of accommodation works. This case seems to come within the scope of these observations, notwithstanding the fact which seems to distinguish it from all the other cases, that the company are to do these things on land which they have obtained by conveyance from the predecessor in title of the plaintiff.

One part of the covenant causes me great difficulty, the stipulation that the company, their successors and assigns, will, on receiving twenty-four hours' notice, take and convey all timber, poles, and faggot wood, and other produce of Colvethick Wood, across the railway, and deposit it where required on the wharves or depôts. It has been objected in the defence that this is a personal service; but though I know of no case in which the court has granted a decree for specific performance of such a contract, I mean to venture so far in this instance; first, because it is a part of a larger contract which can be specifically performed; second, because it is obviously for the convenience of the company that they should themselves personally perform it, since it is to be performed on their land; and, third, because it could not be performed by the plaintiff without risk to himself, and more serious risk to the public traffic. As I have said before, should the company be recalcitrant, performance can only be enforced by sequestration, which would probably be an adequate remedy.

That disposes of the case. I have respected the appeal of counsel to decide no question between the two companies except so far as is necessary in deciding this case, and I do not think that I am rejecting it when I say that I do not think that this obligation is within section 15 of the Lostwithiel Railway Act of 1892, and consequently that it is not extinguished because the plaintiff failed to notify the Lostwithiel Co. of its existence. My grounds for this conclusion are: first, the obligation was "known" to the company, the covenant being entered into by themselves; and, second, that the first, second, and third sub-divisions of that section point to a "debt" in the ordinary sense of the term, or at any rate to a claim which can be reduced to a money value, and not to such an obligation as this is.

There will be a declaration, therefore, that the covenants ought to be specifically performed by the Cornwall Minerals Co., and that will be adjudged accordingly. Nothing will be said with regard to the Lostwithiel Co. except that they will have no costs.

The form of the order will follow as closely as possible *Greene* v. *West Cheshire Railway*, so I will declare that the covenants contained in the deed of the 31st of December, 1873, for the construction and maintenance of the accommodation works and the performance of the services which are set forth in the statement of claim, are, having regard to the Lostwithiel and Fowey Railway Act, 1892, to be specifically performed and carried into execution by the defendants, the Cornwall Minerals Co., and order and adjudge the same accordingly.

Solicitors, *R. W. Childs; Batten & Harling*, for *William Pease*, Lostwithiel; *Hargrove & Co.; R. A. Read, jun.*

Chan. Div.
Kekewich, J. } June 12, 1894.

In re HUDDLESTONE.
BRUNO *v.* EYSTON. (*a.*)

Power of appointment — Special power—Execution—General bequest—Intention—Evidence.

Where, on the construction of a will, the court is of

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

opinion that a special power has not been exercised, evidence is not admissible to show intention to exercise it.

Originating summons.

The testator by his will bequeathed part of his residuary personalty in trust for his daughter, A. Bruno, for life, with remainder upon trust for her children as she should by deed or will appoint, and in default of appointment upon trust for the children and their issue *per stirpes* equally.

A. Bruno by her will declared that "all my property of every kind, including rentes, certificates, securities, or investments, &c., deposited with my bankers and trustees, Glyn, Mills, Witham, Lambert, & Co., of London, and in a word all I may be seised of at the time of my death, nothing being excluded or excepted, shall be divided as follows." The will contained no reference to the special power of appointment in her father's will, but some of the objects of the power received benefits under the gifts.

This was a summons to determine whether the power had been exercised. On the hearing a question was raised whether evidence was admissible to show that the lady intended to include the property in the hands of Glyn & Co., the bankers, in the names of the trustees of her father's will over which she had the power of appointment, as she had no "rentes, stocks," &c., of her own with them.

Dundas Gardiner, for the plaintiff.—The will does not operate as an execution of a special power. No evidence as to state of property is admissible: *Andrews* v. *Emmot*, 2 Bro. C. C. 297.

G. Lawrence, for the defendants.—The gift is *primâ facie* specific. Evidence is therefore admissible: *Innes* v. *Sayer*, 3 Mac. & G. 606.

KEKEWICH, J.—The question in this case is whether the testatrix has by her will executed a special power of appointment. She had a power of appointment to some of those to whom she had purported to give benefits by her will. Having that power, she makes her will in this way. [His lordship read the part of the will above set out, and proceeded:—] No doubt in some respects the phrase is unintelligible. I have to consider what is the purport and extent of that gift standing alone. In the first place she says all my property, and then she makes a special reference to her bankers and trustees. She appears to have thought she may have introduced some doubt as to the generality of the description by subsequent words, and ends up with a reference to all her property. Is this anything but a general devise and bequest? It is suggested it is specific. There are many cases on the meaning of "specific." Whatever else it means, it must mean something separated from the general estate. She distinctly speaks of "my property." Clearly that is what belongs to her. Alone, this is not an exercise of a special power. Evidence has been offered to show that the testatrix meant to exercise the power. Now is this evidence admissible. *Innes* v. *Sayer*, which refers to all the important cases, has been cited, but that case shows that when the gift is not *primâ facie* specific, evidence as to the property is inadmissible. I cannot admit the evidence, and I hold the power has not been exercised.

Solicitors, *L. J. V. Amos; Witham, Lambert, & Roskill.*

Q. B. Div.
(Mathew and Charles, JJ.) Nov. 2.

REG. *v.* WILLIAMS.
Ex parte VISGER. (*a.*)

Metropolis management—Vestryman—Qualification—Rating and occupying—Ceasing to occupy—Penalty—Vacancies caused by death or otherwise—Metropolis Local Management Act, 1855 (18 & 19 *Vict.* c. 120), *ss.* 6, 10, 54—*Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *s.* 79, *sub-sections* 8, 10.

By section 6 *of the Metropolis Local Management Act*, 1855, *rating and occupying are necessary qualifications for election to the office of vestryman.*

By section 54 *a person who acts as a member of any board or vestry without being qualified by rating and occupation shall be liable to a penalty.*

Held, that a vestryman who was properly qualified at the time of his election did not cease to be a member of the vestry before the expiration of his term of office because he had ceased to occupy a house in the parish.

In 1891 the respondent was properly elected a vestryman for the parish of Lewisham for a period of three years. Prior to the expiration of that term he ceased to occuy a house in the parish, but continued to hold the office of chairman of the District Board of Works, although without acting as such. A rule was obtained calling upon him to show cause why a writ of *quo warranto* should not issue directing him to show by what authority he claimed to hold the office of vestryman.

Channell, Q.C., showed cause against the rule being made absolute. There is nothing in section 54 of the Metropolis Local Management Act, 1855, to prevent a man continuing to be a member of a vestry merely because he ceased to occupy a house in the parish. That does not place him in the same position as if he was declared a bankrupt or accepted any office under the board or vestry of which he was a member. He might not, perhaps, be able to act as a member of the vestry so long as he did not occupy a house in the parish, but he could act without re-election if he became an occupier again before his term of office expired. At any rate, sub-sections 8 and 10 of section 79 of the Local Government Act, 1894, cover any want of qualification there might be in this case, since they provide that persons may continue to act as vestrymen, although disqualified, until the first election of the new boards under that Act, the effect of those sections being to extend the time for the continuance of existing vestries until next month. [He was stopped.]

Montague Lush supported the rule.—The extension of time given to existing vestries by the Local Government Act, 1894, only enables vestrymen to continue to act, although disqualified, between the time that their period of office would have expired, and the first election under that Act. When a man lost the necessary qualification by ceasing to occupy, he ceased to be a member of the board or vestry at all. If that were not so, no one could be elected in his place on the vestry, for there would be no vacancy to be filled up. A vestry, therefore, might, under such a state of things, be composed wholly or in part of strangers to the parish. The respondent having ceased to occupy a house in the parish prior to the passing of that Act, his position is not affected by any provisions in that statute.

MATHEW, J.—It seems to me that a consideration of

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

sections 6, 10, and 54 of the Metropolis Local Management Act, 1855, discloses the true answer to this application. The gentleman in question was duly qualified at the time of his election. Being duly qualified he became, under section 6, a vestryman. Section 10 enacts that at all elections after the first the parishioners shall be entitled to vote and elect as many vestrymen as there are vacancies on the vestry. The Act contemplated, therefore, that at the subsequent elections vacancies which occurred "by death or otherwise" should be filled by the election of other persons in place of those who became disqualified. The only provision with reference to persons acting as vestrymen when disqualified is contained in section 54, which prohibits, under penalty, any person, who has become disqualified, continuing to act as a vestryman. This gentleman remains a member of the vestry, and there is no evidence to show that he has incurred any penalties.

CHARLES, J.—I am of the same opinion.

Rule discharged, with costs.

Solicitors, *Ingle, Cooper, & Holmes; W. W. Young & Son.*

Q. B. Div. (Divisional Court) (Mathew and Kennedy, JJ.) Aug. 2, 1894.

In re ALLEN. (*a.*)

Local government—Married woman—Owner—Rates—Arrangement with overseers—Recovery of rates—Warrant of distress and commitment—43 Eliz. c. 2—12 & 13 Vict. c. 14, s. 2—Metropolis Local Management Act, 1855 (18 *& 19 Vict. c.* 120), *s.* 161—*Poor Rate Assessment and Collection Act,* 1869 (32 *& 33 Vict. c.* 41), *ss.* 3, 4—*Summary Jurisdiction Act,* 1879 (42 *& 43 Vict. c.* 49), *ss.* 6, 35, 50—*Married Women's Property Act,* 1882 (45 *& 46 Vict. c.* 75), *s.* 1, *sub-section* 2—*Summary Jurisdiction Act,* 1884 (47 *& 48 Vict. c.* 43), *ss.* 5, 7, 10—*Interpretation Act,* 1889 (52 *& 53 Vict. c.* 63), *s.* 13, *sub-section* 11.

A married woman, the rated owner of houses which were her separate property, arranged with the overseers of the parish, under sections 3 *and* 4 *of the Poor Rate Assessment and Collection Act,* 1869, *to pay rates in respect of her houses, whether they were occupied or not, the overseers allowing her an abatement of thirty per cent. from the amount of the rates. The vestry had previously made an order under section* 4 *of the same Act that the owners of property to which section* 3 *extended should be rated instead of the occupiers. The married woman failed to pay the sewers, lighting, and general rates a year after the arrangement was made, and was committed to prison under* 12 *&* 13 *Vict. c.* 14, *s.* 2.

Held, that the liability of the married womnn to pay the rates did not arise out of any contract made by her in respect of her separate property, but arose from the order of the vestry made under section 4; *that the ordinary remedy for the non-payment of rates was that provided by* 12 *&* 13 *Vict. c.* 14, *and the Metropolis Local Management Act,* 1855, *s.* 161—*viz., warrant of distress and commitment in default of sufficient distress; and that such ordinary remedy applied to married women.*

Referred to the court by Wright, J., sitting in chambers.

Elizabeth Allen, a married woman, was the owner of several houses in Fulham to her separate use and without restraint on anticipation.

In pursuance of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3, she agreed with the overseers of the poor of the parish in December, 1892, that in consideration of being allowed an abatement in her rates she would pay rates for all the houses of which she was owner, whether such houses were occupied or not.

The vestry of the parish, under section 4 of the above Act, had previously made an order to the effect that the owners of all rateable property to which section 3 of the Act extended should be rated instead of the occupiers.

Under this agreement and order Mrs. Allen was rated as owner, and was allowed a certain abatement.

On being required in December, 1893, to pay the amount assessed in respect of her houses for poor rate, lighting rate, general rate, and sewers rate, she paid only the first. A summons was accordingly issued against her, and the justices ordered that the rate should be levied by a warrant of distress. Mrs. Allen having no goods or chattels, the justices later on issued a warrant of commitment under 12 & 13 Vict. c. 14, s. 2, and, under this warrant, she was committed to prison for a month.

Her husband called upon the vestry authorities and the gaoler of the prison to show cause why a writ of *habeas corpus* should not issue to the gaoler to bring up Mrs. Allen before the judge at chambers, and Wright, J., before whom the summons came, referred the matter to the court.

By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-section (2): "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract."

By the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), s. 3: "In case the rateable value of any hereditament does not exceed twenty pounds . . . and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission . . . on the amount thereof."

By section 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force, the following enactments shall have effect:—(1) The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per cent. from the amount of the rate. (2) If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated . . . in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per cent. from the amount of the rate."

By 12 & 13 Vict. c. 14, s. 2, so much of 43 Eliz. c. 2 as relates to commitments for non-payment of rates, or for default of distress, is repealed, and it is enacted

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

that "when to any warrant of distress for the levying of any sum . . . to which any person . . . is . . . rated or assessed . . . it shall be returned by the . . . person having the execution of such warrant that he could find no goods or chattels, or no sufficient goods or chattels, whereon to levy such sum . . . , it shall be lawful for any two or more justices . . . to issue their warrant of commitment against the person with relation to whom such return shall be so made, . . . and thereby order such person to be imprisoned . . . for any time not exceeding three calendar months . . ."

By the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 161, overseers shall, for the purpose of levying sewers, lighting, and general rates, "proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6: "Where under any Act . . . a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act and not otherwise." By section 35, sub-section 2: "An order made by a court of summary jurisdiction for the payment of any . . . civil debt . . . shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved . . . that the person making default in payment either has, or has had since the date of the order, the means to pay . . . , and has refused or neglected, or refuses or neglects, to pay . . ." By section 50: ". . . The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by or who is or are authorized to act under the Summary Jurisdiction Acts or any of such Acts."

By the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 5: "The repeal enacted by this Act shall not take away any jurisdiction of any justices to act summarily in any matter referred to in any enactment hereby repealed, and the Summary Jurisdiction Acts shall, so far as is consistent with the tenor thereof, apply to every proceeding before justices as to which the procedure is wholly or partly repealed by this Act in substitution for the procedure so repealed." By section 7: "It is hereby declared that the above recited definition of court of summary jurisdiction in section 50 of the Summary Jurisdiction Act, 1879, includes such justice, justices, or magistrate as therein mentioned, whether acting under the Summary Jurisdiction Acts, or any of them, or under any other Act, or by virtue of his or their commission or by the common law." By section 10: "Nothing in this Act shall alter the procedure for the recovery of or any remedy for the non-payment of any poor rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction."

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13, sub-section 11: "The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorized to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law."

W. H. Stephenson, for the applicant.—First, the arrest was illegal. Mrs. Allen's liability was not as owner of the houses, but under the agreement which she had made with the overseers under the Poor Rate Assessment and Collection Act, 1869. This agreement was a contract in respect of her separate property under the Married Women's Property Act, 1882, s. 1, sub-section 2. Her property, therefore, only, is liable, and the process should have been civil, not criminal: *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. The appointment of a receiver of her separate property was the real remedy of the overseers. Secondly, under sections 6 and 35 of the Summary Jurisdiction Act, 1879, these rates are recoverable as "civil debts" only. By that statute the provisions of 12 & 13 Vict. c. 14, s. 2, are superseded; and although it was held in *Reg.* v. *Price*, 28 W. R. 615, 5 Q. B. D. 300, that the Summary Jurisdiction Act, 1879, did not apply to the recovery of poor rates, now, by the Summary Jurisdiction Act, 1884, justices, however acting, are a "court of summary jurisdiction" (sections 5 and 7). See also the Interpretation Act, 1889, which repeals section 7 of the Summary Jurisdiction Act, 1884, but gives the same definition of a "court of summary jurisdiction." It has been held in *Reg.* v. *Lord Mayor of London*, 57 L. T. N. S. 491, that a magistrate sitting to hear a proceeding for the recovery of a sewers rate constituted a "court of summary jurisdiction." By the Metropolitan Local Management Act, 1855, s. 161, overseers are to collect sewers, lighting, and general rates in the same manner as poor rates. The Summary Jurisdiction Act, 1879, applies, therefore, to all rates. Section 10 of the Summary Jurisdiction Act, 1884, does not put sewers, lighting, and general rates on a different footing to poor rates.

He also cited *Fourth City Mutual Building Society* v. *Churchwardens, &c., of East Ham*, [1892] 1 Q. B. 661.

Poland, Q.C., and *J. P. Grain*, for the vestry.—The Married Women's Property Act, 1882, has nothing to do with the case. Mrs. Allen remained on the rate-book, notwithstanding the arrangement with the overseers, and was the person to be rated as "owner" of "rateable hereditaments" under section 3 of the Poor Rate Assessment and Collection Act, 1869. The arrangement was not a "contract" within section 1 of the Married Women's Property Act, 1882. As to the method by which these rates should be recovered, Jervis' Act (11 & 12 Vict. c. 43) did not apply to the recovery of poor rates, but 12 & 13 Vict. c. 14, s. 2, recites the provisions of 43 Eliz. c. 2 as to the recovery of poor rates, and enacts that the remedy for non-payment of poor rates shall be by warrant of distress and commitment to prison where there are no sufficient goods and chattels. And the Metropolitan Local Management Act, 1855, by section 161, directs that "overseers shall, for the purpose of levying" sewers, lighting, and general rates, "proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor." In *Reg.* v. *Price* it was held that the Summary Jurisdiction Act, 1879, did not apply to the recovery of poor rates, the ground of the decision being that the liability to pay rates was created by statute, and not by an order of the justices. Section 10 of the Summary Jurisdiction Act, 1884, protects the old procedure for the recovery of rates; and *Reg.* v. *Lord Mayor of London* does not disturb it. The latter Act and the Interpretation Act, 1889, only make justices a "court of summary jurisdiction" to enable them to state a case. If Mrs

Allen is not liable, the overseers are left withou any remedy.

MATHEW, J.—This application must be refused. The first point, in order of importance, taken by counsel for the applicant was that the remedy for enforcing the payment of poor rates by imprisonment in default of distress was gone; that this proceeding before the magistrates was a proceeding in a court of summary jurisdiction; that the amount alleged to be payable was only recoverable in the statutory manner, and that there was no power of imprisonment. Stated compendiously, that was the argument put forward. It would, if well founded, lead to a startling result, emancipating a vast number of people at once from the process that has been supposed hitherto to be the only effective one in the event of non-payment of rates. The history of the legislation on the subject must be looked at in order to determine the question.

It appears that Jervis' Act (11 & 12 Vict. c. 43) did not apply to the recovery of poor rates, and that led to the passing of an Act in the following session which gave special powers in that respect. A special provision as to the recovery of rates is contained in section 2 of that Act (12 & 13 Vict. c. 14), where the mode then in force of collecting the poor rate was followed. That mode was adopted here. By the Metropolis Local Management Act, 1855, s. 161, the other rates that are sought to be recovered in this case are placed in the same category for all purposes as the poor rate, and are to be recovered in the same way; and by 25 & 26 Vict. c. 82 the poor rate and any number of local rates may be included in the same proceeding. The machinery which is provided by those Acts appears to me complete, and to have been faithfully used and followed out in this case.

Then came the Summary Jurisdiction Act, 1879; and it was held by the Court of Queen's Bench in *Reg.* v. *Price* that the Act of 1879 did not apply to proceedings for the recovery of poor rates, and for the excellent reason that the Act contemplated the judical order of magistrates for the recovery of money, and that in respect of a poor rate the liability arose from the rating, and not from any order of the magistrates.

Next came the Summary Jurisdiction Act, 1884. It might have been supposed, but for section 10, that that Act was intended to affect the jurisdiction of magistrates in enforcing the payment of poor rates. Section 10, however, carefully protects the old procedure. For certain purposes proceedings before magistrates were treated as proceedings in courts of summary jurisdiction, but the leading enactment was qualified by this, that section 10 protected and permitted the old procedure as to poor rates, or any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction.

That being the position of things, it is perfectly clear that the owner of property rated to the relief of the poor, who has not appealed against the rate, is subject to the provisions of 12 & 13 Vict. c. 13, an Act carefully kept alive by all the subsequent Acts. If this were the case of an ordinary owner of property, there would be no question that the process of warrant of distress and commitment was still available; but it is said that this is a peculiar case. It is the case of a married woman who is the owner of house property, and is rated to the relief of the poor in respect of rents and profits received from her houses. It is said that in that capacity, though she has not paid these rates, she nevertheless cannot be proceeded against under 12 & 13 Vict. c. 14, and cannot, in default of sufficient distress, be sent to prison.

The position taken was that the liability of the married woman was to be derived from the contract she had made under the statute, which enables an owner in certain cases to compound, and that that contract could only be enforced now by some kind of civil process. The suggestion was that in respect of such property an equitable receiver might be appointed, but in no other way was it suggested that the rates could be recovered. The husband clearly would not be liable. When we turn to the Poor Rate Assessment and Collection Act, 1869 (I assume the notices to have been given, as they appear to have been given, under sections 3 and 4), there is no trace of anything like an agreement, or of anything that would relieve the married woman from liability to pay these rates Notice is given by the owner to the parish officers, and an abatement is made in the amount of the rates. The real truth is that the statute gives the owner of property an indulgence which is for his own benefit. He collects the rates from the occupier, if he can, and upon his paying the rates, whether the houses are vacant or not, it is arranged that there shall be a considerable abatement. There appears to me to be no ground for saying that this married woman's liability arose out of a contract. It is said that no contract would be binding upon her personally; but if that be the legal effect of suggesting that there was a contract in this case, the answer is, that there was no contract.

Now is there any authority for saying that a married woman, the owner of property and being liable to be rated, is exempt from distress and imprisonment in default of payment? The learned counsel for the applicant is able to cite to us no authority for that proposition, and Mr. Poland's researches have left him equally without means of assisting us. I cannot entertain a doubt that the statute means that the owner of property rated to the relief of the poor and not paying the rate is liable to distress and imprisonment in default of a sufficient distress. I know of no principle by which a married woman is exempt from imprisonment, which is what counsel for the applicant insists that we ought, for the first time, to declare to be the law of England. Therefore, the only grounds upon which this application is made entirely fail. The cases cited by the counsel for the applicant do not, in my opinion, affect the points before us. Magistrates, when dealing with the poor rate, or with rates placed in the same position as the poor rate, must follow section 10 of the Act of 1884, which carries them back to the old procedure. For these reasons it seems to me that the application must be refused.

KENNEDY, J.—I agree. With regard to the matter which has been dealt with by my brother Mathew, he has gone through the statutes affecting the question, and it is needless for me to say more than that, notwithstanding all the argument we have heard to the contrary, it is reasonably clear that the point taken is not good.

The only point, in my view, worthy of consideration was one on which there seems to be no authority. The question is whether or not, by virtue of Mrs. Allen being a married woman, she is to escape the liability to which, if she were not a married woman, she would, as owner of the property, be clearly subject. It was suggested that this was a matter of contract; that the contract must be taken to be one with regard to her separate estate: and therefore, as laid down by the Court of Appeal in *Scott* v. *Morley*, there could be no remedy against her person. The argument was mainly based on section

3 of the Poor Rate Act, 1869. By section 4 the parish has power to order that the owners of all rateable hereditaments to which section 3 extends shall be rated to the poor rate in respect of such hereditaments, instead of the occupiers, on all rates made after the date of the order. If the parish make that order, then, under section 4, sub-section 1, the overseer "shall" rate the owners instead of the occupiers, and "shall" allow to them an abatement or deduction of fifteen per cent. from the amount of the rate. That was done here.

The rating of the owner is, therefore, made compulsory by the statute if the vestry make the order. It does, however, appear that under section 4, sub-section 2, Mrs. Allen could get an additional allowance if she signed a certain document; but her liability as owner was wholly apart from section 3; it was imposed by section 4. It seems to me that the argument put forward on her behalf fails, and that, in the absence of any authority for the proposition that she cannot be dealt with as any other owner would be, she is liable to the same procedure as if she were not a married woman. The application must be refused.

Application refused.

Solicitors for the applicant, *Fred Marriott & Co.*

Solicitor for the vestry, *R. W. Barber.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Oct. 29, 30.

In re PAINTER.
Ex parte PAINTER. (*a.*)

Bankruptcy — Annulment of adjudication — Debtor's petition—Abuse of process of court—Bankruptcy Act, 1849 (12 *&* 13 *Vict. c.* 106), *s.* 93—*Bankruptcy Act,* 1861 (24 *&* 25 *Vict. c.* 134), *s.* 86—*Bankruptcy Act,* 1869 (32 *&* 33 *Vict. c.* 71)—*Bankruptcy Act,* 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 5, 8 (1), 35 (1)—*Police Act,* 1890 (53 *&* 54 *Vict. c.* 45), *s.* 7 (1).

The presentation of a petition by a debtor for his own benefit is not an abuse of the process of the court, and he ought to be adjudicated bankrupt thereon.

Appeal by the debtor from an order by Sir Burford Hancock, sitting as deputy county court judge at Birmingham, annulling his adjudication.

The debtor retired from the police force in 1891 with a pension of £1 13s. 4d. per week, which by section 7 of the Police Act, 1890, cannot be assigned except for the benefit of the pensioner's family, and does not pass to the trustee in the event of his bankruptcy.

At the summer assizes at Birmingham in 1893 one Blizzard obtained judgment against the debtor for £294 0s. 11d. damages for slander, and costs. Upon the 17th of November, Blizzard issued a judgment summons, and the debtor was ordered to pay £3 within fourteen days and £2 per month thereafter. The debtor failed to comply with the order, and upon the 29th of January, 1894, he filed his own petition, setting forth his debts as follows:—

Judgment creditor	£294	0	11
Solicitors' bill	35	0	0
Tailor's bill	5	0	0
Loan from wife	20	0	0
Total	£354	0	11

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

against assets £11 6s. 2d. A receiving order was made, and upon the 7th of February the debtor was adjudicated bankrupt.

Upon the 16th of April the judgment creditor applied to annul the adjudication, and the deputy county court judge made an order of annulment, upon the grounds that he did not believe in the *bona fides* of the debts alleged other than the debt due to the judgment creditor, that the debtor had only one creditor, and was abusing the process of the court in order to get rid of his liability to that creditor.

The debtor appealed.

J. G. Pritchett and *Evans Austin*, for the appellant.—The court has no power to annul in this case. Section 8 of the Bankruptcy Act, 1883, provides: (1) "A debtor's petition shall allege that the debtor is unable to pay his debts, . . . and the court shall thereupon make a receiving order"; and by section 35 (1) of the same Act: "Where in the opinion of the court a debtor ought not to have been adjudged bankrupt . . . the court may . . . annul the adjudication." It cannot be contended that the adjudication ought not to have been made. Even if there were only one creditor there is nothing in the Act providing that a debtor with only one creditor may not present his own petition.

They cited *In re Gyll*, 37 W. R. 164, 5 Morr. 272; *In re Hester*, 22 Q. B. D. 632, 37 W. R. Dig. 20; *In re Bullen*, 36 W. R. 836, 5 Morr. 243.

Muir Mackenzie, for the respondent.—The imperative terms of section 8 of the Bankruptcy Act, 1883, do not compel the court to make a receiving order where there has been an abuse of the process of the court: *In re Bond*, 36 W. R. 700, 21 Q. B. D. 17. A petition by a debtor conceived entirely for his own benefit is an abuse of the process of the court. By section 93 of the Bankruptcy Act, 1849, a debtor could not be adjudicated bankrupt unless he could pay his creditors five shillings in the pound. The Bankruptcy Act, Act, 1883, contains no such limitation, but it is left to the discretion of the court to say whether the debtor is abusing its process or not, as it was under the Bankruptcy Act, 1861: see *In re Peacock*, 14 W. R. 49. [VAUGHAN WILLIAMS, J.—*In re Ensby*, 14 W. R. 849, and *Ex parte Norton*, 3 D. 642, are against you there.] I rely upon *In re Gaitskell*, 40 Ch. D. 416, 37 W. R. Dig. 115, taken with *Ex parte Norton*. A petition wholly for the debtor's benefit is bad: *In re Russell*, 23 W. R. 817, L. R. 10 Ch. App. 255; *Ex parte Hewitt*, 31 L. J. Bank. 83, 6 L. T. N. S. 730, 11 W. R. Ch. Dig. 11; *Ex parte Staff*, 23 W. R. 950, L. R. 20 Eq. 775. The debtor has uncontrolled enjoyment of his pension, for no order can be made against him upon a judgment summons while he is a bankrupt: *In re Nuthall*, 8 Morr. 106, 64 L. T. N. S. 241, 39 W. R. Ch. Dig. 69.

J. G. Pritchett replied.

VAUGHAN WILLIAMS, J.—I think we ought to differ from the learned deputy judge.

This was an application, under section 35 (1) of the Bankruptcy Act, 1883, to annul an adjudication, upon the ground that it ought not to have been made.

The Acts have varied in their provisions for the relief of debtors, but from an early period the Legislature has recognized the interest the State has in relieving a debtor from his debts. It is undesirable that a citizen should go about so overburdened with debt as to be unable to do his duty as a citizen.

The Bankruptcy Act of 1849 was the first which provided for a debtor presenting his own petition, and that it allowed him to do by section 93, upon the condition of his being able to pay his creditors five

shillings in the pound. The Bankruptcy Act of 1861, by section 86, allowed the debtor to present his own petition freed from any conditions.

The Bankruptcy Act, 1869, did not continue the provision entitling a debtor to present his own petition, but section 8 (1) of the Bankruptcy Act, 1883, reverted almost in terms to section 86 of the Act of 1861.

We have here to decide whether any limitations can be placed upon this section. Section 8 (1): "A debtor's petition shall allege that the debtor is unable to pay his debts . . . and the court shall thereupon make an order."

It would seem to me that the words themselves do not contain any limitation whatever. It has been urged that the court has an inherent power to prevent any abuse of its own process, and that the word "shall" in the section does not take away this power. I assume here that the court has this power, and that what we have to consider is whether there has been an abuse of the process.

I have no doubt but that in this case the debtor's motive was to get rid of the pressure brought to bear upon him by the judgment creditor, and my only doubt has been whether we could say that this was such an abuse of the process of the court that he ought not to have been adjudicated bankrupt. My wish would have been to uphold the learned deputy judge; but we have to deal here with the Act as it stands, and we should remember that whereas the Act of 1849 imposed conditions, those conditions do not appear in the Act of 1883, which shows that the Legislature deliberately rejected them. For that reason I do not think we have a right to limit the words of the present statute, and I have come to the conclusion that the court is not entitled to refuse a receiving order or adjudication merely because the debtor has no assets and an inalienable pension, nor because, being in this position, he has presented a petition with the express view of preventing the issue of judgment summonses against himself. I should add that I have been assisted in coming to this conclusion by considering the severe provisions of the present Acts with regard to discharge.

KENNEDY, J.—There is no authority for the contention that a debtor ought not to be adjudicated bankrupt because his only object in presenting his petition is to protect himself.

I do not agree with the view that the benefit of the debtor is foreign to the purposes of the Bankruptcy Acts. The interests of creditors and of commerce are no doubt among the objects of the Acts, but the debtor's advantage is also an object.

Appeal allowed.

Solicitors for the appellant, *Weekes & Co.*

Solicitors for the respondent, *Fallowes & Cochrane.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 27.

WILLIAMS *v.* CARTWRIGHT. (*a*.)

Practice—Writ—Service out of the jurisdiction—Proper party to action brought against person within the jurisdiction—Action of tort—R. S. C., 1883, *ord.* 11, *r.* 1 (g).

Ord. 11, *r.* 1 (g), *which allows service out of the jurisdiction of a writ of summons whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, applies to actions of tort.*

Per Lord Esher, M.R.—*The court, in exercising the jurisdiction conferred on it by order* 11, *ought only to allow rule* 1 (g) *to be applied to an action of tort in extreme cases.*

Appeal from an order of Wright, J., refusing to allow service of a writ out of the jurisdiction.

The plaintiff, by his writ of summons, claimed damages against the defendants, Sir Henry Cartwright, J. A. H. Macnair, and J. E. Guild, by reason of their having induced him to purchase shares in the Equitable Mortgage Co. by issuing and sending to him in London a false, fraudulent, and misleading prospectus and report of the assets, liabilities, and business of the said company. Sir Henry Cartwright and Macnair were resident within the jurisdiction, and service of the writ was duly effected upon them. Guild being resident in Scotland, the plaintiff applied at chambers, under ord. 11, r. 1 (*g*), for leave to serve the writ upon him out of the jurisdiction.

That rule provides that "service out of the jurisdiction of a writ of summons may be allowed by the court or a judge whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

Wright, J., in the first instance made an order giving the plaintiff leave to serve the writ on Guild in Scotland; but he subsequently rescinded that order, giving the plaintiff leave to appeal, and also giving leave for further affidavits to be filed for use before the Court of Appeal.

McCall, Q.C., and *Whitehouse*, for the plaintiff.—This case is clearly within ord. 11, r. 1 (*g*). The plaintiff charges the three defendants with a joint fraud; therefore Guild is a person whom it would be reasonably necessary or proper to join as a party to this action if he were in England. Wright, J., seemed to doubt whether ord. 11, r. 1 (*g*), applied to actions of tort; but the words of the rule are general, and cannot be confined to actions of contract. In *Massey* v. *Heynes*, 36 W. R. 834, 21 Q. B. D. 330, Lindley, L.J., said: "When the liability of several persons depends upon one investigation, I think they are all proper parties to the same action, and, if one of them is a foreigner residing out of the jurisdiction, rule 1 (*g*) of order 11 applies." In *Croft* v. *King*, 41 W. R. 394, [1893] 1 Q. B. 419, a Divisional Court expressly held that this sub-section of the rule applied to actions of tort. [They also cited *Witted* v. *Galbraith*, 41 W. R. 395, [1893] 1 Q. B. 577, and *Firth & Sons* v. *De las Rivas*, 42 W. R. 100.] The jurisdiction being plain, the question resolves itself into one of convenience. The affidavits show that the balance of convenience is in favour of this action proceeding in England.

Sir R. E. Webster, Q.C., and *Theobald*, for the defendant Guild.—It is not necessary to contend that rule 1 (*g*) does not apply to any action of tort, but it is certainly not applicable to every action of tort. The test is whether there is a joint cause of action, and that cannot be the case in an action of fraud. Where several persons are charged with fraud the cause of action against each defendant must of necessity be a separate cause of action. The rule, therefore, cannot properly be held applicable to this case. At any rate, this court ought not to interfere with the discretion which has been exercised by the learned judge.

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Lord ESHER, M.R.—It seems to me that a very nice question of jurisdiction has arisen in this case with regard to the proper application of ord. 11, r. 1 (*g*). I myself feel strongly inclined to say that the power to order service out of the jurisdiction conferred on the court by this sub-section is not applicable to actions of tort, or, at least, not to actions of fraud. If the person on whom it is desired to serve the writ out of the jurisdiction were the only person to be sued, then it is clear that order 11 could not apply at all, and an order for service out of the jurisdiction could not in that case be obtained; for none of the other provisions of order 11 allow service out of the jurisdiction on a person resident abroad in a case of tort. It seems strange that a person who, being resident out of the jurisdiction, cannot be sued alone for tort in the English court, can nevertheless be brought into the English court by the mere fact of the plaintiff also suing for tort someone else resident in England and alleging that the person abroad has been a party to the same tort. But it cannot be denied that the words of sub-section (*g*) are large enough to include actions of tort as well as other actions. It says that service out of the jurisdiction may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." Therefore I cannot say that the sub-section may not in some cases be applicable to actions brought in respect of a joint tort. But I am of opinion that the court, in exercising the discretion conferred on it by this rule, ought never to allow sub-section (*g*) to be applied to actions of tort except under extreme circumstances. I come to this conclusion from a consideration of rule 1. Then there is rule 2, which deals with cases where it is proposed to serve the writ in Scotland or Ireland, and where there may be a concurrent remedy in one or other of those countries. Very large discretionary powers are given to the judge by this rule as to whether in such cases he should allow a Scotch or Irish defendant to be compelled to appear in the English court. I think that, not only in the case of Scotchmen and Irishmen, but also in the case of all persons resident out of the jurisdiction, the judge has a very wide discretion as to whether he should allow order 11 to be put into operation against a person who is charged with fraud jointly with someone resident in England, and, in my opinion, the order ought not to be applied in such cases unless under exceptional circumstances, and the discretion exercised by a judge at chambers in such a matter ought not lightly to be overruled.

There seem to me to be no such exceptional circumstances in the present case. The plaintiff has been injured in consequence of misleading statements contained in a prospectus issued by a company, and he does that which is common in such cases—viz., he charges some of the heads of the company with fraud. That does not, in my opinion, show such an extreme case as ought to induce the court to apply this order. I have formed my opinion on this case quite independently of the proposed defendant being resident in Scotland, and I base my decision, not on rule 2, but on rule 1. I think that the learned judge was right in refusing to make the order, and that we ought not to overrule his discretion.

LOPES, L.J.—I agree with the Master of the Rolls that in such a case as this we ought to pay great attention to the manner in which the judge at chambers has exercised his discretion. But it is to be noticed that in this case the judge in the first instance granted leave to serve the writ out of the jurisdiction, though he afterwards rescinded his own order, and he gave leave to file further affidavits, so that the whole case might come before us in a more complete form. I, therefore, think that this is an exceptional case, and one in which the judge's discretion might be interfered with on lighter grounds, perhaps, than usual.

This is an action of deceit, which is brought against three persons, one of the defendants, Guild, being resident out of the jurisdiction—viz., in Scotland, and the three defendants are charged jointly with fraud. Ord. 11, r. 1 (*g*), says that service out of the jurisdiction may be allowed whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. The other two defendants have been duly served within the jurisdiction. The question therefore is whether Guild is a proper party to the action brought against the other defendants. I think that the right test is whether, if Guild had been resident within the jurisdiction or had been found within the jurisdiction, he would have been a proper party to this action; and unquestionably in that case he would have been a proper party. But does this sub-section apply to actions of tort? That is a question which has arisen during the argument. The only answer seems to me to be that the words are clearly large enough to include actions of tort as well as actions of contract; and, therefore, I think, as far as jurisdiction is concerned, that Guild comes within sub-section (*g*). It is, however, admitted that the jurisdiction exists; but we are asked not to exercise the jurisdiction in this particular case, especially after the judge at chambers has declined to do so, and we are referred to rules 2 and 4 of order 11. Rule 4 shows that ample discretionary powers are conferred on the court or judge, and rule 2 shows what matters ought especially to be taken into consideration in the case of persons in Scotland or Ireland, one element being the comparative cost and convenience of proceeding in England or in the other country, which means, in my opinion, not only the cost and convenience of the person proposed to be served, but the general cost and convenience of all the parties to the action. The circumstances of this case lead me to the conclusion that there are strong reasons in favour of having this action tried in England, and that the plaintiff ought to be allowed to serve the writ on Guild in Scotland. In my opinion this appeal ought to be allowed.

RIGBY, L.J.—I think that this is purely an appeal to the discretion of the court, and I concur in what has been said as to the importance of exercising a careful discretion on the particular facts of each case. I do not take into consideration the order which was made by Wright, J., in the first instance; his second order is the only thing with which we have to deal. He thought that there were other material facts besides those which were before him, and he gave leave for further affidavits to be filed for use before the Court of Appeal. Now if this action had been brought against this Scotch defendant alone, it is clear that he must have been sued in Scotland; for in that case he would not have been within ord. 11, r. 1, at all. But the meaning of sub-section (*g*) seems to me to be that where such a person is not sued alone, but together with other defendants, then there may be cases in which, assuming that the action can properly be brought against those other defendants in England, such a person may be brought within the operation of the rule. And this, I think, will be the case where, if he had been in England, it would have been proper to join him as a party to the action. It was admitted in the course of the argument that the court has jurisdiction under this sub-section to

allow service out of the jurisdiction in actions of tort. But in questions of jurisdiction we ought not to have regard to any admissions, and, independently of that admission, I have come to the conclusion that this jurisdiction exists.

The question therefore remains one as to the exercise of our discretion, and it must be determined with regard to the balance of convenience. [His lordship went in detail through the facts set out in the affidavits, and concluded:—] I think that the person now sought to be served would have been a proper party to this action if he had been in England, and that he therefore comes within sub-section (*g*), and that this is an exceptional case, in which the plaintiff has shown very strong reasons why his action ought to be allowed to be brought in England, and not elsewhere. I agree with Lopes, L.J., in thinking that the appeal ought to be allowed.

Appeal allowed.

Solicitor for the plaintiff, *W. M. Willcocks.*

Solicitors for the defendant, *Thorne & Welsford.*

From Chan. Div. (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) — July 13; Aug. 10, 1894.

WIGRAM *v.* BUCKLEY. (*a.*)

Lis pendens—*Personal estate*—Choses in action—*Book debts—Injunction—Receiver—Notice—Judgments Act,* 1839 (2 & 3 *Vict.* c. 11), *s.* 7.

The doctrine of lis pendens *is inapplicable to* choses in action *and to all personal property other than chattels real.*

Opinion of Romilly, M.R., *in* Berry *v.* Gibbons, 21 *W. R.* 255, *L. R.* 8 *Ch. App.* 749*n*, *dissented from.*

The plaintiff, being first mortgagee of the book debts owing to the defendant, brought an action to enforce his mortgage, and obtained the appointment of a receiver and an injunction to restrain the defendant dealing with the book debts. This action (which was still pending) was registered as a lis pendens. *Neither the plaintiff nor the receiver gave any notice whatever to the book debtors of the defendant, nor did the receiver take possession. Afterwards the defendant executed another mortgage of the book debts to B., who thereupon gave notice to the book debtors. B. had then no notice of the mortgage to the plaintiff, or of the pending action, or of the appointment of a receiver, or of the injunction.*

On seeking to enforce his mortgage, B. first became aware of these facts, and thereupon took out a summons in the action pending between the plaintiff and the defendant, claiming priority over the plaintiff's mortgage.

Held, (1) *that B., being the first to give notice to the book debtors, was* primâ facie *entitled to priority over the plaintiff; and* (2) *that such priority was not prevented by the fact of the registration of the plaintiff's action against the defendant as a* lis pendens, *nor by the appointment of a receiver and the granting of an injunction in that action, B. being no party to that action and having no notice of these facts.*

Appeal from Chitty, J.

In December, 1885, the defendants, who were dealers in art manufactures, assigned to the plaintiffs by way of security for a loan, *inter alia*, the goodwill of their business and all the book and other debts then due and owing, or which, during the subsistence of the security, should become due and owing to the defendants on account of their business. This mortgage contained a power to get in the debts. On the 28th of June, 1892, the plaintiffs commenced an action in order, *inter alia*, to recover the money due to them on their security and for a foreclosure or sale. On the 1st of July, 1892, the plaintiffs registered this action as a *lis pendens*, and on the 29th of July, 1892, they applied for and obtained an order, by consent, appointing a receiver of the book and other debts comprised in the above-mentioned security, and the defendants were restrained from carrying out a certain agreement for the sale of their business and book debts to a limited company and from selling or disposing of any share or interest in the business or any of the property belonging to the business, otherwise than in the usual course of such business, in contravention of the covenants contained in the plaintiffs' mortgage of December, 1885. No notice was ever given to the debtors of the defendants of the plaintiffs' security, or of the action, or of the injunction, or of the appointment of a receiver. In 1893 the defendants made three assignments for value and by way of security to the London Banking Corporation of a number of debts comprised in the plaintiffs' security. Notice of these assignments was at once given by the banking corporation to the various debtors whose debts were so assigned. The banking corporation had no notice of the plaintiffs' security, nor of the action, nor of its registration as a *lis pendens*, nor of the order appointing a receiver and granting an injunction. On the 28th of November, 1893, the banking corporation obtained judgment against the defendants for the amount due from them to the banking corporation. After this, and not before—viz., on the 30th of November, 1893—the receiver took possession and claimed the debts. Thereupon the banking corporation took out a summons for liberty to get in the debts assigned to them.

Chitty, J., dismissed the summons, on the ground that the plaintiffs, by the registration of their action against the defendants as a *lis pendens*, had prevented the defendants conferring on third persons, pending the litigation, any right to the specific property in question in the action, which would be prejudicial to the claim of the plaintiffs, and he held that the doctrine of *lis pendens* was applicable whenever specific property was sought to be affected by the pending action, whether that property was realty or personalty.

The banking corporation appealed.

Horace Kent, for the appellants.—Apart from *lis pendens*, the appellants had no notice whatever. The doctrine of *lis pendens* is not applicable to personalty. All the cases on *lis pendens* relate to real estate, and the opinion of Lord Romilly, M.R., in *Berry* v. *Gibbons*, 21 W. R. 255, L. R. 8 Ch. App. 749n, is the only authority for saying that the doctrine of *lis pendens* is applicable to personalty, and the actual decision of Lord Romilly in that case was reversed by the Court of Appeal (21 W. R. 754, L. R. 8 Ch. App. 747). The enactments relating to *lis pendens* are 2 & 3 Vict. c. 11, s. 7; 23 & 24 Vict. c. 115, s. 2; and 30 & 31 Vict. c. 47. These Acts must be read, as to the effect of *lis pendens*, with reference to what was the previous practice in the Court of Chancery; and all the cases are cases of real estate: *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; *Ex parte Thornton*, 15 W. R. 292, L. R. 2 Ch. App. 171; *Price* v. *Price*, 35 W. R. 386, 35 Ch. D. 297. If the doctrine of *lis pendens* be applicable to personalty most commercial transactions would be impeded. For instance, no one could safely take an assignment of a bill of exchange or of shares or stocks without first searching the *lis pendens* register to see whether any action was pending

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

respecting such bill of exchange, shares, or stocks. The fact that in the present case an injunction had been granted and a receiver appointed is immaterial so far as the appellants are concerned, because they were no parties to the action between the plaintiffs and the defendants, and had no notice of the injunction or appointment of a receiver. [Lord HERSCHELL, L.C.—When a decree is made the *lis pendens* is gone, and then judgment takes effect; but a debtor can deal with his goods after judgment until the goods have been actually taken in execution. If the decision below is right, then *lis pendens* has a greater effect than judgment.] Yes. In the present case no judgment has yet been entered in the action; the action has only gone as far as the delivery of the statement of claim.

Levett, Q.C., and *Rowden*, for the plaintiffs.—The plaintiffs got an assignment of all the book debts of the defendants long before the banking corporation got their assignment. The priority of the plaintiffs is sought to be displaced by the banking corporation under the doctrine of *Dearle* v. *Hall*, 3 Russ. 1—viz., that the later assignee who has given notice to the debtor of the assignment gets priority over the earlier assignee who has not given such notice, but that doctrine has no application where there is a *lis pendens*, and where an injunction has been granted against parting with the property. The doctrine of *lis pendens* is as applicable to *choses in action* as to real estate when the *chose in action* is the subject-matter of a *lis*: *Ward* v. *Duncombe*, 42 W. R. 59, [1893] A. C., at p. 390; *Bellamy* v. *Sabine*, 6 W. R. 1, 1 De G. & J. 566, at p. 578. [DAVEY, L.J.—*Bellamy* v. *Sabine* was a case of real estate, and the transfer of real estate is always the subject-matter of an investigation of title. Ought we not to suppose that Lord Cranworth's observations in that case had reference to real estate only?] The doctrine of *lis pendens* depends on change of title pending litigation, and Lord Cranworth puts it on the ground of notice. [LINDLEY, L.J.—If you are right, and if *lis pendens* is notice, then the debtor has paid the wrong man, and would be liable to pay the debt over again.] It may not be notice to all the world; it is only notice as regards the subject-matter of the suit. It is the practice of conveyancers to direct a search of the *lis pendens* register on the transfer of personalty other than leaseholds—*e.g.*, a reversionary interest in Consols: see Comyn's Abstracts of Title, 4th ed., at p. 193; Elphinstone & Clark on Searches, at p. 164.

Kent replied.

Cur. adv. vult.

LINDLEY, L.J.—I have been asked by the Lord Chancellor to state that he has had the opportunity of reading and concurs in the judgments about to be delivered. [The Lord Justice stated the facts above set out, and proceeded:—] It was not disputed that if the plaintiffs' action had not been registered as a *lis pendens*, and if there had been no injunction or receiver, the banking corporation, having no notice of the plaintiffs' title, would have acquired a better title than the plaintiffs to the debts assigned to them, although they were comprised in the plaintiffs' earlier security. This was conceded on the authority of *Dearle* v. *Hall*, and is not open to controversy. But the plaintiffs contended, and the learned judge held, that, as the debts were the subject of an action to recover them, and such action was registered as a *lis pendens* and a receiver of those debts had been appointed, and the defendants had been restrained from dealing with them, the title of the defendants could not be allowed to prevail over that of the plaintiffs. The doctrine involved in this decision is very far-reaching, and is of great practical importance to business men, and it requires very careful examination. For the reasons which I will state, I am clearly of opinion that the doctrine is unsound and cannot be supported.

I will first consider the effect of the registration of the plaintiffs' action as a *lis pendens*, and I will then consider the effect of the order for an injunction and a receiver. In *Sorrell* v. *Carpenter*, 2 P. W. 482, the Lord Chancellor said:—"Where there is a conveyance made *pendente lite* . . . even although the alienation be for never so good a consideration, yet, if made *pendente lite*, the purchase is to be set aside, and this in imitation of the proceedings in a real action at common law, where, if the defendant alien after the pendency of the writ, the judgment in the real action will over-reach such aliention. But, where there is a real and fair purchaser without any notice, it is a very hard case, especially in a court of equity, to set such a purchase aside." The judgment in a real action, if in favour of the demandant, was that he recover seisin of the land, and the writ of execution upon it was a writ of *habere facias seisinam*, which directed the sheriff to cause the demandant to have seisin of the lands which he had recovered: see Roscoe on Real Actions, pp. 328, 341. There were no similar judgments or writs in action at common law to recover goods and chattels. Even in detinue the defendant could, before the Common Law Procedure Act, keep the chattel he had got on paying its value to the sheriff. It is true that the goods which a defendant had at the date of the writ of execution could be taken even from a subsequent purchaser, unless in market overt: see Com. Dig. "Execution," D. 2; but this is a very different matter. So far, therefore, as goods and chattels are concerned, the doctrine that no title could be made to them by an unsuccessful defendant pending litigation for their recovery had no foundation in common law, and if the rule was different in equity, such rule cannot be based on the principle that equity follows the law. Any such doctrine would, if logically carried out, practically greatly embarrass ordinary trade, and be, to say the least, highly inconvenient to every one except plaintiffs claiming goods. If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce—*e.g.*, bills of lading, dock warrants, wharfinger's receipts, nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. Such a doctrine would paralyze the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* or in the decisions of the courts. The first statute on the subject is 2 & 3 Vict. c. 11, s. 7. The language of this statute shows that the Legislature was dealing with "estates"—*i.e.*, land and land only. It is true that in the amending Act, 30 & 31 Vict. c. 47, s. 2, the word "property" is used instead of "estate," but this variation in language by no means warrants the inference that the Legislature was altering the law by extending the effect of registration to ordinary goods and chattels. Nor has it ever been so understood. Reliance was placed on *Bellamy* v. *Sabine*, but that was a case of real estate, and there is no ground for supposing that the observations made in that case were intended to apply to personal property. Similar remarks apply to the instructive judgments in *Winchester* v. *Paine*, 11 Ves., at p. 197, and *Metcalfe* v. *Pulvertoft*, 2 V. & B. 200. Again, reliance was placed on the practice of conveyancers who advise purchasers and mortgagees of personal estate to search the *lis pendens* registry. This is intelligible and reasonable enough. Conveyancers advise on

abstracts of title and always try and keep their clients out of difficulties and possible litigation. If an abstract of title to personalty is laid before a conveyancer, he naturally advises an intending purchaser or mortgagee to make such inquiries as experience shows to be prudent in order to avoid trouble and vexation in future. There is no case in the books which warrants the notion that the doctrine of *lis pendens* applies to personal property other than leasehold property. It is true that Lord Romilly in *Berry* v. *Gibbons* decided that the doctrine applied as well to goods and chattels as to land; but his decision was reversed on appeal, and there is nothing in the judgment of the Court of Appeal which justifies the inference that that court shared his opinion. The Court of Appeal gave an excellent reason for their decision—viz., that the registration of an administration suit as a *lis pendens* did not prevent an executor from disposing of the assets and conferring a good title to them. It was unnecessary to say or decide more. This was not the first case in which the Court of Appeal differed from the view taken by Lord Romilly of the effect of registering a proceeding as a *lis pendens*. In *Ex parte Thornton* a winding-up petition was registered as a *lis pendens* against a contributory, and Lord Romilly refused to set aside the registration. But on appeal the then Lords Justices Turner and Cairns reversed his decision, and it is impossible not to see from their judgments that they considered that the registration of the petition affected land only, and in that case the land of the company sought to be wound up. Lord Cairns (at p. 179, L. R. 2 Ch. App.) points out that section 153 of the Companies Act, 1862, expressly makes void alienations of a company's real and personal estate after a winding-up petition is presented, and he says distinctly that section 114, the *lis pendens* section, has no reference to personal estate at all.

Upon principle and authority I am of opinion that the doctrine in question is inapplicable to personal property other than chattel interests in land. The inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premisses for arriving at such a conclusion.

But then it is said that in this case there was not only a registered *lis pendens*, but an injunction and a receiver. But of these the present appellants had no notice whatever when they advanced their money and obtained and perfected their security. Their title is in no way affected by those orders, nor have the appellants, the bank, been guilty of any contempt of court. The case would have been different if the bank had had notice of the order appointing the receiver or granting the injunction, or even if the receiver had given notice to the debtors to pay their debts to him. Such a notice would have been equivalent to notice by the plaintiffs of the assignment to them.

Lastly, I am of opinion that, in addition to all other grounds, the *laches* of the plaintiffs disentitles them from invoking the aid of the court against the bank. The plaintiffs gave the debtors whose debts were assigned to them no notice of the assignment, nor of the action, nor of the injunction, nor of the appointment of the receiver. They left the defendants to carry on their business and deal with the debts owing to them as if no assignment of them had been made. The action was not prosecuted with diligence; no step was taken in it between July, 1892, and the end of November, 1893, by which time the bank had not only acquired and perfected their title, but had obtained judgment and sought to enforce it. This *laches* alone is fatal to the plaintiffs' case, and would be so even if the doctrine of *lis pendens* could be invoked by them: see Sugden's Vendors and Purchasers, citing his decision in *Drew* v. *Lord Norbury*, 3 Jo. & Lat. 267. The appeal must be allowed, with costs here and below.

DAVEY, L.J.—It is admitted that there is no recorded decision in the Court of Chancery or in this court in which the doctrine of *lis pendens* has been applied to the title to a chattel or *chose in action* so as to postpone a person taking *pendente lite* without notice, who but for the existence of the action would have a good title against the plaintiff, if the case of *Berry* v. *Gibbons*, before Lord Romilly, M.R., be excepted. The foundation of the doctrine has been said to be by analogy to what was done in real actions. If so, there is a *primâ facie* presumption that the doctrine was applicable to real estate only. There are undoubtedly to be found in the judgments of very eminent judges of the Court of Chancery statements of the doctrine which are in terms general and equally applicable to personal estate as real estate—the judgment of Plumer, V.C., in *Metcalfe* v. *Pulvertoft* is as good an example as any—and the maxim *pendente lite nihil innovetur* has been more than once cited. But it will be found on examination that such expressions of opinion, although general in terms, have been invariably made in cases dealing with real estate alone, and may, therefore, be interpreted as having reference to real estate only. The language of sections 4 and 7 of 2 & 3 Vict. c. 11, providing for registration of *lis pendens* and the re-registration thereof, is in my opinion favourable to the inference that the provisions of those sections were considered to apply to real estate only. And it is impossible to read the judgments of Turner and Cairns, L.JJ., in *Ex parte Thornton* without coming to the conclusion that those learned judges treated the registration of *lis pendens* as affecting real estate only; and indeed Cairns, L.J., expressly says so at p. 179 (L. R. 2 Ch. App.), although, as the particular question was not then under discussion, his words cannot be regarded as a decision. Great weight must, of course, be given to the opinion of a learned and experienced judge like Lord Romilly; but his decision on the case before him was overruled on other grounds, and I cannot agree with Chitty, J., in holding that the Court of Appeal, because they found other sufficient grounds for differing from Lord Romilly's judgment, and did not expressly dissent from his view of the law, must be taken to have given it the weight of their authority.

In this state of the authorities I am of opinion that the Court of Appeal is at liberty to say, and must say, whether they will apply the doctrine to a case like the present, affecting the title to *choses in action*, and in coming to a decision on that point the court ought to have regard to the effect of such an application on the business and dealings of mankind. This very case is as good an illustration as another. A man claiming to be mortgagee of the present and future book debts of a firm commences an action to enforce his mortgage—obtains by consent the appointment of a receiver and an injunction to restrain the defendants dealing with the book debts, and does nothing more. Neither the plaintiff nor the receiver gave any notice to the debtors from whom the book debts are due which are left in the order and disposition (to borrow an expression from the bankruptcy law) of the defendants. A year afterwards the defendants assign certain book debts (some of which were not even due at the date of the commencement of the action) to the present appellants, who, without any notice of the

plaintiff's claim, complete their title by giving notice to the debtors. It is said they ought to be postponed to the plaintiff, because the latter, on the 1st of July, 1892, registered the action as a *lis pendens*. Is it reasonable or in accordance with the habits of business persons who deal in shares of joint stock companies, bills of exchange, bills of lading, book debts, and other similar property to search the register of *lis pendens* before concluding any contract of sale or mortgage, at the risk of losing their money, if the property in question is the subject of an action or of an order for an injunction or a receiver? Suppose an action to enforce a trust against the legal registered holder of shares in a railway company; he sells them, in breach, perhaps, of an injunction, and the purchaser (probably not the immediate purchaser from him) takes a transfer. Would it be right or just to hold that transferee subject to whatever equitable rights may ultimately be established in the action? Could the multifarious business of life be carried on on such terms? Real estate and leaseholds stand on a different footing, because they are the subject of title, and no prudent person in this country deals with them without at least some investigation of title, and this is known and recognized among business people.

It may be said that the present appellants derive title through the breach of an injunction by the defendants. Be it so. And in that case the defendants, who have set at defiance the order of the court, will richly deserve the severest treatment the court can deal out to them. But how does this affect the appellants, who are not bound by the order and have no notice of it? I remember the warning of Lord Nottingham in the *Duke of Norfolk's case*, 3 Cas. in Ch. 33: "Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."

Not, then, finding any decision in the history of the court which binds me to decide against the appellants and being of opinion that so to decide would not "stand with the reason of mankind," I think that this appeal ought to be allowed. I think that the *laches* of the plaintiffs in prosecuting this action and their *laches* in acting on the order for a receiver which they obtained, would in the present case be sufficient grounds for not postponing the appellants to their claims; but I have preferred to take the larger and higher ground.

Appeal allowed.

Solicitor for the appellants, *Thomas Edwards.*

Solicitors for the plaintiffs, *Lindsay, Greenfield, & Mason.*

From Chan. Div. (Lord Herschell, L.C., and Lindley and Davey, L.JJ.) — July 24, 26; Aug. 9, 1894.

In re CLERGY ORPHAN CORPORATION. (*a.*)

Charity—Endowment—Voluntary subscriptions and donations—Investment in land—Charity Commissioners—Jurisdiction—Charitable Trusts Act, 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 62, 66.

Whether the property of a charity is applicable to the general purposes of the charity, or only to some specific purpose in connection with the charity, is not the true test of whether the property is an endowment within the meaning of the Charitable Trusts Act, 1853, *although this circumstance is material in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in section* 62.

The reasoning of Romilly, M.R., *in* Governors of Charity for Relief of Poor Widows, &c., of Clergymen *v.* Sutton, 8 *W. R.* 167, 27 *Beav.* 651, *on this point, dissented from.*

Held, on the true construction of sections 62 *and* 66 *of the Charitable Trusts Act,* 1853, (1) *that income of any endowment* primâ facie *means income derived from any invested funds;* (2) *but that, in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the jurisdiction of the Charity Commissioners; and* (3) *that such bequests and donations, and the income thereof, are not brought within the jurisdiction of the Charity Commissioners by the fact of their being invested by the governors of the charity.*

Appeal from Kekewich, J.

Land situate at St. John's Wood, and belonging to the charity known as the Clergy Orphan Corporation, was taken by a railway company under the powers contained in their special Act (56 Vict. c. 1), s. 51, whereby the purchase-money had been fixed at £40,000, of which £5,000 had been paid into court under the Lands Clauses Act, 1845.

The land had been originally bought by the charity, under the powers of their special Act of 1809 (49 Geo. 3, c. xviii.), with moneys produced by the sale of Consols, which were originally derived from voluntary contributions available for the general purposes of the charity, and capable of being dealt with as income. The charity had no express power given by its special Act of 1809 to sell land.

The charity presented a petition for the payment out to them of the £5,000 in court as being absolutely entitled thereto. The petition was opposed by the Charity Commissioners, on the ground that the fund in court represented land which the charity had no power to sell without the consent of the Charity Commissioners.

The Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62, enacts that "this Act shall not extend or be applied to . . . any society for religious or other charitable purposes, . . . wholly maintained by voluntary contributions; . . . and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may be legally applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board"—*i.e.*, the Charity Commissioners—"or the powers or provisions of this Act, and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now, or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation

(*a.*) Reported by M. J. BLAKE, Esq., Barrister-at-Law.

or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act." By section 66 of the same Act it is enacted that, "in the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to, or be held in trust for, any charity, or for all or any of the objects or purposes thereof; and the expression 'land' shall extend to and include buildings, tenements, and hereditaments . . . of every tenure and description."

Kekewich, J., held that, as the fund in court represented land which was originally purchased by the charity out of funds voluntarily contributed for the general purposes of the charity, it was not an endowment within the meaning of the Charitable Trusts Act, so as to require the consent of the commissioners to the sale of the land, and accordingly he ordered that the fund in court should be paid out to the charity.

The Charity Commissioners appealed.

Sir J. Rigby, A.G., and *Vaughan Hawkins*, for the appellants.—This is certainly not a charity "wholly maintained by voluntary contributions," and consequently does not fall within the first exemption in section 62 of the Act of 1853. It is a "mixed charity"—*i.e.*, a charity "maintained partly by voluntary subscriptions and partly by income arising from any endowment"; and as regards such a charity, the second part of section 62 expressly enacts that the provisions of the Act shall extend and apply to the income arising from the endowment. This fund in court is an endowment within the meaning of section 66 of the Act of 1853. The charity had invested the savings and accumulations of unused voluntary subscriptions and donations first in the purchase of Consols, and afterwards the charity sold the Consols and invested the proceeds in the purchase of land, which land is now represented by the fund in court. The investment in Consols and afterwards in land was not intended as a mere temporary, but as a permanent, investment, and consequently such investment must be regarded as capital, and became thenceforth applicable only as capital. Such an investment constitutes an endowment within the meaning of the Act, and whether such investment is applicable to the general purposes of the charity or applicable only to some particular purpose in connection with the charity, it is none the less an endowment. In the case of *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton*, 8 W. R. 167, 27 Beav. 651, Lord Romilly held that the test whether property of a charity was an endowment within the Act or not was whether it was applicable to the general purposes of the charity or only to some specific purpose in connection with the charity, but that case cannot be supported. Even if the case was rightly decided, the present case is distinguishable, as the fund in court is not applicable to the general purposes of the charity, it represents land, and the charity have no power under their special Act to sell land, and consequently cannot apply the purchase-money as income merely. *In re St. John-street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618, merely followed *Sutton's case*. It does not follow that because the property of the charity was at one time exempt it must be always exempt from the jurisdiction of the commissioners. The real test is, not what the property was in its origin, but what it was at the time of being dealt with.

They cited *Attorney-General* v. *Mayor of Newark-upon-Trent*, 1 Ha. 395; *In re Sir Robert Peel's School, Tamworth*, 16 W. R. 773, L. R. 3 Ch. App. 543.

Warmington, Q.C., and *Dibdin*, for the respondent charity.—*Governors of the Charity for Relief of Poor Widows and Children of Clergymen* v. *Sutton* governs this case. That case has been followed in *Royal Society of London* v. *Thompson*, 29 W. R. 838, 17 Ch. D. 407, in *Corporation of the Sons of the Clergy* v. *Skinner*, 41 W. R. 461, [1893] 1 Ch. 178, and in *Ex parte Western Synagogue*, 26 SOLICITORS' JOURNAL, 435, and it was in substance rightly decided. The real question is, not whether this fund is or is not an endowment, but whether it is or is not capable of being spent as income. This fund originally arose from voluntary subscriptions capable of being applied as income to the general purposes of the charity, and did not lose that character by being invested in Consols and afterwards in land.

Sampson, for the railway company.

Cur. adv. vult.

Aug. 10.—The judgment of the COURT (Lord HERSCHELL, L.C., and LINDLEY and DAVEY, L.JJ.) was delivered by

DAVEY, L.J.—The real and substantial question on this appeal is, whether the Clergy Orphan Corporation is subject to the jurisdiction of the Charity Commissioners and to the provisions of the Charitable Trusts Act so far as regards their land in St. John's Wood, which is or was the site of their school, but has been sold to a railway company under the provisions of an Act of Parliament. The corporation is undoubtedly a charity within the meaning of the Acts. The question is whether the land and the purchase-money which now represents it are exempted from the jurisdiction by the provisions of section 62 of the Charitable Trusts Act, 1853. The first exemption is of charities "wholly maintained by voluntary contributions." It is not contended that the corporation is within this description. But we may observe that, if these words are read in their widest and most liberal meaning, every charity in the kingdom would be exempt, for we suppose that the ultimate source of all charitable endowments is to be found in the spontaneous bounty of founders and supporters. The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will. The second exemption which applies to this case is in the following words: "Where any charity is maintained partly by voluntary subscriptions, and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscription, shall be subject to the jurisdiction or control of the said board"—*i.e.*, the Charity Commissioners—"or the powers or provisions of this Act."

Before we proceed to comment on this enact-

ment we ask what is meant by an "endowment." The interpretation of this word is given in section 66, which enacts as follows:—"The expression 'endowment' shall mean and include all lands and real estate whatsoever of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to, or be held in trust for any charity, or for all or any of the objects or purposes thereof." We can see no sufficient reason for limiting or restricting the meaning of these words, or for confining the words to property held upon some special purpose or trust, in connection with a charity as distinguished from the general purposes of the charity. On the contrary, the words, "in trust for any charity or for all or any of the objects or purposes thereof," seem to us to preclude any such limited construction. We conclude, therefore, that the words mean what they say, and that all property of every description belonging to or held in trust for a charity, and whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income, is an endowment within the meaning of the Act.

We return now to section 62. We observe that the words used are "voluntary subscriptions." We think that these words are used in a popular sense, and denote recurring gifts repeated annually or otherwise, with more or less regularity. Donations or bequests, which would be included as well as subscriptions, in the general term contributions, are dealt with in the following sentence. The next words to be noticed are—"partly by income arising from any endowment." Bearing in mind the definition of endowment, we think that these words, if they were not qualified by the subsequent context, would mean, and so far as they are not so qualified do mean, income derived from any invested funds belonging to the charity, and any charity which depends for its maintenance partly on voluntary subscriptions and partly on income from investments would be within the description. The next sentence, however, must be read as a proviso on, or qualification of, the previous enactment, because it is made applicable only to "any such charity as last aforesaid," *i.e.*, to what has been called at the bar a mixed charity. The effect of this proviso is, in our opinion, to exempt from the jurisdiction every donation or bequest for the general purposes of the charity which is given on such terms that the capital may legally be applied for the maintenance of the charity, but to leave subject to the jurisdiction, an endowment for general purposes the income only of which is applicable to maintenance. We are further of opinion that, if the exempted donation or bequest or any subscriptions are in fact invested by the governors with the intention that they shall form a permanent fund or endowment, such investments or the income thereof are exempt from the jurisdiction, and such income is excepted from the "income from endowment" in the previous sentence. That this is so is, we think, made clear from the last sentence of the section specially referring to donations, bequests, and voluntary subscriptions which have been invested. This sentence is again a proviso on the immediately preceding words. The effect of it is, that the governing body, by appropriating for some specific purpose and investing a donation or bequest, or any subscriptions, which would otherwise be exempt, do not bring such appropriated endowment or the income thereof within the jurisdiction.

We have thus far dealt with the construction of the clause apart from authority. In the case of *The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen* v. *Sutton* Lord Romilly put a construction on these sections. Although in the result Lord Romilly's conclusion may not differ much from that which we have endeavoured to express, we cannot agree with him in the reasons which he gave for his judgment. We do not think it was a legitimate mode of interpreting the Act first to consider the 62nd section and then to construe the interpretation clause by the 62nd section of the Act. Lord Romilly held that the word "endowment" in the 66th section applied only to endowments for a special purpose in connection with a charity, and not to endowments for the general purposes of the charity. As we have already said, we cannot agree with this construction of the 66th section, and we may add that it seems to us inconsistent with other sections: see, for example, the 44th section. Lord Romilly's view has been followed in other cases, but apparently on his authority without the expression of any opinion as to its correctness by the judges who adopted and followed it. The test whether the property of a charity is an endowment within the meaning of the Act is not whether it is applicable to the general purposes of the charity or only to some specific purpose in connection with it, although this circumstance may be important in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in section 62.

The corporation now before the court was incorporated in the year 1809 by an Act of Parliament by which it was recited that the society had been formed in the year 1749, and had been supported by the voluntary subscriptions and donations of charitable and well-disposed persons. The corporation was empowered to purchase and hold lands for the purposes of the charity, and by section 2 the governors were empowered to apply and dispose of the moneys and funds already given, and which should from time to time be contributed, and all other moneys and funds belonging to the corporation, for the purposes mentioned in this Act, and for any other purpose relating to the corporation and for the benefit of it at their discretion.

In the year 1858 the governors sold out £6,400 Consols, part of a larger sum then belonging to the corporation, and out of the proceeds purchased the reversion of the land in St. John's Wood, which they then held on lease and on which the school for the clergy orphans had been erected. It was not disputed by the counsel for the commissioners that the Consols so sold out arose from the investment of subscriptions, donations, and bequests which the governors might have legally applied as income. We cannot hold that these subscriptions, donations, and bequests lost that character by being invested in Consols. Did they lose it when the Consols were sold and the proceeds applied in the purchase of land? It seems at first sight a strong thing to hold that lands purchased and held for the purpose of carrying on the charitable work of the corporation are not part of the permanent capital endowment of the corporation. But we are unable to say that the investment in land altered the character of the funds invested. The retention of the lands was not essential to the existence of the charity, for the corporation might have bought or rented schools elsewhere, or a site for other schools might have been given to them. In these circumstances, we cannot hold that the funds ceased to be legally applicable as income at the discretion of the governors. The governors for the time being could not, we think, alter the destination of the funds, or the trusts upon which they were held by investing

them in land, or deprive their successors of the discretion vested in them. We are therefore of opinion that the proceeds of the sale of the lands are still applicable as income to the general purposes of the charity, and therefore exempt from the jurisdiction of the commissioners and the powers and provisions of the Charitable Trusts Acts.

It is unnecessary to say what would be the case if a charity had no subscription list, and relied for its maintenance wholly on the income of endowments derived from voluntary donations for its general purposes in past years which had been invested and capitalized. We will only observe that it is for those who claim an exemption to make it out, and the provisions of the Act on which we have commented seem to apply only to a charity maintained partly by voluntary subscriptions and partly by income of endowments.

The result of our judgment, therefore, is (1) that income of any endowment *primâ facie* means income derived from any invested funds; (2) but that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests, and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift, are exempt; and (3) that such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body.

There remains the question whether the learned judge was right in directing payment of the £5,000 to the corporation. Mr. Vaughan Hawkins contended that a charity cannot sell its land by law independently of the Charitable Trusts Acts. We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances: *Attorney-General* v. *Warren*, 2 Swanst., at p. 302. But we doubt whether this principle is applicable to a case where the land represents the investment of funds which the governors are empowered to apply and dispose of for any purpose of the charity at their discretion. The authorities referred to seem to contemplate a case where the land is part of the permanent endowment of a charity, the income only of which is applicable by the governors. We are therefore of opinion that, if the money in court were reinvested in land, the governors could sell it at their discretion and apply the proceeds as income, and the learned judge was therefore right in directing payment to the corporation. We are of opinion that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant, *J. M. Clabon.*

Solicitors for the respondents, *Dawes & Sons; Cunliffes & Davenport.*

High Court of Justice.

Chan. Div. Chitty, J. — Nov. 7, 16.

In re TURNER.
TURNER *v.* SPENCER. (a.)

Mortgage—Construction—Reversionary interest—Proviso for redemption on payment of principal with interest—Covenant for payment of interest half-yearly—Arrears of interest—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 42.

A mortgage of a reversionary share in the proceeds of realty and in personalty in court contained a proviso for redemption upon payment, on or before the death of the life tenant, of the principal sum, "with interest for the same in the meantime" at the specified rate. Then followed distinct covenants for payment of principal on the life tenant's death and of interest in the meantime half-yearly respectively; but the proviso did not refer to these covenants. When the life tenant died some thirteen years' interest was unpaid.

Held, that the proviso for redemption was a distinct contract, and that the covenant for payment of interest ought not to be imported into it; and, therefore, that the mortgagees' right to all the interest unpaid, which was expressly given by the proviso, was unaffected by any statute of limitations or principle of equity.

Sutton *v.* Sutton, 31 *W. R.* 369, 22 *Ch. D.* 511, *considered.*

Summons.

A reversionary share in the proceeds of sale of realty and in personalty belonging to an estate which was being administered by the court was mortgaged by the person entitled thereto, subject to the interest of his father, the tenant for life. The reversion had recently fallen into possession by the death of the tenant for life, the real estate had since been sold in the above action for administration of the estate, and the share of the mortgagor in the proceeds of sale and in the personalty had been carried to the separate account of the mortgagees and the trustee in liquidation of the mortgagor. The proviso for redemption was that, if the mortgagor should, on or before the death of the tenant for life, pay the principal sum "with interest for the same in the meantime" at the specified rate, the mortgagees would reconvey. Then followed two distinct covenants, one for payment of the principal on the death of the life tenant, the other for payment of interest in the meantime half-yearly at the specified rate. The proviso did not refer to the covenants. Thirteen years' interest was in fact unpaid.

The summons, which was an ordinary summons in the administration action, asked for payment to the trustee of the whole of the fund standing to the separate account, but at the bar the mortgagees' right to payment of principal and six years' interest was admitted.

Farwell, Q.C., and *Butcher*, for the trustee.—The mortgagees' security comprises "money payable out of land" within 3 & 4 Will. 4, c. 27, s. 42: *Bowyer* v. *Woodman*, L. R. 3 Eq. 313, 15 W. R. Ch. Dig. 91; and they are therefore not entitled to recover more than six years' arrears of interest. The money secured by the mortgage and the covenant is one and the same, so that when the right of action in respect of the covenant is gone the money to which the covenant relates cannot be recovered by any other means: *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511; *Fearnside* v. *Flint*, 31 W. R. 318, 22 Ch. D. 579. Other cases are *In re Frisby, Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106; *Hebblethwaite* v. *Peever*, 40 W. R. 318, [1892] 1 Q. B. 124; and *In re Nugent's Trusts*, 19 L. R. Ir. 140. *Hunter* v. *Nockolds*, 1 Mac. & G. 640, and *Smith* v. *Hill*, 9 Ch. D. 143, 26 W. R. Dig. 146, are not in point. *In re Slater's Trusts*, 27 W. R. 448, 11 Ch. D. 227, is in our favour, and *In re Marshfield, Marshfield* v. *Hutchings*, 35 W. R. 491, 34 Ch. D. 721, and *Mellersh* v. *Brown*, 38 W. R. 732, 45 Ch. D. 225, are distinguishable.

Levett, Q.C., and *J. G. Wood*, for the mortgagees

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

—The mortgagor can only redeem on paying what he has agreed to pay, and the rule applicable to foreclosure is the same. See *Harlock* v. *Ashbury*, 30 W. R. 327, 19 Ch. D. 539, as to foreclosure. Neither *Sutton* v. *Sutton* nor section 42 of 3 & 4 Will. 4, c. 27 apply at all, nor would that case support the argument. In *Clarkson* v. *Henderson*, 28 W. R. 907, 14 Ch. D. 348, the mortgagee of reversionary property was not limited to six years' interest.

Farwell, Q.C., replied.

Nov. 16—CHITTY, J.—The question is whether the mortgagees are entitled by virtue of their mortgage security to all the interest unpaid, or only to six years' interest. [His lordship here stated the abovementioned facts, and continued:] The argument for the trustee that no more than six years' interest can be recovered was founded on *Sutton* v. *Sutton*. The decision of the Court of Appeal in that case is binding on me, and I accept it without comment. The subsequent history of that case is remarkable. After the demurrer had been overruled by the Court of Appeal, the plaintiffs amended their statement of claim by alleging (as was the fact) that the mortgage comprised some land in Jamaica which, by reason of its trifling value, had not been mentioned in the original pleadings: and having thus displaced the ground upon which the Court of Appeal had proceeded, there being no Statute of Limitations for the shorter period of twelve years applicable to the Jamaica land, they obtained payment of the money due under the covenant, and by a judgment of the court in the action. This subsequent history of the case, however, leaves the decision of the Court of Appeal untouched, although it may explain why an appeal was not carried to the House of Lords. Upon the foundation of *Sutton* v. *Sutton* the trustee's counsel have ingeniously raised an elaborate superstructure, into the details of which I do not enter, because the entire argument is swept away by the terms of the mortgage deed itself. [His lordship here referred to the frame of the proviso for redemption and covenants for payment of the principal sum and interest in the meantime, and continued:]

The proviso for redemption does not refer to the covenants. It is a distinct contract, and there is no ground for importing into it the covenant for payment of interest. Now, on the proviso for redemption two things are clear: first, that within the express terms of that contract the mortgagor was entitled to redeem at any time before the death of the tenant for life on payment of the principal sums with interest in the meantime; secondly, that the mortgagees were not entitled to institute any action to enforce by foreclosure or otherwise their mortgage charge before the death of the tenant for life. This is the effect of the express bargain between the parties. Default in payment of interest under the covenant would not have entitled the mortgagees to enforce their security. This application in point of form is neither foreclosure by the mortgagees nor redemption by the trustee. The application is made by ordinary summons by the trustee asking for payment of the fund to himself; probably the better view would be to treat the application as one for redemption. But I lay no stress on this point, because I think that the rights of the parties to the fund would be the same, whether the question of interest was raised in an action for foreclosure or for redemption. If on or before the death of the tenant for life the mortgagor had sought to redeem, he would have been bound to pay all the interest unpaid down to the redemption. If the mortgagees had brought an action to foreclose on or after the death of the tenant for life, they would have been entitled to all the interest unpaid down to the foreclosure. There is no statute of limitations that could be well pleaded against the mortgagees in the only action that they could have instituted: the principal and interest on the charge could not have been claimed by them under the proviso until after the death of the tenant for life. I am asked to import the covenant for payment of interest into the proviso for redemption for the purpose of making the interest in arrear; this, I think, would be to alter the express contract of the parties in relation to the charge. The object and effect of a foreclosure suit when worked out is to recover the mortgaged property—*i.e.*, to make the mortgagee's title to the property absolute by barring the right to redeem. The distinction between the charge and the personal covenant for payment existed before the Judicature Act, and still exists. In the old Court of Chancery a mortgagee could not sue for payment on the personal covenant; he was entitled to bring his suit for foreclosure in that court, and, without any interference by the court of equity, to bring his action on the covenant in the court of common law. Since the Judicature Acts he can maintain both actions in this division, and the well-known forms of judgment in modern practice keep distinct the two distinct remedies. According to one of the reasons given in *Sutton* v. *Sutton*, the security on land is the greater, and the personal liability on the covenant is the lesser. But, without pursuing the matter further, I hold that the mortgagees' right to all the interest unpaid is expressly given by the redemption clause, and is unaffected by any statute of limitations or principle of equity.

Application refused.

Solicitor for the applicant, *S. Seal.*

Solicitors for the mortgagees, *Flower, Nussey, & Fellowes.*

Chan. Div. Chitty, J. — Nov. 13, 14.

SANGUINETTI v. STUCKEY'S BANK. (*a.*)

Bankruptcy—Voluntary settlement—Avoidance—Puisne incumbrancers—Priority—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

The avoidance of a voluntary settlement under section 47 *of the Bankruptcy Act*, 1883, *does not give the settlor's trustee in bankruptcy any priority over puisne incumbrancers.*

Ex parte Payne, In re Cross, 27 *W. R.* 808, 11 *Ch. D.* 539, *and* Ex parte Blaiberg, In re Toomer, 31 *W. R.* 906, 23 *Ch. D.* 254, *followed.*

By a voluntary post-nuptial settlement executed in March, 1883, a tenant for life of settled property charged his life interest with an annuity of £800 per annum in favour of his wife and children. Subsequently to the execution of such settlement he gave the plaintiff an equitable charge on such life interest. In February, 1885—*i.e.*, within two years after the date of the settlement—the settlor became bankrupt, and the settlement was set aside as against his trustee in bankruptcy under section 47 of the Bankruptcy Act, 1883. The plaintiff having brought a foreclosure action, the trustee in bankruptcy claimed on behalf of the unsecured creditors to take the £800 a year comprised in the settlement in priority to the plaintiff's charge.

Farwell, Q.C., and *Fossett Lock*, for the trustee in

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

bankruptcy.—The plaintiff's charge is not accelerated. Under section 47 the settlement is only "void against the trustee in the bankruptcy." He is entitled to keep the instrument alive against all puisne incumbrancers, just as if the security for the £800 a year had been valued and given up to him and the annuity proved for, as in *Cracknall* v. *Janson*, 6 Ch. D. 735, 26 W. R. Dig. 148.

Levett, Q.C., and *George Henderson*, for the plaintiff.—The case is covered by the analogous cases under the Bills of Sale Acts. A trustee who sets aside a bill of sale under these Acts cannot stand in the place of the grantee, and thus acquire priority over subsequent incumbrancers: *Ex parte Payne, In re Cross*, 27 W. R. 808, 11 Ch. D. 539, following *Ex parte Leman, In re Barrand*, 25 W. R. 65, 4 Ch. D. 23; compare *Ex parte Blaiberg, In re Toomer*, 31 W. R. 906, 23 Ch. D. 254.

Kenyon Parker and *J. W. Baines*, for other parties.

CHITTY, J.—The point that I have to consider is the effect of the bankruptcy order which set aside the settlement as against the trustee in bankruptcy. The present plaintiff, being a secured creditor and standing outside the bankruptcy proceedings in virtue of his security, was not a party to the order, and is not affected by it. So far as he is concerned the order is *res inter alios acta*.

Now the defendant, the trustee in bankruptcy, says that the settlement is declared to be void as against him only, and that, therefore, the result is that it is not declared void as against the plaintiff in the present action. That proposition on the part of the trustee is correct. The only person who gets, on the face of the order, the benefit of the order is the trustee in bankruptcy. The order appears to have been made in virtue of the 47th section of the Bankruptcy Act, 1883, the provisions of which, shortly stated, are to this effect, that a settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of the wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, &c. The settlement here, being made within two years of the bankruptcy, fell within that portion of the section.

Now it has been argued on the part of the trustee in bankruptcy that he is trustee for the unsecured creditors. That proposition again I think is correct. The mortgagee stands outside the bankruptcy. He may come in under the bankruptcy subject to the provisions relating to mortgagees who come in. I accept the argument for the defendant that the trustee in the bankruptcy means the trustee for the general body of unsecured creditors, and that this avoiding against the trustee does not avoid in favour of a mortgagee for whom the trustee in the bankruptcy is not trustee. But that leaves the question open with regard to the effect of this order, and here a somewhat curious point seems to arise. The defendant, as was shown in the argument ultimately developed at the bar, is claiming the benefit of the order as against the plaintiff, and the argument is that the settlement, being avoided against the trustee, is avoided for the benefit of the general body of unsecured creditors, and that the result is that this proceeding, to which the secured creditors—namely, the plaintiff and the other *puisne* incumbrancers in this suit—were not parties, has been to vest in the trustee the property which purported to pass by the settlement, which settlement, at the instance of the trustee, the court has declared to be void as against him. I think that it is not an incorrect statement of the line of defence to say that the defendant trustee, in the result of the argument, is endeavouring to set up as against the mortgagee incumbrancers, subject to whose *bonâ fide* title the property of the bankrupt vested in him, a settlement which he has himself, through the action of the court, set aside—set aside, I agree, not generally, but set aside so far as relates to him.

Now the 47th section of the Act does not use the term "fraud." No doubt, having regard to the course of legislation on this subject, the Legislature considered, without mentioning fraud on the face of the section, that the settlements referred to, with the exceptions mentioned, ought not to stand as against the trustee in bankruptcy. It is noticeable that settlements made in good faith for valuable consideration are excepted. I think it is not necessary for me to say whether the trustee has obtained that order against the settlement on the footing that the settlement was fraudulent. I think the better mode of expressing myself is to say that it has been avoided under this section. But being avoided under that section against the trustee does not, in my opinion, enable the trustee to say that this order, coupled with the 47th section and the other sections of the Act, had the effect of transferring to him all the beneficial interests of the parties who were interested in the settlement—that is to say, all the beneficial interests to the extent that would be required to answer the trustee's claim in bankruptcy for the unsecured creditors. Whether the settlement is void or not void as against the incumbrancers is a question left untouched by the 47th section, and it is clear that the plaintiff might, if so advised, have impeached the settlement in this action, and brought the persons beneficially interested under the settlement before the court for the purpose of having it declared that the settlement was void as against him a creditor, and might have obtained a proper judgment to enforce his securities. The plaintiff did not take that course.

I think the parties, as I tried to express it in the commencement of this judgment, have come here to have this one question decided, and this only—whether the effect of the order obtained is to pass the property in the settlement to the trustee in bankruptcy. In my opinion the effect of that order is not such as is contended for. It would be strange that that section should have the effect of vesting the property comprised in the settlement in the trustee as against incumbrancers or mortgagees outside the bankruptcy.

In my opinion the principles established by *Ex parte Payne* and *Ex parte Blaiberg*, cited at the bar, apply to this case, and I cannot find any just or sufficient ground for saying, consistently with the course of authority on this subject, that the property comprised in the settlement has passed to the trustee in bankruptcy. I am strongly impressed with the peculiar position taken up by the trustee in bankruptcy when he says that the very document that he had set aside as against himself is still a document or a settlement that he can set up as against the plaintiff. I cannot accede to that view, and the defendant's contention therefore fails.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *John Trevor Davies*, Sherborne, Dorset; *Richard Furber; G. J. Coldham.*

Chan. Div. North, J. — Nov. 15.

NATIONAL FOLDING BOX AND PAPER CO. v. NATIONAL FOLDING BOX CO. (LIMITED). (a.)

Company—Name—Calculated to deceive—Striking out paragraph of affidavit.

A foreign company trading in this country is entitled to restrain the use of a name so similar as to be calculated to deceive its customers.

To state that the members of a company which is plaintiff are undischarged bankrupts is irrelevant to the action, and a paragraph containing such an allegation will be struck out.

Motion.

The plaintiff company manufactured their goods in America, but sold them in this country. The defendant company, who formerly traded as J. M. Parmenter & Co. (Limited), adopted the name of the National Folding Box Co. in June, 1894. There was evidence that the names of the two companies were so similar that they were calculated to lead persons to take the goods of the defendant company instead of those of the plaintiff company.

Levett, Q.C., and *Beddall*, for the plaintiff company, said that the names were so similar as to lead to confusion and deceive customers of the plaintiff company.

Byrne, Q.C., *Crump, Q.C.*, and *E. Lewis Thomas*, for the defendant company.—One company manufactures in America, one here. "National" means the country of manufacture—the United States in the case of the plaintiff company. Mere similarity of name will not induce the court to grant an injunction. [They cited *London and Provincial Law Assurance Society* v. *London and Provincial Joint-Stock Life Insurance Co.*, 17 L. J. Ch. 37; *London Insurance* v. *London and Westminster Insurance Corporation*, 32 L. J. Ch. 664, 11 W. R. Ch. Dig. 43; *Colonial Life Insurance Co.* v. *Home and Colonial Insurance Co. (Limited)*, 12 W. R. 783, 33 Beav. 548; *Merchant Banking Co. of London* v. *Merchants' Joint-Stock Bank*, 26 W. R. 847, 9 Ch. D. 560; *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512, 28 W. R. Dig. 229.] At all events, the matter should stand over until the trial.

NORTH, J.—The injunction must go. It is now suggested for the first time that the matter should stand until the trial, but I cannot accede to that. It is said that there is no evidence that taking the name of the plaintiff company will result in deceiving. I think that there is; the only difference in the titles is the word "Paper," and the presence of that word would not prevent persons being deceived. The evidence as to the probability of people being deceived is uncontradicted. Mr. Crump says that "National" means "American" in one case and not in the other; but the name does not express this; and although the manufacture may be in America, the plaintiff company sell their goods and are entitled to protection here. The defendant company is trying to pass off its goods as those of the plaintiff company, and it has no right to make such misrepresentations. I think the names similar. The defendant company adopted the name only last June, and no sufficient reason for the change is given.

The plaintiff company is entitled to an order as asked, and the defendant company must be restrained from using the title of the "National Folding Box Co.," or any other colourable imitation of the plaintiff company's name.

In one of the affidavits filed in opposition to the motion it was alleged that two of the members of the plaintiff company had had receiving orders made against them.

Levett, Q.C., moved to strike out the paragraph containing this allegation.

E. Lewis Thomas.—This is relevant. It shows the position of the manager and secretary of the plaintiff company.

NORTH, J.—The statement complained of is that two of the members of the plaintiff company have had receiving orders made against them. That has nothing to do with the action, for the company is plaintiff, and not the individuals who compose it, and the paragraph has only been introduced for purposes of prejudice. The plaintiff company is entitled to succeed, and the paragraph must be struck out, with costs.

Solicitor for the plaintiff, *J. R. Pakeman.*

Solicitors for the defendants, *Bird, Moore, & Strode.*

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. — May 24; Oct. 25.

Ex parte THE VICAR OF CASTLE BYTHAM. (a.)

Settled land—Money in court under Lands Clauses Act—Application of—Land limited to vicar "and his successors"—Glebe land—Terminable rent-charges—Redemption of—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 1, 32—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69.

By an award made under an Inclosure Act of Geo. III. lands were conveyed to the then vicar of C. "and his successors." A portion of these lands was taken by a railway company in pursuance of their compulsory powers, the purchase-money being paid into court. In 1878, 1879, *and* 1884 *the vicar of C. carried out certain improvements on the glebe, and, to defray the cost of these improvements, with the consent of the then patrons of the living, created rent-charges upon the glebe land, repayable by half-yearly payments during a fixed period. The vicar made application to the court that a portion of the purchase-money might be applied in redemption of the rent-charges.*

Held, that the land sold to the railway company was not "settled land" within the meaning of section 1 *of the Settled Land Act*, 1882; *that the word "settlement" in section* 32 *of the Settled Land Act*, 1882, *must be read as having the same wide meaning as the word "settled" in section* 69 *of the Lands Clauses Act; and that, under those two sections, read together, and section* 1 *of the Settled Land Act*, 1887, *the court had jurisdiction to grant the application; but that the case was not one in which the court would exercise its jurisdiction in favour of the applicant.*

By virtue of an Inclosure Act of Geo. III. and an award made thereunder a piece of land was conveyed to the then vicar of Castle Bytham, in Lincolnshire, "and his successors." A part of this land was taken, under their compulsory powers, by the Midland Railway Co., who paid the purchase-money into court. The purchase-money had remained

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

in court up to the present time, the interest having been in the meantime paid to the vicar for the time being under orders of the court.

In 1878, 1879, and 1884 the vicar of Castle Bytham, the present applicant, having executed certain improvements on the glebe, raised, with the consent of the patrons of the living and the sanction of the Inclosure Commissioners, sums to pay for these improvements. The money was raised by the creation of terminable rent-charges upon the glebe, repayable by half-yearly instalments during a period of twenty-five years. The improvements were all such as are authorized by the Settled Land Act, 1882.

The total net income received by the vicar from all sources (exclusive of the interest on the money in court) was £190, out of which he had to pay £75 per annum in respect of instalments of the rent-charge, leaving an available income of only £115 per annum.

This was an application by the vicar that out of the money in court representing the purchase-money paid by the Midland Railway Co. the sum of £709 might be applied in redemption of the rent-charges.

Section 2 (1) of the Settled Land Act, 1882, is as follows:—"Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." Sub-section (3) provides that "land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land."

Section 32 provides that where, under an Act incorporating or applying the Lands Clauses Consolidation Acts, money is paid into court, and "is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in court, that money may be invested and applied as capital money arising under this Act . . . ."

Section 1 of the Settled Land Act, 1887, provides that "where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent-charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882."

Section 69 of the Lands Clauses Consolidation Act, 1845, deals with the application of purchase-money of lands taken from persons, such as a tenant for life, having a partial or limited interest only in such lands, and directs that such purchase-money may be applied in the following, among other ways—viz., "in the discharge of any debt or incumbrance affecting the lands in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes."

May 24.—*Yate-Lee*, for the applicant.—The court has jurisdiction to make this order. In the first place, the Inclosure Act and award constitute a "settlement" within the definition section of the Settled Land Act, 1882. [STIRLING, J.—If that contention is right, the vicar could sell?] Yes. The case also comes within section 32 of the Act of 1882: *In re Byron's Charity*, 31 W. R. 517, 23 Ch. D. 171; *In re Bethlehem and Bridewell Hospitals*, 34 W. R. 148, 30 Ch. D. 541; *Ex parte Jesus College, Cambridge*, W. N., 1884, p. 37, 32 W. R. Dig. 115. Section 1 of the Settled Land Act, 1887, specially provides for the expending of capital money in redeeming a temporary rent-charge. [STIRLING, J.—*In re Smith*, 37 W. R. 199, 40 Ch. D. 386, shows that there is a discretion in the court.] I do not say there is no discretion. There is also jurisdiction to make the order under the general jurisdiction of the court. [STIRLING, J.—Who is the owner of the advowson? Is he not affected?] The Bishop and the Dean and Chapter of Lincoln are the patrons.

The case was adjourned for the consent of the patrons to be obtained.

Oct. 25.—*Wace*, for the Bishop and the Dean and Chapter of Lincoln. — The patrons of the living oppose the application, on the ground that there is no jurisdiction to grant it, and that, even if there were jurisdiction, the court should not exercise its discretion in favour of the application. The money was paid in under the Lands Clauses Consolidation Act, but it cannot be applied under that Act in the manner suggested: *In re Louth and East Coast Railway Co.*, 24 W. R. 723, 2 Ch. D. 225; *Ex parte The Rector of Kirksmeaton*, 30 W. R. 539, 20 Ch. D. 203. The proposed application of the purchase-money can only be effected under the Settled Land Act, 1882, and there is no "settlement" within the definition section of that Act. The applicant must show that the glebe land generally was "settled land." If any land was settled it was the land conveyed by the Inclosure Act and the award. Even that land was conveyed to a corporation sole, and was, therefore, not settled. The cases relied on by the applicant are cases of charity land. [STIRLING, J.—What is the distinction?] In those cases there must have been a title deed under which the rights were enjoyed. At any rate, your lordship is not bound by the decisions, this being ecclesiastical land.

Yate-Lee replied.

STIRLING, J.—This is an application which raises several questions not free from difficulty under the Settled Land Acts. In the view which I take of the case it is not necessary that I should decide every point which has been raised, but I desire to take some notice of them in due order. The case is a very simple one as regards the facts. [His lordship stated the facts.] That being the state of things, it has come to pass, from causes with which we are familiar, that the value of the glebe land to the vicar is now very much less than it used to be, and it cannot be doubted that he heavily feels the pressure of the payment of these instalments, and he applies to the court that a portion of the fund in court should be applied in the redemption of these terminable charges. That cannot be done except under the powers of the Settled Land Acts. It is necessary, in order that the application should succeed, first of all, to show that the case is fully within the terms of the Settled Land Act, 1882, and, secondly, that, if it be so, it is a case in which the court ought properly to exercise the discretion vested in it by the Settled Land Act, 1887, and direct the payment.

With reference to the question of the jurisdiction

of the court, two arguments have been urged. First of all it is said that this is settled land within the meaning of the Settled Land Act, 1882, where a settlement is defined to be any instrument, reading it shortly, under or by virtue of which "any estate or interest in land stands for the time being limited to or in trust for any persons by way of succession." Now that raises a very wide question, because, if that contention is well founded, not only would there be jurisdiction in this court to deal with the money in court, but, independently of the court, each successive vicar would have power to deal with the land in question by sale or lease in accordance with the provisions of the Settled Land Acts. This is ecclesiastical land, and by the statute of 13 Eliz. c. 10, s. 2, parsons, amongst other persons, are prohibited from alienating, except to a very limited extent, houses, lands, tithes, tenements, or other hereditaments being parcel of the vicarage. The restrictions contained in that statute have been to a certain extent removed in modern times, but in no cases, I believe, can alienations take place by an ecclesiastical corporation within the meaning of the Statute of Elizabeth without the consent of the Ecclesiastical Commissioners, and it is difficult to imagine that when the Settled Land Act was passed the Legislature intended to repeal the Act of Elizabeth as to the extent of the alienation, or to dispense in such cases with the consent of the Ecclesiastical Commissioners. But when one looks at the definitions, in truth it seems to me that in the 2nd section of the Act it is clear that the limitation here is not "to or in trust for any persons by way of succession." No doubt the land is awarded to the vicar "and his successors," but the word "successors" is simply a word of limitation, as it seems to me, introduced for the purpose of showing that the vicar was to take in his corporate capacity, and not as an individual, and it really has no greater effect than the word "heirs" in a limitation to A. B. and his heirs. The whole fee simple of the land is, in point of law, vested in the vicar, subject to certain restrictions. I am not, therefore, prepared to hold that the Inclosure Act and the award constituted a settlement within section 2 of the Act.

But there is another way of looking at the question, and for this purpose the material section is section 32 of the Act of 1882, which provides that where, under the Lands Clauses Consolidation Act, any money has been paid into court and is liable to be laid out in the purchase of land to be made subject to the settlement, then that money may be invested or applied as capital money arising under the Settled Land Act as if it had been authorized by the Act under which the money is in court. There have been decided a number of cases, beginning with a decision of Fry, L.J., when a judge of first instance, in which an interpretation has been put upon the language of that section.

The first case which arose was that of *In re Byron's Charity*. The headnote to that case is as follows:—[His lordship read it, and continued:—] The very point was raised by the learned judge in the course of the argument. He says: "Can it be said that the purchase-money of land belonging to a charity absolutely is liable to be laid out in the purchase of land to be made subject to a settlement?" and it was argued on behalf of the petitioners that section 32 of the Settled Land Act must be read with section 69 of the Lands Clauses Consolidation Act: that the money was "settled" within the meaning of the Lands Clauses Act, s. 69, and, therefore, was within section 32 of the Settled Land Act; and the learned judge said: "I think the 32nd section of the Settled Land Act must be read with the 69th section of the Lands Clauses Act, and therefore I make the order." When one looks at the 69th section of the Lands Clauses Act it appears obvious that the word "settled" is used in a much wider and looser sense than in the Settled Land Acts. As was pointed out in *In re Byron's Charity*, one of the ways in which the money may be applied is in the discharge of incumbrances affecting the land in respect of which such money shall have been paid or affecting other lands settled therewith to the same or the like uses, trusts, or purposes," and it may be applied in the "purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner, as the land in respect of which such money shall have been paid stood settled." The word used is "settled," and no one can dispute that if the present application had been made under the Lands Clauses Consolidation Act for the investment of the fund in court, or a portion of it, in the purchase of land to be conveyed to the use of the vicar and his successors, that would have been a proper application of the money, and the land so bought would have stood settled to the like uses as the land taken by the railway company stood settled before it was so taken. The judgment of Fry, L.J., amounts to this, that inasmuch as in section 69 the word "settled" is used in this wide and popular way, the like interpretation must be put on the word "settlement" occurring in section 32, and that that word is not to be read there as having the strict meaning in accordance with the definition contained in section 2 (1) of the Settled Land Act. The matter does not rest solely on the authority of Fry, L.J., great as that authority would be by itself, but his decision has been followed without question, and apparently without argument, by Kay, L.J. (then Kay, J.), in *Ex parte Jesus College, Cambridge*, and secondly by Chitty, J., in *In re Bethlehem and Bridewell Hospitals*, so that there is the authority of these three learned judges for the view which is pressed upon me. Having regard to that weight of authority, I am not prepared to take upon myself to say that that interpretation of section 32 is one with which I cannot agree. It certainly, in many respects, appears to me to be a very beneficial interpretation, as it enables the court to do things which may well have been within the purview of the Legislature. At all events, I am not prepared to dissent from these decisions, although personally I might have felt some difficulty in coming to the same conclusion in the first instance. Therefore I assume that under section 32 there is jurisdiction to deal with the money in court in accordance with the provisions of the Settled Land Acts in the way suggested by the applicant. Now under the Settled Land Act, 18[illegible] the money could not have been so applied. That was decided by the Court of Appeal in *In re Knatchbull's Settled Estate*, 33 W. R. 569. Shortly after the decision the Settled Land Act, 1887, was passed. That provides that where an authorized improvement has been made, and a rent-charge, whether temporary or perpetual, created, any capital money expended in redeeming such rent-charge shall be deemed to be applied in payment for an improvement authorized by the Act of 1882. The language is peculiar, but it provides that any capital expended in redeeming the rent-charge is to be deemed to be applied in payment for the improvement. I need not say that there is a discretion in the court as to whether the money shall be so applied or not. There are a number of ways in which money under the Act may be applied, and the court has a discretion in the matter. That is not disputed, and cannot be disputed.

The question arises whether this is a proper case for the exercise of the discretion vested in me. The patrons of the living, the then Bishop and Dean and

Chapter of Lincoln, gave their consent, which was necessary under the Act, to the creation of the charge, on the terms that the charge should be redeemed within a limited period. None, I understand, of the ecclesiastical dignitaries who then constituted among them the patrons are now living, but the present patrons now appear and object to the order being made. They say, and truly, that the expenditure of this sum in court, which represents *corpus*, would diminish the value of the advowson, and that they themselves would not have consented to any such charge being created in perpetuity if they had been asked to do so in the first instance. The question, therefore, is, ought I now to say that this is a proper application of the fund in court? It does not appear to me that I ought. I cannot see that there is any hardship on the vicar in my refusing to make the order, because I am simply keeping him to the bargain he made with his eyes open; but if I make it against the opposition of the patrons, I am driving them into a bargain which, as they say, they never made, and never would have contemplated. I deeply regret that the value of the living should have fallen so low, but it is beyond my power to obviate it, and I cannot agree that I ought to make the order on that ground. The depreciation in value has arisen from causes with which we are familiar, and which do not affect ecclesiastical corporations alone. I do not see my way to the exercise of my discretion in favour of the present application.

Solicitors for the vicar, *Routh, Stacey, & Castle*, for *Stapleton & Hildyard*, Stamford.

Solicitors for the Bishop and the Dean and Chapter of Lincoln, *Patersons, Snow, Bloxam, & Kinder*, for *Swan & Bourne*, Lincoln.

Chan. Div. }
Kekewich, J. } July 14, 20, 1894.

In re SHAW.
BRIDGER *v.* SHAW. (*a.*)

Administration—Costs of probate action—Personal estate insufficient—Real estate.

The costs of contesting a probate action are not payable out of real estate, except under special circumstances.

Adjourned summons.

The question raised in this summons, taken out in an administration action, was whether, where personal estate is deficient to pay the costs of a probate action in which the will was established, the costs of that action ought to be provided out of the real estate.

Marten, Q.C., and *Bardswell*, for the summons.—The executor ought to have his costs out of the real estate: *Charter* v. *Charter*, 24 W. R. 874, 3 Ch. D. 218; *In re Price, Williams* v. *Jenkins*, 34 W. R. 291, 31 Ch. D. 485; *In re Pearce, McLean* v. *Smith*, 35 W. R. 358.

Warmington, Q.C., and *S. B. L. Druce*, for the heir-at-law.

Tanner, for the executor.

Renshaw, Q.C., and *Charles Browne*, for infants interested in specifically devised real estate.

KEKEWICH, J.—The Probate Division in this case made an order allowing the heir-at-law his costs out of the estate, leaving the other costs to be provided in the usual course of administration. This appears to me to mean the personal estate is to bear them. The Court of Probate in *Young* v. *Dendy*, L. R. 1 P. & D. 344, 15 W. R. Prob. Dig. 20, held that it had no jurisdiction to order payment of costs out of the real estate. It may be right to pay the costs of contesting a will out of the real estate in an administration action when the executor has taken proceedings for the benefit of the whole estate. It is a question of discretion, but, except under special circumstances, the court ought not to order the costs of a probate action to be borne by real estate.

Solicitors, *Letts Brothers* for *P. Baker*, Birmingham; *Gamlen & Burdett*, for *Baker, Lee, & Co.*, Birmingham.

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. }
(Vaughan Williams, J.) } Nov. 19, 20.

In re CATFORD.
Ex parte CARR *v.* FORD & CANNING. (*a.*)

Bankruptcy—Property of bankrupt—General lien of warehouseman—Custom of trade in Bristol.

By a custom of trade in Bristol, warehouse keepers in that city are entitled to a general lien over all goods warehoused with them for all warehouse rent, labourage, and other charges incurred in connection with such goods or with any other goods warehoused by the same owner—either before or after.

Motion by the trustee in the bankruptcy for an order to Messrs. Ford & Canning, warehouse keepers of Bristol, to deliver up to him certain goods, the property of the bankrupt, stored in their warehouse, upon the payment by him of the warehouse rent and other charges incurred by them in respect of the said goods.

Messrs. Ford & Canning filed in opposition to the motion a number of affidavits by warehouse keepers in Bristol stating that by a local trade custom they were entitled to detain the goods to satisfy their general account with the bankrupt. The exact terms of the custom were set forth in Mr. Ford's affidavit as follows:—"It is, and has been for over twenty years past, the undisputed legal usage and custom of trade in Bristol that warehouse keepers should be entitled to a general lien over all goods warehoused with them for all warehouse rent, labourage, and other charges incurred or becoming payable in connection with such goods or with any other goods warehoused by the same individual either before or after."

The affidavits also set forth several instances in which warehouse keepers in Bristol had successfully maintained their claim to the said general lien against trustees in bankruptcy and others, but the question had not previously come before any court save in the case of *Ex parte Ludlow, in re Hancock*, W. N., 1879, p. 65, which decided that wine merchants in Bristol have a general lien over goods warehoused for their customers.

This case was distinguished in an affidavit made by Mr. Inskip, solicitor, of Bristol, on behalf of the trustee, as establishing a custom peculiar to the wine trade alone, the reason for its existence being that in that trade the warehouse keeper is also the vendor.

Robson, Q.C., and *F. C. Willis*, for the trustee, contended that the custom as alleged was too wide, uncertain, and unreasonable; that it would extend to

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

goods deposited by persons who were not the owners thereof, and to charges such as haulage, which had little to do with warehousing; and that, being a purely local custom, the court should hesitate to affirm it. They further pointed out that in the cases set forth in the affidavits the lien had never been admitted without some dispute, that in fact the warehouse keepers had been claiming and the merchants resisting the lien for many years. They distinguished *Ex parte Ludlow, In re Hancock*, upon the grounds set forth above, and cited *Leuckhardt* v. *Cooper*, 3 Bing. N. C. 99, to show that the custom as stated was bad.

Whinney, for Messrs. Ford & Canning, pointed out that, although the claim had been disputed, the parties disputing had hitherto always admitted it without going to law. The custom as stated was not too wide, for it was not intended to extend to goods warehoused by persons not the owners thereof; the reason why such limitation was not expressly stated being, that it was very rare for factors or non-owners to warehouse goods in Bristol. All that was really claimed was the right to retain goods against the indebtedness of their owner.

He cited *In re Witt, Ex parte Shubrook*, 24 W. R. 891, 2 Ch. D. 489, and *Ex parte Ludlow, In re Hancock*.

F. C. Willis replied.

VAUGHAN WILLIAMS, J.—I have no doubt as to the existence of this custom. It seems to me impossible that any person can have dealt with warehouse keepers in Bristol without being aware of its existence. It has been urged that the custom is unreasonable, and that it claims a general lien over goods deposited by a factor. If it did so, *Leuckhardt* v. *Cooper* would compel me to hold that it was bad. But upon studying the evidence it becomes clear that there is no pretence for saying that this custom would include a general lien upon goods deposited by persons other than the owners thereof. It has also been urged that it is bad for extending to too wide a class of debts. Clearly it only applies in respect of warehousing goods of the same owner. True, it applies to other things than warehouse rent, but I do not consider that unreasonable. Nor do I understand the objection that this custom is merely local. There are of course general liens apart from local which are part of the law merchant and of the common law, of which the courts do not require proof.

In every case where a lien has to be proved as a fact, it must be originally local, limited as to trade, and to place. All liens were originally local and particular.

Application dismissed.

Solicitors for the trustee, *Wood, Bird, & Wood.*

Solicitors for Messrs. Ford & Canning, *Torr & Co.*

Prob. Div. & Adm. Div. } July 2, 3, 1894.
Admiralty. }

"THE THETA." (a.)

Admiralty—Damage—Jurisdiction—"Damage done by any ship"—Personal damage caused by fall down hatchway of ship within the body of a county not recoverable in admiralty—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7.

A seaman belonging to a vessel moored in the Regent's Canal, within the body of a county, whilst attempting to reach the quay by crossing the deck of The T., *a vessel moored alongside, fell down one of the hatchways of such last-mentioned vessel, and was injured.*

At the time of the accident the hatchway was merely covered with a tarpaulin. The seaman, to recover for the injury he had sustained, instituted an action in rem *against* The T. *Thereupon her owners entered an appearance under protest in the suit, and moved to set aside the writ of summons, on the ground of want of jurisdiction.*

Held, that the motion must be granted, as the damage proceeded for in the suit was not "damage done by a ship" within the meaning of section 7 *of the Admiralty Court Act*, 1861.

This was a motion on behalf of the owners of the vessel *Theta*, the defendants under protest in an action *in rem* instituted on behalf of William Yule, chief engineer of the vessel *Faithfull* against the vessel *Theta*, to set aside the writ of summons in the action, and to dismiss the action with costs, on the ground that the court had no jurisdiction to entertain the suit.

The Theta was under arrest in the action, and from the affidavit to lead the warrant and a letter from the plaintiff before action to the defendants under protest, claiming redress, which were put in and read at the hearing of the motion, it appeared in substance that *The Faithfull* was lying at anchor in the Regent Canal Dock, within the body of a county and *The Theta* was also lying at anchor alongside *The Faithfull*, and between *The Faithfull* and the quay wall, that the plaintiff, in order to get to the quay wall, stepped on the deck of *The Faithfull*, and whilst attempting to cross the deck fell down one of the hatchways of *The Theta*, then covered only with a tarpaulin stretched across it, and sustained the injuries to recover compensation for which he had instituted the suit.

July 2.—The motion was heard before Bruce, J., sitting in court as an additional judge of the Probate, Divorce, and Admiralty Division, in the absence of Barnes, J.

Parker Lowe, on behalf of the defendants under protest, in support of the motion.—The first contention of the defendants is that the provisions of the Admiralty Court Act, 1861, which gave the High Court of Admiralty jurisdiction over "damage done by any ship within the body of a county," do not enable this court to entertain any action brought to recover for "personal damage," and that the decisions in *The Sylph*, L. R. 2 A. & E. 24, 16 W. R. Adm. Dig. 17, and *The Beta*, 17 W. R. 933, L. R. 2 P. C. 447, on the point must be considered as overruled by the decision of the Queen's Bench in *Smith* v. *Brown*, 19 W. R. 1165, L. R. 6 Q. B. 729. [BRUCE, J., referred to *The Zeta*, [1893] A. C. 468.] Secondly, the defendants contend that even if the court has jurisdiction *in rem* in some cases of personal damage, it has none in the present case, where the damage, if not brought about by the sole negligence of the plaintiff, was attributable merely to the hatchways not being properly safeguarded. Damage from an act of omission of this kind is surely not "damage done by a ship" within the meaning of section 7 of the Admiralty Court Act, 1861. No doubt it has been decided in America that a similar claim to that in the present case can be brought *in rem*, but *The Max Morris*, 30 U. S. Rep. 137 (Davis), but the admiralty jurisdiction over torts in America is much more extensive than was ever claimed for the High Court of Admiralty in matters occurring on the high seas, whilst the question in this case is merely one on the construction of the Admiralty Court Act, 1861, the

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

accident having admittedly happened within the body of a county.

Sir W. Phillimore, for the plaintiff, *contrà*.—The real question in this case is whether the damage done to the plaintiff was damage done by those in charge of *The Theta* with the ship as the noxious instrument: *The Vera Cruz*, 32 W. R. 783, 9 P. D. 101. If it was, as is contended, damage so done by the servants of the shipowner in using the ship, the court has jurisdiction to entertain the suit, and any *dicta* to the contrary in *Smith* v. *Brown*, may be disregarded since the judgments in the case of *The Vera Cruz*, 9 P. D. 101, 10 App. Cas. 66, and *The Zeta*, [1893] A. C. 468, at the hearing of which latter case the House of Lords had before them all the previous cases on the subject referred to in *Reg.* v. *The Judge of the City of London Court*, 40 W. R. 215, [1892] 1 Q. B. 272. It must be assumed for the purposes of to-day that the plaintiff had a right to go across *The Theta*, and, if so, it was a wrongful act on the part of the servants of the defendants in using the ship to omit making the hatchway secure. This omission is, it is contended, as much a wrongful act for which the ship is liable as the allowing a block to fall from aloft on the plaintiff would be a wrongful act giving a cause of action *in rem* against the ship.

Parker Lowe in reply.

Cur. adv. vult.

July 3.—BRUCE, J.—In this case the defendants move to set aside the writ and to dismiss the action with costs, on the ground that this court has no jurisdiction. The question before me turns on the words in the 7th section of the Admiralty Court Act, 1861, "damage done by the ship." I see no reason to doubt that the term "damage" is as applicable to damage done to a person as to damage done to property. It seems to me to be doing great violence to the ordinary meaning of the word "damage" to limit its meaning to damage to property. Classically, the word damage is used as applicable to mischief done to a person. There is one passage from the Authorized Version of the New Testament where, in the 27th chapter of the Acts, St. Paul says, "I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives." Not only does the word "damage" in the ordinary classics apply to mischief to a person, but I think on the authorities that its meaning comes to much the same in our courts. Of course it is true that it is said in the case of *The Zeta*, [1893] A. C. 469, that "it is impossible to reconcile all the opinions which have proceeded from the bench from time to time," but I am guided by the more recent opinion which has been expressed by judges of high authority in the Court of Appeal and the House of Lords. I find in the recent case of *The Vera Cruz*, 9 P. D. 99, the Master of the Rolls says, "I do not say that damage need be confined to damage to property; it may be damage to person." In the House of Lords, in the case of *The Zeta*, Lord Herschell, after mentioning cases which have been decided, says: "It is not necessary to trouble your lordships with all the cases, it is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question." Therefore, I have come to the conclusion that it is now decided by authority that the word damage, by Act of Parliament, has the ordinary meaning of the word—damage to property and damage to persons.

But another question arises—namely, whether in the present case the damage was done by the ship. I cannot think that the present case falls within the provisions of the Act of Parliament. Damage done by the ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz*, "A ship was the active cause of damage," and in the words of Bowen, L.J., "The damage done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument." In this case those in charge of the ship so placed a tarpaulin over the hatchway of *The Theta* as to make a trap into which the plaintiff fell in passing to his own ship. The ship cannot be said to be the active instrument of the damage done. The damage was done on board the ship, and not, I think, in the meaning of the Act, by the ship. Therefore, I must allow the motion, and dismiss the action, with costs.

Solicitor for the defendants under protest, *Greening*.

Solicitors for the plaintiff, *Pritchard & Sons*.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 1.

REID v. WILSON AND WARD.
REID v. WILSON AND KING. (*a*.)

Lord's-day observance—Action for penalty—Sunday lecture—Keeper of house or place opened for public entertainment—Person managing or conducting entertainment—Lord's-day Observance Act, 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2.

A Sunday lecture society hired a hall for the purpose of giving a series of lectures. The company to whom the hall had belonged being in liquidation, the letting was arranged by an agent for the liquidator. This agent had applied for and obtained a licence for the hall. A lecture of an entertaining character, to which the public were admitted on payment, having been given on a Sunday, an action was brought under section 1 *of the Lord's-day Observance Act*, 1781, *to recover penalties from the agent and from the person who acted as chairman at the lecture.*

Held, that the agent was not liable as the keeper of the hall, neither was the chairman liable as the person managing or conducting the entertainment.

Judgment of Mathew, J. (ante, p. 47), *affirmed.*

Appeal from a judgment of Mathew, J., on further consideration, reported *ante*, p. 47.

These were two actions brought by the plaintiff, representing a society called the Lord's-day Observance Society, to recover penalties for alleged infringements of the Lord's-day Observance Act, 1781, the material sections of which (sections 1 and 2) are fully set out in the report *ante*, p. 47.

The first of the two actions was brought to recover a penalty of £200 from the defendant Wilson as the keeper of a hall called the Coliseum, at Leeds, which was opened and used for public entertainment and amusement on Sunday, the 7th of January, 1894, and to which persons were admitted by payment, and a penalty of £100 from the defendant Ward, as the person managing and conducting such entertainment and amusement, or acting as master of the ceremonies or chairman of the meeting.

Wilson was a solicitor, and had been secretary of a

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

company which owned the Coliseum at Leeds. That company had gone into liquidation, and subsequently Wilson acted as solicitor to the liquidator. It appeared that a society called the Leeds Sunday Lecture Society desired to hire the Coliseum for the purpose of giving a series of Sunday lectures, and the hall was accordingly let to them for that purpose. This arrangement was sanctioned and carried out by Wilson acting for the liquidator. Wilson had applied to the licensing authorities and had obtained from them a licence in respect of the hall. One of the lectures was given on Sunday, the 7th of January, 1894, by Mr. Villiers, a war correspondent, the subject being "Chicago, Past and Present," including a description of the recent exhibition called "The World's Fair." The lecture was illustrated by limelight representations of the places and persons described. The defendant Ward, who was Mayor of Leeds and the president of the Sunday Lecture Society, took the chair at the commencement of the proceedings, and introduced the lecturer to the audience; he then left the platform and took his seat in the body of the hall.

The second action was brought to recover a similar penalty of £200 from the defendant Wilson, and a similar penalty of £100 from the defendant King, in respect of another of the same series of lectures, which took place on Sunday, the 21st of January. This lecture, which was delivered by Mr. Max O'Rell, was entitled, "John Bull, Sandy, and Pat," being an account of the characteristics of the three nations—England, Scotland, and Ireland. On this occasion King acted as chairman, and remained on the platform throughout the lecture.

The defendants all pleaded not guilty. The actions were tried before Mathew, J., and a jury. In answer to a question put to them by the learned judge, the jury found that the Coliseum was, on the occasions in question, a place opened and used for public entertainment and amusement. On further consideration Mathew, J., gave judgment for the defendants, on the ground that Wilson was not the "keeper" of the hall, within the meaning of section 1 of the statute, or within the definition given in section 2, and that neither Ward nor King was brought within the terms of section 1.

The plaintiff appeal.

Sir R. E. Webster, Q.C., and *Cecil Chapman*, for the plaintiff.—All the defendants come within the words of the statute, so as to be liable. Wilson was the "keeper" of the hall. Every act he did with regard to the hall was the act of a keeper. It is, however, immaterial, under section 2, whether he was actually the keeper; it is sufficient that he appeared to be the person having the care, government, or management of the hall. He was the person to whom anyone would have applied for the use of the hall; and he was in fact the person who was intrusted with the right to let it. Ward and King are also both within section 1. Each of them was the person managing or conducting the entertainment. It is the duty of the chairman on such an occasion to keep order, and prevent anything illegal or improper being done in the course of the entertainment.

Robson, Q.C., Corrie Grant, and *J. A. Johnston*, for the defendants, were not called upon to argue.

Lord ESHER, M.R.—We have here to deal with a statute which, being a penal statute, ought to be construed strictly. The first question is whether Wilson was the keeper of this house, which the jury, following the direction of the learned judge, have found to have been a house which, under the statute, must be deemed to be a disorderly house. Wilson was a solicitor, and had been the secretary of a company which, while it existed, had power to let the house. If, while he was such secretary, he had, in his capacity as secretary, arranged for the letting of the house, even then the house would not have been let by him, but by the company. The company had, however, gone into liquidation, and a liquidator had been appointed. After that Wilson could not any longer be secretary of the company; neither was he secretary of the liquidator. He acted as solicitor to the liquidator, and advised him in the letting of the house. Wilson therefore did not let the house; but supposing that he did let it, the question remained, Was he the keeper? If he did let the house, he was only in the position of a landlord who has let premises to a tenant, who can then in fact use them either for a legal or an illegal purpose. If he let the house to a tenant who took it for the purpose of its being used in a manner contrary to an Act of Parliament, he could in no sense be said on that ground to be the keeper of the house. It was argued that he was the keeper because he applied for and obtained a licence for music and dancing. But he himself had nothing to do with the music and dancing; the application must have been made by him on behalf of the lessee. I am, therefore, of opinion that he was not the keeper of the house. Then, did he appear to be the keeper, so as to bring himself within section 2 of the statute? In my opinion he did not appear, act, or behave himself as master, or as the person having the care, government, or management of the house. Therefore, I think there is no case against Wilson.

Then as to Ward and King, each of them is sought to be made liable under the second part of section 1 as "the person managing or conducting such entertainment or amusement." The other words, "or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting for public debate," clearly have no application to the present case. These meetings were not meetings to which the expression "master of the ceremonies" is applicable at all, nor were they meetings for public debate. Can these gentlemen, who merely acted as chairmen at the two lectures, be said to have managed or conducted the entertainment? A person who takes the chair and presides at such a meeting may be said to manage the audience, but he does not manage or conduct the entertainment; for it is clear that he has no power whatever to arrange, or alter, or interfere with the entertainment. In no sense can either Ward or King be said to be within the terms of the statute so as to be liable to these penalties. If the members of this Lord's-day Observance Society, who have instituted these proceedings, are so horror-struck at the idea of working men and others going to harmless entertainments of this kind on Sunday evening instead of going to the public-house, they ought to be very careful to take their proceedings against the proper persons, and to be in a position to prove their case strictly. In the present case, being unable to attack the society, which, in fact, arranged the entertainments, they have attacked these three defendants. In so doing they have gone against wrong persons, and they have consequently failed. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. This statute, being a penal statute, must be strictly construed. The defendant Wilson is said to be liable to these penalties as being the keeper of a house which has been used in a manner contrary to the provisions of the statute. At the time when the penalties are alleged to have been incurred, the company to whom the house had belonged were in liquidation, and con-

sequently the directors and other officers of the company no longer existed as such. The evidence showed that Wilson in arranging for the letting of the house acted as the agent of the liquidator. If under these circumstances he is liable to these penalties, then any house agent who lets a house which is afterwards used for the purpose of a Sunday lecture will be similarly liable. It is clear that Wilson could have known nothing about the nature of the entertainments which were going to be given, and in my opinion he cannot be held liable as the keeper of the house.

Then it is said that the other two defendants, who were the chairmen on the two occasions, are liable under the statute as being the persons who conducted the entertainments. But the chairman at such an entertainment does not in any way conduct the entertainment; he has no power to control it at all. The only persons who could control these entertainments were the Sunday Lecture Society. I am of opinion that the plaintiff has failed to show that any of the defendants are within either the meaning or the spirit of the Act.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Desborough, Son, & Prichard.*

Solicitors for the defendants, *Darley & Cumberland*, for *E. & H. Wilson*, Leeds.

From Prob. Div. & Adm. Div. (Lord Halsbury and Lindley and A. L. Smith, L.JJ.) — Nov. 21, 22.

TYRRELL *v.* PAINTON. (*a.*)

Practice — Equitable execution — Appointment of receiver—Equitable reversionary interest in proceeds of sale of land—Jurisdiction—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 8.

Since the Judicature Acts the court has jurisdiction to grant equitable execution by the appointment of a receiver of an equitable reversionary interest in personalty.

Appeal from a refusal of Lord Russell, C.J., sitting as vacation judge to appoint a receiver of an equitable reversionary interest to which one of the defendants was entitled.

In a probate action (*Tyrrell* v. *Painton*) the defendants unsuccessfully propounded a will for probate, and were ordered by the President of the Probate Division to pay the costs of the action, which were taxed at £213 14s. 10d., within seven days from the service of the order upon them. Such costs were not paid, and it appeared that the defendants had very little (if any) property which could be attached under a writ of *fieri facias.*

By his will Joseph Painton devised his real and personal estate to the defendant John Painton and Wm. Tovey, upon trust for the testator's wife for life, and after her decease upon trust to sell the same and to stand possessed of the proceeds in trust for the child or children of the testator and his wife, who, being a son or sons, should attain twenty-one or die under that age leaving issue, or, being a daughter or daughters, should attain that age or be married, and in default of such issue then in trust for the said John Painton absolutely.

There were no children of the marriage of the testator and his wife.

The testator's widow was still living, and was in receipt of the rents and profits of the testator's real estate, which consisted for the most part of copyhold property.

The plaintiff moved for the appointment of a receiver of the defendant John Painton's reversionary interest. Lord Russell, C.J., refused the motion on the ground that the defendant's interest was an interest in land held in trust for him within the meaning of 1 & 2 Vict. c. 110, s. 11, and could therefore be taken under a writ of *elegit.*

The plaintiff appealed.

Wheeler, Q.C., and *W. H. Nash*, for the plaintiff, relied upon *Fuggle* v. *Bland*, 11 Q. B. D. 711, 32 W. R. Dig. 160, and *Westhead* v. *Riley*, 32 W. R. 273, 25 Ch. D. 413, where similar orders had been made. [LINDLEY, L.J., referred to *Anglo-Italian Bank* v. *Davies*, 9 Ch. D. 275, 26 W. R. Dig. 185.]

Carrington, for the defendants, contended that *Harris* v. *Beauchamp*, 42 W. R. 451, [1894] 1 Q. B. 801, was a binding authority against the application.

Lord HALSBURY.—We have considered this case, and it appears to us tolerably certain that Lord Russell, C.J., refused the application for the appointment of a receiver because he was under the impression that according to the practice an *elegit* could be issued to take the defendant's interest under the will. We now think that is not so, because the interest which the defendant takes under the will is an equitable reversionary interest in personalty, and is not an interest in land. The authorities establish that relief of the kind asked for is appropriate when an *elegit* cannot be issued; therefore, we think that the order of Lord Russell, C.J., must be reversed, and an order made for the appointment of a receiver.

LINDLEY, L.J. — [The Lord Justice stated the provisions of the will, and continued:—] The difficulty has arisen from the form of the will. But, after carefully considering its provisions, I cannot make out that any interest in land is held on trust for the defendant within the meaning of section 11 of 1 & 2 Vict. c. 110. His interest is an equitable reversionary interest in a sum of money, and such an interest cannot be attached by means of an *elegit*, or in any other way than by the appointment of a receiver. I have looked at the authorities, and I cannot find that the Court of Chancery has ever appointed a receiver of an equitable reversionary interest. It is said that there is this difficulty, that during the life of the tenant for life there would be nothing for the receiver to receive. But I do not think this is a fatal objection, and I think that if it had been shown that a tenant for life was *in extremis* the Court of Chancery would have appointed a receiver of the equitable reversionary interest. I think the jurisdiction to do so is established. The matter stands thus. There is a case at common law in which such an order has been made, and I can see no reason why we should not follow that and make an order appointing the plaintiff receiver of the defendant's equitable reversionary interest in the proceeds of the sale of the copyholds. The summons is wrong in form, because it asks for the appointment of a receiver of the defendant's reversionary interest in the copyholds themselves.

A. L. SMITH, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiff, *Wood, Bigg, & Nash*, for *A. G. Haines*, Faringdon.

Solicitors for the defendants, *Tarry, Sherlock, & King.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, Lopes, and Davey, L.JJ.) Aug. 9, 1894.

In re GLORY PAPER MILLS CO. DUNSTER'S CASE. (*a.*)

Company—Shares—Contributory—Signature of memorandum by member of firm—Application for shares by firm—Director—Qualification shares—Contract—Intention—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

D., a member of a firm, signed the memorandum of association of a company in his own name for 100 *shares. In the name of the firm he subsequently applied for* 100 *shares, which were allotted to the firm.*

Held, upon the evidence, that there was only one agreement to take 100 *shares—viz., an agreement entered into by D. on behalf of the firm, and created by his signature to the memorandum; that the application for, and allotment of, the shares to the firm was merely made in pursuance of, and to carry out, that agreement; and, consequently, that D.'s name ought not to have been placed on the list of contributories for* 100 *shares in addition to the* 100 *shares held by the firm.*

A director's qualification shares may be held jointly with another person.

Decision of Vaughan Williams, J., *reversed.*

Appeal from Vaughan Williams, J. (38 SOLICITORS' JOURNAL, 649).

Prior to the incorporation of the Glory Paper Mills Co. (Limited) it was informally arranged that the firm of Dunster & Wakefield, paper makers, of which Thomas Dunster was a member, should become agents for the company when formed. The firm accordingly promoted the company, and Dunster proposed to sign the memorandum of association in the firm name. Being told, however, that the Registrar of Joint Stock Companies objected to the memorandum being subscribed by a firm, he signed it in his own name for 100 shares of £10 each, and was named as one of the first directors of the company.

On the 2nd of May, 1887, the company was incorporated, and the firm of Dunster & Wakefield were formally appointed agents. On the 17th of May, 1887, Dunster sent to the company an application for 100 shares, signed by him in the firm name. These shares were allotted to, and paid for by, the firm, and were registered in the firm name. By article 29 of the company's articles the company had "a first and paramount lien" upon shares registered in the name of any member, "whether solely or jointly with others," for his debts, liabilities, and engagements to the company. By article 73 a director's qualification was the holding of 100 shares of £10 each.

On the 8th of March, 1894, a winding-up order was made against the company. The official receiver, acting as liquidator, having put Dunster's name on the list of contributories for 100 shares in addition to those standing in the name of the firm, Dunster took out a summons to have his name removed in respect of such 100 shares.

There were affidavits by the directors and secretary of the company, as well as by Dunster himself, alleging the facts already stated, and, further, that the application by, and allotment to, the firm were intended and regarded as a performance of the contract previously entered into by Dunster on behalf of the firm, and that Dunster was never considered by any of the parties as having agreed to take any shares beyond those which were registered in the name of the firm.

On the 18th of July, 1894, Vaughan Williams, J., dismissed Dunster's summons.

Dunster appealed.

Buckley, Q.C., and *Methold*, for the appellant.—It is clear that in fact there was, and was intended to be, only one agreement to take shares. The company have Dunster *plus* Wakefield on the register; all that the original application entitled them to, and more. There is nothing in the point on which the learned judge relied, namely, that the right of set-off would be different in the case of Dunster alone being on the register from what it would be in the case of the firm being on the register. Article 29 provides for a lien on shares standing in joint names. Dunster was not bound to hold the shares for any particular time, and might at once have transferred them to the firm. What was done was at most only such a transfer, without a transfer deed. *In re Crooke's Mining and Smelting Co., Gilman's case*, 34 W. R. 362, 31 Ch. D. 420, is on all fours with this case. [They were stopped by the court.]

Farwell, Q.C., and *E. S. Ford*, for the respondent.—There are two contracts to take shares. Dunster, having subscribed the memorandum, became under the rules one of the first directors of the company, and was, therefore, bound to take 100 shares. These shares cannot be held jointly with somebody else. Under section 23 of the Companies Act, 1862, he is liable for 100 shares without any application. If he may share with one person, he may share with twenty, and his stake in the company becomes illusory. *In re China Steamship, &c., Co., Drummond's case*, 18 W. R. 2, L. R. 4 Ch. App. 772, is clearly distinguishable. *Gilman's case* was decided simply on grounds of fact. *Nokes' case*, 16 W. R. 1135, is not against us; to follow that you must take the firm off the list and put on Dunster alone, but that is impossible. [DAVEY, L.J.—Even the set-off argument comes to nothing: article 29.]

They also cited *Bainbridge* v. *Smith*, 37 W. R. 594, 41 Ch. D. 462; *Pulbrook* v. *Richmond Consolidated Mining Co.*, 27 W. R. 377, 9 Ch. D. 610; *In re London, Hamburg, and Continental Exchange Bank, Evans' case*, 15 W. R. 543, L. R. 2 Ch. App. 427.

LINDLEY, L.J.—With great respect to Vaughan Williams, J., I think he has gone wrong in this case. The real question here is whether there was one contract to take shares or two. No doubt, on the first blush of the thing, it looks as if there were two. Dunster signed the memorandum of association of this company for 100 shares. That made him liable to take 100 shares, and he cannot get out of it. But now it is sought to put him on the register for another 100 shares, upon the ground that, by a letter dated about a fortnight after, he applied for 100 shares in the name of his firm, and 100 shares were allotted to him and his partner Wakefield. The question is whether that application was really anything more than carrying out the original agreement that his firm should take 100 shares in the company. There was an arrangement before the company was incorporated. Dunster & Wakefield were paper makers, and the company was a paper mills company, and the arrangement was that the firm should take 100 shares in the company and should become the agents of the company on certain terms. When the time came for signing the memorandum of association Dunster wanted to sign it in the name of the firm, but he was told that a firm name would not be accepted by the Registrar of Joint Stock Companies.

(*a.*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

So he signed in his own name, but the real truth is that he was signing for the firm. After that, in pursuance of the same arrangement, that the firm should become agents for the company, which was always an understood thing on both sides, there is an application for shares by the firm. Is that anything more than carrying out an agreement previously made, or is it, in truth, another agreement to take another 100 shares? The evidence is all on one side. It is plain that the intention was merely to perform the agreement Dunster had entered into on behalf of the firm. It is not true to say there were two agreements to take 100 shares, one by him and one by the firm. The documents would have supported the allegation of two agreements if, in fact, there had been two; but the fact is there was only one. Then, how is it in point of law? Why should Dunster be fixed with 200 shares? That was not the agreement, and nobody so understood it—neither he nor the directors or secretary of the company. That is the true solution of this case.

Then something is said about a director's qualification shares. I do not feel any difficulty about that. Article 73 says that the qualification of a director shall be the holding of 100 shares, and the director need not acquire them at once. Dunster did not "hold" these shares the less because he held them jointly with another person. The object of the rule was that he should take 100 shares and be responsible on them, and if the company chose to take the extra responsibility, or additional responsibility, of his partner, that makes no difference. I think the question is reduced to one of fact, whether there were two agreements to take 100 shares. It is clear there were not, and therefore I think this appeal must be allowed, with costs here and below.

LOPES, L.J.—I am of the same opinion, and I quite agree with the last observation of my brother Lindley—namely, that the question in this case is really a question of fact: Was there one contract or were there two contracts?—that is to say, What is the inference to be drawn from the circumstances placed before us in evidence?

Dunster & Wakfield were paper manufacturers, and it appears that Dunster signed the memorandum of association of this company for 100 shares. But in what circumstances did he do that? He wished and intended to sign the name of the firm, and he would have done so, but he was told that it was not right to sign the memorandum of association in the name of a firm, and thereupon he signed in his own name, meaning thereby, "I sign in my own name, but as and for the firm." Subsequently the company is formed, and then that is done which seems a work of supererogation: an application is sent in in the name of the firm for 100 shares. Then it is said that that is a separate agreement, and that Dunster ought to be on the register for another 100 shares as well. In my opinion that is wrong. It is only one contract. That which is alleged to be the second is simply a performance of the original contract. It is impossible to contend with anything like reasonableness that there are two agreements here. There was no intention from first to last to take 200 shares. The whole meaning of the thing is that there is only one contract.

With regard to the qualification shares, I agree there is no difficulty about that. Dunster held 100 shares, and was qualified to be a director.

DAVEY, L.J.—In my opinion we should be doing a gross injustice if we affirmed this order. We should be imposing a liability upon this gentleman which neither he nor any of the other parties ever intended or dreamt of. If we are to believe the statements made upon oath, not only by Dunster, but by the secretary and the four directors of the company, not one of whom has been cross-examined, there can be no question that there was one contract, and one alone, and that Dunster, when he made the application in his own name, did so with the intention of carrying out the informal arrangement, informal because not binding on the company—that his firm were to take 100 shares in this company. That then became a contract of the company. The application in the name of Dunster & Wakefield is proved to have been made for the purpose of formally getting the shares into the name of Dunster & Wakefield, and in my opinion it would be an outrage to hold that there were two contracts in this case. We should be going contrary to the intention of everybody connected with the transaction. Nor do I think the documents relied on for the respondent, when properly understood, are in the least degree inconsistent with this view. In general, they appear to have put into writing the terms upon which the shares were to be taken and to have settled those terms, which may not have been exactly fixed till that time. But that is not inconsistent with Dunster having signed the memorandum of association, and his firm having taken the 100 shares, in pursuance of an arrangement with the promoters that they should be agents for the company, and, in fact, the company employed them as agents from the time it was formed. I am of opinion that there was only one contract in this case, and that was by Dunster to take 100 shares. It is proved that he entered into that contract on behalf of his firm, and it is, to my mind, proved that the application in the name of Dunster & Wakefield for 100 shares was made only for the purpose of carrying out that contract.

Mr. Farwell has raised another point, not mentioned in the judgment of the learned judge, that Dunster was one of the first directors of this company, and was, therefore, under an obligation to be the holder of 100 shares. I do not think it necessary to go into that, because this is an application to put Dunster on the register for 100 shares, not on the ground that he is a director, but on the ground of his having expressly contracted with the company to take them; but I entirely agree with Lindley, L.J., that a man is none the less the holder of 100 shares because the company has the additional advantage of having another person joined with him, these gentlemen being jointly and severally liable on the shares.

I am, therefore, of the opinion that this order ought to be discharged, and Dunster's name removed from the register.

Appeal allowed.

Solicitors for the appellant, *Blachford, Riches, & Co*

Solicitors for the respondent, *Goldring & Bell.*

High Court of Justice.

Chan. Div. Stirling, J. — Nov. 21, 22.

BASSET v. ST. LEVAN. (a.)

Will — Construction — Disentailing — Resettlement — Money to be invested in land—Hereditament—Equitable conversion.

A testator gave all the residue of his real and personal

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

estate to A., on condition that A. would disentail and resettle certain property the subject of a settlement and will, and of which A. was tenant in tail male in remainder. The said property included large sums of money liable, under the limitations of the settlement, to be invested in land.

Held, that, in order to comply with the condition in the testator's will, these moneys must be included in the resettlement.

Adjourned summons.

Gustavus Lambert Basset, by his will, dated the 6th of March, 1888, after appointing William Francis Higgins and Edmund Chase Marriott executors and trustees, and appointing his wife Mary Basset and the said W. F. Higgins guardians of his only son, Arthur Francis Basset, and reciting that, under a family settlement, dated the 3rd of March, 1854, and the will, dated the 15th of February, 1859, of his late brother, John Francis Basset, he, the testator, was tenant for life, and his said son, A. F. Basset, was tenant in tail in remainder of the "Manor of Tehidy and certain estates in the county of Cornwall held therewith, and hereinafter called the Basset Estates," and reciting that, in the event of the failure of his, the testator's, issue, he was desirous that the said manor and estates should be settled upon the descendants of John Tope Rogers, the next representatives of the Basset family, the said testator proceeded as follows: "Now I do hereby desire and direct my said son, A. F. Basset, within six months of my death, or of his attaining the age of twenty-one years, whichever should last happen, to effectually disentail the said manor and estates and all other estates and hereditaments then subject to the limitations of the said settlement of the 3rd of March, 1854, and the said will of the said John Francis Basset, or either of them, and to execute within the time aforesaid an effectual resettlement thereof to the uses and upon the trusts and subject to the powers and provisions hereinafter declared." The testator then declared that such resettlement should contain such powers and provisions as the trustees or trustee of his will should, in their or his uncontrolled discretion, think fit, and that they or he, in the exercise of a like discretion, might extend the time within which the said A. F. Basset was thereinbefore required to execute the said disentailing assurance and resettlement to a period not exceeding the space of one year and a half from his (the testator's) death, or the majority of his said son, whichever should last happen; and the testator devised and bequeathed his residuary real and personal estate to his said trustees upon trust for sale and investment, and to pay certain annuities out of the income, and, subject thereto, in case his said son, A. F. Basset, should attain the age of twenty-one years, and execute the disentailing assurance and resettlement as thereinbefore directed, to hold the capital of the said investments in trust to pay the sum of £7,000 to the testator's wife, and subject to such payment in trust for his said son absolutely, but if his said son should attain the age of twenty-one years and refuse to execute, or die before executing, the disentailing assurance and resettlement in the manner thereinbefore directed, the testator gave the capital and income of the said investments over. The said will contained other provisions and three codicils, which it is not material to set out here.

The testator died on the 25th of July, 1888, and in the year 1889 two actions for the administration respectively of the trusts of the said settlement of 1854 and of the will of the testator were commenced, and the usual administration orders were made in both actions. The said A. F. Basset attained his majority on the 29th of January, 1894, and on that date there was, in addition to the said Manor of Tehidy and other real estate, a large sum of money in the hands of the trustees of the settlement of 1854, subject to the trusts of the said settlement, and liable thereunder to be invested in the purchase of lands to be settled according to the uses of the settlement. On the 16th of February, 1894, the said A. F. Basset executed a disentailing assurance of the said settled land, conveying it to the use of himself in fee simple, and he also barred the *quasi*-entail in the said settled moneys, declaring them to be held in trust for himself absolutely.

This was a summons taken out by the said A. F. Basset to have it determined whether, in order to comply with the above-mentioned condition in the testator's will, he must bring into the proposed settlement simply the aforesaid settled lands and no more, or whether he must also bring in all the aforesaid settled moneys which were subject to the trusts of the said settlement of 1854 at the time he attained his majority.

Graham Hastings, Q.C., Ingle Joyce, and *Challis*, for Arthur Francis Basset.—The words in the will, "the said manor and estates, and all other the estates and hereditaments then subject to the limitations of the said settlement," are not words which describe money, but only refer to land. Money cannot be a "hereditament." Nothing can be described as a "hereditament" unless at common law it would devolve upon the heir in case of an intestacy. The doctrine of equitable conversion only applies for the purpose of ascertaining the rights of parties under the settlement itself; it cannot be applied in construing a document (*i.e.*, the testator's will) hostile to the settlement. *In re Duke of Cleveland's Settled Estates*, [1893] 3 Ch. 244, was not an authority against Mr. Arthur Bassett, but was rather in his favour, as it went to affirm the maxim as to the doctrine of equitable conversion and the limits of its application.

They cited the following cases:—*Chandler* v. *Pocock*, 28 W. R. 806, 15 Ch. D. 491; *Ackroyd* v. *Smithson*, 1 Wh. & Tud., 6th ed., p. 1027; *Curteis* v. *Wormald*, 27 W. R. 419, 10 Ch. D. 172.

Giffard, Q.C., and *R. F. Morton*, for the trustees.—Whatever is to be disentailed is to be resettled. The direction in the settlement of 1854 was to invest in land, and whether this had been done or not does not affect the question for the court to decide now, as equity supposes that to be done which ought to be done; *Guidot* v. *Guidot*, 3 Atk. 254; *In re Greaves' Settled Estates*, 31 W. R. 807, 23 Ch. D. 313. Hence this money must be regarded as "land."

They referred to *Leach* v. *Jay*, 27 W. R. 99, 9 Ch. D. 42, but they relied on the decision in *In re The Duke of Cleveland's Settled Estates*.

W. Freeman, for the persons entitled if the gift over took effect.

Hastings, Q.C., replied.

STIRLING, J., after reading the will and stating the facts, proceeded as follows:—The question for me to settle here is what property is included in the words "said manor and estates, and all other estates and hereditaments then subject to the limitations of the said settlement of 1854 and the said will of John Francis Basset." If the will had stopped at the words "said manor and estates," I think that the funds now in the hands of the trustees of the settlement would not be included in the direction to resettle, but the words used are much wider, and it is contended by the trustees that the moneys are included in the words "all other estates and hereditaments," &c. Now what is the meaning of "heredita-

ment"? Mr. Challis defined it, in his argument, as anything "capable of being inherited according to common law." I think that is well founded, but ought I to put such a meaning on the word when I am construing a will? The courts have gone a long way in construing words in wills according to their technical meaning, especially in the case of *Leach* v. *Jay*. But that decision was based on the fact that the word seisin is the most technical word in the law, and I do not think I am bound to put such a strict construction on the word "hereditament," in the absence of further authority. Moreover, the word "hereditament" is enlarged here by the addition of the word "estates." Now suppose the testator had had an ultimate remainder in fee reserved to himself in the settlement of 1854, and suppose he had devised "all other estates and hereditaments subject to the said settlement" to A. Would these funds pass under such devise? I think they would, for the case falls within *In re Duke of Cleveland's Estates*. [His lordship here read the facts in that case and the judgment of Lindley, L.J., therein, and proceeded:—] This judgment of Lindley, L.J., seems to me to show clearly that these moneys may be regarded in a will as "land," and, therefore, they may be regarded as "estates and hereditaments," for from the point of view of equity these moneys are subject to an imperative trust for investment in land, and are capable of descending or devolving as land in a court of equity, though not in a court of law.

It is said by Mr. Arthur Basset, however, that the testator was not in the present case disposing of his own estate, but was merely directing his son to resettle property in which he, the testator, had no interest, and that, therefore, a narrower meaning should be placed on the language of the testator's will. I do not think that this affects the question. I quite admit that the doctrine of equitable conversion is a doctrine that is to be invoked only for the benefit of persons claiming under, and not outside, a settlement, but this does not seem to me to be a case of hostile documents. The testator in his will refers to certain property under a given settlement, to which his son will be eventually entitled, and requests him to deal with it in a certain manner. Why should less effect be given to words in his will, used to describe a certain property, than if the testator had himself been capable of disposing of some estate and interest in that property, and was attempting by this clause to dispose of it? I see no reason for taking such a view, and, therefore, I am of opinion that the moneys in question, subject to the settlement of 1854 and the will of 1859, are included in the phrase "estates and hereditaments," and that consequently the disentailing assurance and resettlement must include them in order to comply with the condition in the testator's will, attached to the gift of his residuary real and personal estate.

Solicitors, *Bell, Brodrick, & Gray; Lawrence, Graham, & Co.; Senior, Attree, Johnson, & Son.*

Chan. Div. }
Kekewich, J. } Oct. 27; Nov. 15.

BUDGETT v. BUDGETT. (a.)

Costs — Taxation — Copy correspondence — Taxing master's discretion—Statute-barred costs—Allowance to trustees.

The amount to be allowed for copy correspondence is in the discretion of the taxing master, whose duty it is to ascertain what part of the correspondence, having regard to all the circumstances of the case, is requisite for its proper determination.

Trustees are entitled to be recouped out of the trust estate statute-barred costs which they have properly incurred.

These were cross-summonses issued to review taxation of costs. The children of S. Budgett were entitled to a considerable property under a settlement, and there had been a partition suit in 1884 and a sale of a daughter's share. The present action was by a beneficiary against the trustees, and had subsequently arisen out of the whole previous proceedings. The correspondence referred to in the action, and which extended over a period of thirty years, amounted to 3,477 folios in six volumes, a considerable portion of it was read at the trial, and it was entered as read in the judgment. The taxing master allowed only one-third of the costs of the copies of the correspondence, and in answer to the objections carried in he said that the amount he had allowed was all that, in his judgment and discretion, it was necessary and proper to allow.

This was a summons asking that the cost of the whole correspondence might be allowed.

Ingle Joyce, for the applicants.

Butcher, for the respondents.—The question is entirely in the discretion of the taxing master, and he has exercised his discretion. The proper charges for copies of documents are always in the discretion of the taxing master: *Turnbull* v. *Janson*, 26 W. R. 815, 3 C. P. D. 264.

KEKEWICH, J.—I must send the matter back to the taxing master, as it is a question of great importance. It must be considered both from the point of view of what is necessary for justice and also the hardship on suitors in regard to excessive costs. I confess that I hold a strong opinion that, in a large number of cases, a well-arranged copy of the correspondence is extremely useful to the judge, and, if really useful, counsel on both sides ought to have similar copies. The inconvenience of handing up letters separately by the solicitors, and the trouble of referring to the correspondence from time to time is otherwise great. Sometimes, however, correspondence is both incomplete and over-burdened. In my opinion, where the merits of the case turn on the correspondence, as in this case, a proper copy ought to be allowed. What is a proper copy is entirely a matter for the taxing master. He must master the whole case, and consider it from all the points of view; how the court and the counsel engaged have dealt with it: what part of the correspondence, having regard to all the circumstances, was necessary and proper for the argument and decision. He does not say he has looked at it from every point of view, and I must therefore refer it back to him with this expression of my opinion.

Nov. 15.—The taxing master having reported that, after consideration, in view of the judge's directions, he was of opinion that he had allowed the correct amount in allowing one-third.

The summons was dismissed.

The second summons substantially raised two questions:—

(1) Whether the trustees ought to be allowed the costs of an action (*Budgett* v. *Walsh*) which were payable by Walsh, but could not be recovered from him, as there was insufficient to levy execution upon?

(2) Whether statute-barred costs, some of which

(a.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

had been paid and some not, ought to be allowed to the trustees?

Butcher, for the applicants.—The trustees did not pursue all their remedies against Walsh to recover the costs of *Budgett* v. *Walsh*. The statute-barred costs ought not to be allowed. As regards those not yet paid I am entitled to insist on the statute: *In re Wenham, Hunt* v. *Wenham*, 40 W. R. 636, [1892] 3 Ch. 59.

Ingle Joyce, for the trustees.—The costs are charges and expenses properly incurred, and ought to be allowed: *In re Murray*, W. N., 1867, p. 190; *Curwen* v. *Milburn*, 38 W. R. 49, 42 Ch. D. 424; *In re Carter, Carter* v. *Carter*, 34 W. R. 57.

KEKEWICH, J.—As regards the first point I think the trustees did all that was necessary in endeavouring to recover them, and that they are entitled to be recouped out of the estate. The question whether statute-barred costs ought to be considered by the taxing master or not arose before North, J., in the case of *Curwen* v. *Milburn*, and that case is useful as indicating the convenient course to follow. Here the taxing master has followed a convenient course by certifying what (if any) is proper to be allowed, and leaving it to the court to decide the question whether there shall be an allowance or not. I am dealing here with a direction to ascertain by taxation the costs, &c., properly incurred by the trustees. The order says the trustees are to pay and retain them. These costs and expenses were to be paid out of the trust estate. Why not costs which they have properly incurred but which they might have refused to pay because they statute-barred? Now the costs in this case are of two classes: Those paid which they were not bound to pay, as being statute barred, and, having paid them, they are, in my opinion, entitled to be indemnified against them out of the trust estate. An analogy has been drawn from the case of executors; their position helps the trustees. An executor may pay a statute-barred debt. He may retain a statute-barred debt: see *Midgley* v. *Midgley*, 41 W. R. 659, [1893] 3 Ch. 282; and *Hill* v. *Walker*, 4 K. & J. 166, 6 W. R. Dig. 25, 113. The law is very well stated in Mr. Elgood's book, at p. 188. But this does not dispose of their claim to pay costs which are statute barred and have not been paid, but which they say ought to be paid. Are they entitled to say these costs ought to be paid and retained out of the estate? Mr. Butcher's point is that when once the *cestui que trust* has intervened he is entitled to say, No, I insist on the statute being raised, and he relies on the case of *In re Wenham, Hunt* v. *Wenham*, before North, J. But there is this distinction: that in that case the executor was paying a debt of the testator's, whereas in the present the trustee is paying his own debt. The debt itself is not gone, and moral liability remains, though it is not recoverable by action. Therefore I think that all these sums which have been certified as having been properly incurred, whether paid or payable, notwithstanding the statute, ought to be paid out of the capital moneys subject to the trusts of the settlement.

Solicitors, *Ingle, Holmes, & Sons; Foss & Ledsam.*

Chan. Div. Kekewich, J. } Aug. 9, 1894.

DAVIS v. FOREMAN. (a.)

Contract—Service—Negative stipulation really affirmative—Breach—Injunction.

An injunction ought not to be granted on the breach of a stipulation in a contract of service which, though negative in form, is affirmative in substance.

Motion.

The plaintiff was employed by the defendant as manager under an agreement which provided by clause 7 thereof as follows: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period; that he shall draw from the said business £15 each and every month and the said interest as aforesaid; but in the event of the said business failing to realize the said sums, then this agreement and the service hereby created may be determined by either party giving to the other three calendar months' notice for that purpose."

The defendant gave notice to determine the agreement, and this action was brought to restrain the defendant from acting on the notice, and the case was argued on the assumption that the grounds of the notice were justified.

Warmington, Q.C., and *J. Bacon*, for the plaintiff.—The clause of the agreement is negative, and therefore enforceable: *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416; *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 41 W. R. 146, [1893] 1 Ch. 116; *Donnell* v. *Bennett*, 31 W. R. 316, 22 Ch. D. 835.

Marten, Q.C., and *Ribton*, for the defendant.

KEKEWICH, J.—The stipulation in clause 7 of this agreement is distinctly negative in point of form, but I think it is distinctly affirmative in substance. In this respect it differs entirely from the agreement in *Lumley* v. *Wagner*, where there was a distinct undertaking by the defendant not to use her talents at any other theatre than that of the plaintiff. The question has been frequently considered, and it seems to be well settled that an agreement for personal service cannot be enforced otherwise than by an action for damages, though it may be possibly enforced by injunction in some exceptional cases, not to be extended, where there is a strictly negative stipulation. Having regard to the principle laid down by the Court of Appeal in *Whitwood Chemical Co.* v. *Hardman*, and recognized in *Ryan* v. *Mutual Tontine Westminster Chambers Association*, what ought I to do in this case? The clause in the agreement says that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. That is equivalent to saying that he will retain the manager in his employment. If I come to the conclusion that this is really the substance of the agreement, is it right, having regard to the authorities, to say that an injunction ought to be granted merely because the form of the agreement is negative? In my opinion it would be contrary to the decision of the Court of Appeal, and I refuse the motion.

Solicitors, *Halses, Trustram, & Co.*, for *Greathead & Goldie*, Rochester; *W. Headley*, for *A. B. Hearn*, Chatham.

(a.) Reported by FRANCIS T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J.

Aug. 4, 1894.

In re EDWARDS.
EDWARDS *v.* EDWARDS. (*a.*)

Will — Construction — Failure of issue—Die without leaving any male issue—Estate tail or estate in fee simple—Wills Act (1 *Vict. c.* 26), *s.* 29.

Under section 29 *of the Wills Act a devise since that Act to A., his heirs and assigns, with a proviso that in case A. should "die without leaving any male issue" then over, is a devise in fee simple to A., subject to an executory devise over.*

Upton *v.* Hardman, *Ir. Rep.* 9 *Eq.* 157, 23 *W. R. Dig.* 257, *followed.*

Thomas Edwards by his will, dated the 22nd of October, 1881, devised the whole of his freehold estate in Burton, Denbigh, to his son John Edwards for life, and after his decease, as to one portion of it, to T. W. Edwards, his heirs and assigns, subject to two payments of £100 each to persons as therein mentioned, and as to the other portion of his said estate, he devised it John Howard Edwards, his heirs and assigns, subject to a payment of £100 as therein mentioned. The will contained the following proviso:—"Provided always that in case the said T. W. Edwards and J. Howard Edwards, or either of them, shall die without leaving any male issue, then I direct that the property so given and devised to them and their heirs as aforesaid shall, after their respective deaths, go to the male issue of my son Thomas Edwards.

This was a summons taken out in the Liverpool District Registry by T. W. Edwards and a mortgagee from him as plaintiffs, against J. Howard Edwards and other benefiaciaries named in the will, and others as defendants, raising the question (*inter alia*) whether the devisees, T. W. Edwards and J. Howard Edwards, took estates in tail male, or estates in fee simple, subject to executory devises over.

Section 29 of the Wills Act (1 Vict. c. 26) provides as follows:—"In any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue unless a contrary intention shall appear by the will by reason of such person having a prior estate tail or of a preceding gift being without any implication arising from such words a limitation of an estate tail to such person or issue or otherwise."

J. P. Rylands, for the plaintiffs.—Section 29 of the Wills Act must be construed strictly as meaning what it says, and consequently applies only when the precise expressions "die without issue," "die without leaving issue," or "have no issue," or some expression covering exactly the same ground is used. Here the word "male" is introduced, which makes it quite a different limitation, and indicates "contrary intention." The plaintiffs take an estate tail.

P. O. Lawrence, for defendants in same interest.

R. B. Lawrence, for other defendants *contrà*.—*Upton* v. *Hardman*, Ir. Rep. 9 Eq. 157, exactly covers our case. There the decision of the Irish Court of Chancery was to the effect that a gift over in default of "male" issue was within section 29 of the Wills Act.

Rylands and *P. O. Lawrence* replied.

KEKEWICH, J.—There are in this will no words which, if section 29 of the Wills Act is applicable to this case, would in any way come within the meaning of the words "contrary intention" in that section. A testator may say, "Notwithstanding the Wills Act, I do not mean by words importing a want or failure of issue what the Legislature has said those words mean." He may say that in language which is unmistakable, and which cannot be otherwise construed, but there is nothing of the sort here to enable me to get out of the section in this manner.

That being so, the question is, Are the words used in the proviso words which import "a want or failure of issue" within the meaning of section 29 of the Wills Act? The words in the proviso certainly do import a want or failure of issue, though restricted to male issue. Now, the words of the Act are, "In any devise or bequest . . . the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue . . . " shall be construed as therein stated. Now, on the most elementary principle of construction I must hold that "any other words which may import a want or failure of issue" bring within the section expressions other than the preceding expressions, "die without issue," "die without leaving issue," or "have no issue," but it is said they do not cover the expression here used, "die without leaving any male issue." That is a curious question, which might deserve some consideration now were it not that the exact point was raised before the Court of Chancery in Ireland in *Upton* v. *Hardman*. Mr. Theobald, in his book upon Wills, which I refer to, not as an authority, but as a well-known text-book, at p. 495 of the 3rd edition, published in 1885, eleven years after the decision in *Upton* v. *Hardman*, states that case as follows:—"The words 'dying without male issue' will, under this section (*i.e.*, section 29 of the Wills Act), be restricted to male issue living at the death of the ancestor." That is quite accurate; but the value of the reference is not that Mr. Theobald thought that that was the decision, but that he gave a note of the decision without a reference to any other case or comment or criticism of any kind. In order to pursue the matter to date, I have sent for the 5th edition of Jarman on Wills, but *Upton* v. *Hardman* is not mentioned there, the editor no doubt thinking (and far be it from me to say he was wrong in so doing) that the Irish case did not come fairly within the scope of the work. Of course, I am not bound by the Irish decision if I think it wrong, but am at liberty to construe the Act as I understand it. This is, however, a question of title, and in such questions the court has always given great weight to any decisions, and even to the established practice of conveyancers. It is impossible to doubt that between 1874, the date of the decision in *Upton* v. *Hardman*, and 1894 that titles may have passed on gifts similar to the present one on the authority of that decision, and I do not think that I can properly criticize it now. If it is to be disregarded, it must be done by a higher tribunal, and I accordingly follow the judgment in that case. The devisees, therefore, take estates in fee simple, subject to executory devises over on failure of male issue.

Solicitors, *C. W. Tibbits*, Liverpool; *J. W. Dalton*, Liverpool.

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a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Chan. Div. Wright, J. } June 14; July 13; Aug. 3, 1894.

In re PERUVIAN GUANO CO. (LIMITED). (*a.*)

Company—Winding up—Dividend—Net profits—Estimate—Payment of dividend out of estimated profits—Stale demand—Resolution for dividend—Directors' remuneration—Interest—3 & 4 Will. 4, c. 42, s. 28.

The articles of a limited company provided that, after certain sums had been paid, ten per cent. of the residue of the net profits should be paid as remuneration to the directors, and that the ultimate residue of net profits should be applied in paying such dividend on the ordinary shares, or in such manner as, subject to the regulations, a general meeting might determine. At a general meeting held in April, 1883, it was resolved that a sum treated as the balance of net profits should be dealt with in accordance with the last-mentioned provisions of the articles. It was objected that some of the items which were then treated as valuable had no substantial value, and that the directors could not, acting reasonably, take the view that they were valuable. The directors acted on the report of their auditor and after consultation with him. The company was wound up voluntarily in 1883, and all the creditors were paid in full, and certain directors claimed to be paid their shares of the ten per cent. of the residue of the net profits—a claim which was opposed by the liquidator, on the ground that the assets were over-estimated at the time the resolution was passed, and that the proposed distribution of the residue was in effect a payment of dividends out of capital.

Held, that the directors were entitled to the ten per cent. claimed, but without interest.

Orton *v.* Cleveland Fire Brick and Pottery Co., 13 *W. R.* 869, 3 *H. & C.* 868, *not followed.*

This was a summons by the voluntary liquidator of the above-named company that a claim made by certain late directors of the company, or their legal personal representatives, to have ten per cent. of a sum of over £130,000 paid to them as directors' remuneration under the articles of association might be determined by the court, and that the liquidator might be at liberty to distribute the assets of the company as if the claim had not been made.

The company was formed in 1876, with the principal object of carrying out a contract as to the consignment and sale of Peruvian guano.

At a general meeting held in April, 1883, it was resolved (*inter alia*) that a balance of £135,243 should be dealt with, appropriated, and paid in accordance with article 131 (sections 3 and 4) of the articles of association. These clauses provided as follows:—"(3) 10 per cent. of the residue of the net profits shall be paid and applied as remuneration to the directors; (4) the ultimate residue of the net profits shall be applied in payment of such dividend on the ordinary shares of the company, or in such other manner as (subject to the regulations) a general meeting may determine."

The balance-sheet for the half-year ending the 31st of December, 1882, showed a net profit of £11,493, but the directors, with the approval of the auditor of the company, caused a supplemental balance-sheet to be prepared, in which the net profit was increased to £176,493 by transferring £165,000 from the suspense account to the profit and loss account. At a general meeting of the company, held in April, 1883, both balance-sheets were approved, and it was resolved that £135,243, treated as the residue of net profits, should be dealt with in accordance with the above-mentioned provisions of the articles. The residue of £135,243 was not distributed prior to the voluntary liquidation. The company went into voluntary liquidation in May, 1883. All the creditors of the company having been paid in full, certain directors claimed to be paid their shares of ten per cent. of the net profits. The liquidator opposed the claim, on the ground that the value of the assets had been largely over-estimated, and that the proposed distribution of the residue could not be made without a dividend being paid out of capital.

Haldane, Q.C., and *Jenkins*, for the liquidator, referred to the following cases: *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Flitcroft's case*, 31 W. R. 174, 21 Ch. D. 519; *Stringer's case*, 17 W. R. 694, L. R. 4 Ch. App. 475.

Muir Mackenzie, for a shareholder who was also a director.—The dividend was declared *bonâ fide* after an investigation of the company's affairs, and at the time the conclusion arrived at by the directors was a reasonable one.

Bramwell Davis, *Stewart Smith*, and *G. A. Scott*, for other parties.

WRIGHT, J., said the claim of the directors was to something which they had a legal title to be paid. Various objections had been taken to the claim. But the general meeting having so decided, it followed from the articles that the directors had become entitled to what they claimed, and his lordship could not deprive them of it unless he attacked the very root of the matter—namely, the resolution passed nearly twelve years ago. At that time it was certainly not impossible for business men to suppose that a reasonable estimate had been placed on the items mentioned. His lordship was not sure that under any circumstances he could say that the resolution was not valid; but if he was entitled to do so, there was not sufficient proof before him that the valuation made was not substantially correct, or that the directors could not take the view that the items were not of substantial value. There was nothing imaginary about these items. They appeared in a balance-sheet made up almost entirely of estimated items. The directors were acting on the report of the auditor, and after consultation with him and they openly came to the conclusion that a certain amount could be legitimately applied as dividend, because out of the expected million of assets at least that amount would probably be realized. It was difficult, after twelve years had elapsed, to say that that view was wrong. At that time the litigation, which was ultimately disastrous to the company, was favourable to them. They had obtained a judgment in their favour in Belgium, and were advised that they would probably be equally successful in England. His lordship would have had no doubt as to this except for a letter (to which he referred at some length) which was relied on by the applicant's counsel. But there was nothing to show that the circumstances were such as to prevent the company from returning the whole capital to the shareholders. The shareholders wanted a winding up, and the directors agreed as to this. Before steps were taken to wind up the company the directors, after consulting the auditor, decided what was the proper sum to be appropriated to dividend. His lordship declared that the directors were entitled to the remuneration, by way of percentage, claimed by them, but that they must give credit for certain sums received by them as remuneration under another of the articles, which was not payable in case they received the percentage remuneration claimed.

Aug. 3.—The question was now argued whether the directors were entitled to interest.

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Muir Mackenzie, for a director, argued that interest was payable, and referred to Buckley on the Companies Acts, 6th ed., p. 368; *In re Herefordshire Banking Co.*, 15 W. R. 1056, L. R. 4 Eq. 250; *East of England Banking Co.*, 17 W. R. 18, L. R. 4 Ch. App. 14; *Orton* v. *Cleveland Fire Brick and Pottery Co.*, 13 W. R. 869, 3 H. & C. 868. [WRIGHT, J.—That case is no longer law.]

He also referred to *Isaac's case*, 40 W. R. 518, [1892] 2 Ch. 158, and 3 & 4 Will. 4, c. 42, s. 28.

Haldane, Q.C., and *Jenkins*, for the liquidator, referred to *Hill* v. *South Staffordshire Railway Co.*, L. R. 18 Eq. 154, 22 W. R. Dig. 81.

WRIGHT, J., said that he would not allow the claim for interest. The action of the company in taking £165,000 from the suspense account on the eve of the winding up and appropriating it as a profit to a large extent for directors' remuneration was such a speculative affair that the claim of the applicants was not so meritorious that they ought to be allowed interest. He doubted whether there was any sum certain due to the directors until it was ascertained by the order just made. On that ground, too, he thought the claim for interest must be disallowed.

Solicitors, *Murray, Hutchins, Stirling, & Murray; Waterhouse, Winterbotham, & Co.; E. F. Turner; L. Du Cane.*

Chan. Div.
Vaughan Williams J. } July 20, 21, 23, 1894.

DAVIES *v.* R. BOLTON & CO. (LIMITED). (a.)

Company — Debenture — Affixing seal to—Articles of association—Irregularities in issue of debentures—Valuable consideration—Notice.

B. was a director of and vendor to a company which had agreed to pay him a certain sum of money, with interest at six per cent. B. owed D. a smaller sum, and it was arranged that this latter sum should be secured by the company issuing a debenture to B. for the amount owing, with interest at five per cent., and that B. should transfer the debenture to D. The debenture was sealed by the company in the presence of B. as a director and countersigned by M., the secretary of the company. No meeting of directors was called to sanction the issue of the debenture, but it appeared that at a meeting held about that time B. and M. were present, and a resolution was passed authorizing the issuing and sealing of the debenture. The material provisions of the articles were the following:—Money borrowed might be secured by debentures. The common seal of the company was not to be affixed to any document except in the presence of two directors or of one director and the secretary, and in pursuance of a resolution of the directors. No director was to vote in respect of any contract in which he was personally interested, and if he should vote his vote was not to be counted. Any debenture bearing the common seal and issued for valuable consideration was to bind the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same.

Held, that, the debenture being given for valuable consideration, the irregularities attending its issue were cured by the last-stated clause in the articles.

Action.

R. Bolton and G. L. Davies were in partnership as mining engineers for a short time, when Davies retired on the terms of being paid £649 1s. 3d. by Bolton.

In 1893 Bolton sold his business to a company formed to take it over.

The material articles of association of the company provided as follows: The directors might borrow (55), and secure the money borrowed by debentures or debenture stock (56). Debentures, debenture stock, and other securities might be made assignable free from any equities between the company and the person to whom the same were issued (57). The number of the directors was to be not less than two nor more than seven (88). Bolton was to be the first managing director. Bolton and the remaining six subscribers of the articles were to be the first directors (89). The directors might act notwithstanding any vacancy in their body, but not if the number were reduced below the minimum (93). No director was to vote in respect of any contract or arrangement in which he was interested, and if he did vote his vote was not to be counted, but no director was to be disqualified by his office from entering into contracts or arrangements with the company (95). One director was sufficient to form a quorum (104). Meetings of directors at which a quorum was present could exercise the powers of the directors generally (107). All acts done by directors were to be valid as if every person had been validly appointed and was duly qualified (110). Any mortgage bond, debenture, or other security bearing the common seal of the company, and issued for valuable consideration, was to be binding on the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same (115). The common seal was not to be affixed to any document except in the presence of two directors, or of one director and the secretary, in pursuance of a resolution of the directors (118). Deeds, &c., sealed with the common seal and signed by two directors, or by one director, and countersigned by the secretary, or the person acting as secretary, were to be deemed to be duly executed.

In June, 1893, one Millington was purported to be appointed a director, though he never was a director in fact.

In July, 1893, Davies pressed Bolton for payment of the £649 1s. 3d., and an arrangement was come to under which the company was to issue a debenture for that amount to Bolton, who was immediately to transfer it to Davies.

The debenture was then issued under the common seal, and the company thereby covenanted to pay Bolton on such day as the moneys thereby secured became payable £649 1s. 3d., or such part thereof as might not already have been paid, and in the meantime pay interest at £5 per cent. on the amount owing. The moneys were to become immediately payable on a winding up or on default in payment of certain acceptances granted by the company to Bolton for sums amounting to £649 1s. 3d.

By the debenture the company charged all its property, present and future, including uncalled capital (if any), for the time being.

Before the issue of the debenture a print of the articles had been shown to Davies' solicitors. It appeared that a resolution had been passed at which Bolton and Millington were present authorizing the issuing and sealing of the debenture though no meeting of directors was called.

Under the agreement for sale to the company more than Davies' debt was due by the company to Bolton; but the amount was to be paid by instalments, which had not become due at the date of the debenture, and interest was payable on instalments unpaid at the rate of £6 per cent. per annum.

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

The debenture was only signed by Bolton and Millington.

The company was ordered to be wound up in January, 1894.

An action had been commenced in December, 1893, by Davies to enforce his security, and in this action the following objections were raised to the debenture: (1) That the seal of the company had never been affixed to the debenture; (2) that it was never sealed or delivered with the authority of or so as to bind the company; (3) that no resolution under clause 118 of the articles had been passed; (4) that no meeting of directors was held at which such a resolution could have been passed; (5) that the seal was affixed by the sole authority of Bolton, in whose favour the debenture was issued; (6) that clause 95 of the articles prevented Bolton from passing any resolution required by clause 118; (7) that the moneys purported to be secured could not be secured under clauses 55 and 56 of the articles.

Herbert Reed, Q.C., and *Eastwick*, for the plaintiff, a transferee of the debenture, who had obtained leave to carry on the action in the name of Davies.

O. L. Clare, for the official receiver and liquidator.—There was no valuable consideration for the debenture, and Davies had notice of the irregularities, a copy of the articles having been sent to his solicitors. The present plaintiff is in the same position as Davies would have been. The provisions of the articles were not followed with regard to sealing and the presence of the directors. Millington was never a director, neither were the requirements of clauses 55, 56, and 95 fulfilled.

Herbert Reed, Q.C., and *Eastwick* contended that there was valuable consideration, an antecedent debt being a sufficient consideration, and that any irregularities were cured by clause 115 of the articles.

On the question of notice they referred to *In re Romford Canal Co.*, 24 Ch. D. 85, 31 W. R. Dig. 43.

VAUGHAN WILLIAMS, J.—This case has caused me a great deal of doubt and anxiety, not so much as to this particular case, but because the case raises a question of some general and public importance. The practice of insolvent traders turning themselves into limited companies and then issuing debentures in favour of some or all the creditors of the particular trader—debentures which secure really the price payable by the company to the vendor—has of late years become extremely frequent. It is quite clear that in many cases the whole operation is a mere fraud. It involves conduct which, if it was that of an individual trader, no one would hesitate to describe as a fraud on his creditors. The court ought not easily to permit a man, by taking the benefit of the device of turning himself into a company, to defraud his creditors. My only motive for saying this is because I am led by the practice of translating a trader into a company to scrutinize every step in such a transaction with jealousy, and to take care, if any slip is made in carrying it out, that the law shall not be strained in favour of the parties to such a transaction. I am glad, however, to say that the present case is not a bad or flagrant instance of the user of the practice referred to. Mr. Bolton was not present, and I do not wish to say anything against him. He has apparently absconded. He entered into partnership with Davies, and I am not surprised that it turned out unsatisfactorily and that Davies was glad to get out at a sacrifice. After such sacrifice had been made there was still a considerable sum due from Bolton to Davies. After this Bolton turned himself into a company, not with a view to benefiting Davies, but rather in a spirit of hostility to him. Thereupon Davies put the matter into the hands of his then solicitors, who pressed Bolton for payment. Bolton was unable to pay the amount due, but said the company had to pay him for the purchase of the business, and anticipated that the sum would come in from the shareholders, but that if Davies pushed matters very far, Bolton might become bankrupt, and there would be a loss to the creditors. By "the creditors" I suppose that Bolton meant his own creditors and perhaps also those of the company.

It was suggested that Davies should take security from Bolton, and that, as the company owed money to Bolton for the purchase of the business, by instalments not yet payable, the company might give a debenture to Bolton who would transfer it to Davies. That was agreed to, and during the negotiations the solicitors of Davies wrote to Bolton, and got him to send the company's memorandum and articles of association, apparently with a view to seeing whether the debenture could be validly given by the company. The debenture in question in the present action was given, and it is the duty of the court to consider the various objections which have been raised to it. The first objection taken was that the seal of the company was never affixed to such instrument, nor was the same sealed or delivered with the authority of or so as to bind the company. I am of opinion that the seal was affixed to the debenture so as to bind the company. Bolton was a director, and certain clerks and friends were the other directors, but Bolton was the beginning, the middle, and the end of the company. But it seems to me that this debenture was sealed in the presence of Millington, the secretary of the company, and of Bolton, and was then handed to someone acting on Davies' behalf. The second objection is on article 118 of the articles of association. On the facts it is plain that there was a meeting of Bolton and of the secretary, and that all that was done was done by the two of them. It was said that this was not enough to satisfy the requirements of article 95, which provided, amongst other things, that no director should vote in respect of any contract in which he was interested, and that if he did so vote his vote should not be counted. In my judgment the only director present was Bolton. It was suggested that Millington was also a director, but I do not think he was. He was one of the signatories of the memorandum and articles of association, and article 89 provides that Bolton and the remaining six subscribers to the articles shall be the first directors until such time as the latter, or a majority of them, shall nominate by an instrument in writing under their hands another director or directors to act with Bolton in place of the remaining six subscribers. A memorandum in writing was signed by the majority of the subscribers and purported to appoint Millington as director to act with Bolton in place of the six subscribers other than Bolton; but Millington never signed this memorandum or consented to act as a director under it or otherwise. I therefore doubt whether there was a compliance with the articles, because the articles required the presence, not only of Millington, but of another director who was not interested in the contract. But, assuming that the presence of Bolton was not a compliance with article 95, I think that article 115 applies so as to cure the irregularity.

The further objections taken were that no meeting of the directors was convened or held at which any such resolution could have been passed; and that the seal of the company was affixed to the instrument by the sole authority of Bolton, the person in whose favour the instrument purported to be made. That no other director of the company was

present or voted in favour of the said affixing of the said seal, and no meeting of the directors had been convened for the purpose or in fact, and that, even if a meeting of the directors had been duly convened, article 95 prohibited Bolton from passing any such resolution as was required by article 118. Further, that the moneys purporting to be secured by the said instrument were not moneys which the director had power to secure within the meaning of the articles. The first of these objections are, in my opinion, made in respect of mere irregularities. They relate principally to the internal management of the company's affairs, and when the court is satisfied that the seal of the company has been affixed to the debenture in the course of business by those who had the management and control of the company, non-compliance in the manner pointed out seems to come within the terms of and to be cured by article 115. Then it was said that, although the debenture was so issued, it was not given for a valuable consideration, because the sum to secure which it was given was not then actually due and payable by the company to Bolton, and, therefore, it was only given for his accommodation. I think that if there had been no other circumstances beyond the fact of the debenture having been issued for the sum due, but not payable, the debenture would, nevertheless, have been issued for value. But the question does not arise for decision, because under the agreement between Bolton and the company six per cent. interest is payable by the company, whereas under the debenture only five per cent. interest is payable, and that change is a sufficient consideration to support the debenture.

A further point taken was that Davies had notice of the infirmities of the debenture, and took subject to the equities affecting it; and it had been very properly conceded that the present plaintiff stood in no better a position in this respect than Davies. Davies had no personal knowledge of the infirmities, but his lordship had had some doubt whether his solicitors, who sent for the articles, had such knowledge as would affect him with notice. If there had been anything on the face of the debenture which showed a non-compliance with the articles, I should have considered the case not to be covered by article 115. But the debenture was signed by Bolton and the secretary, and all that article 118 requires is that the seal of the company should be deposited at the office of the company, "and never be affixed to any document except in the presence of two directors, or of one director and the secretary." This debenture was *ex facie* signed by one director in the presence of the secretary. It was urged that this was not sufficient, because Bolton, being an interested party, was not a director who had authority to sign, having regard to article 95. That is quite true, but an examination of the articles would not tell the solicitors of this defect. They could not tell whether Millington was a director, or, if he was not, whether there were other directors present, for article 118 only requires the presence of directors, and the mere fact that the debenture was signed by the director in whose favour it was issued would not of itself show that there had been a violation of the articles. The debenture must be held valid, and the plaintiff is entitled to have it enforced.

The question of costs was reserved. The debenture included all the assets, and his lordship said he should not make any order which would involve payment of costs by the liquidator personally unless he was satisfied that that was the ordinary practice followed by the judges of the Chancery Division.

Solicitors, *Deacon, Gibson, & Medcalfe; Firth & Co.*

Prob. Div. & Adm. Div. / Admiralty. } June 18, 25, 1894.

"THE MONA." (*a.*)

Admiralty—Damage—Practice—Tender—Assessment of damages less than the amount tendered—Refusal to pay out whole of tender to the plaintiff—Rules of the Supreme Court, ord. 22, rr. 1-5; ord. 72, r. 3.

The rules of order 22 of the Rules of the Supreme Court with respect to payment into court have not altered the practice as to tenders by act in court in admiralty actions, except so far as they affect the manner of lodging the money in court; and, accordingly, where, in a damage suit, a sum tendered by act in court after admission of liability was not accepted, and the registrar reported that a certain sum was due to the plaintiffs in respect of the damage proceeded for, the court, on it appearing that the sum so reported due was less than the sum tendered, refused to order the whole amount of the tender to be paid out to the plaintiffs.

This was a motion on behalf of the owners of the barge *Stockholm*, the plaintiffs in an action of damage instituted against the steamship *Mona* to recover the damages sustained in a collision between the two vessels, for an order for payment out to them of the total sum of £750 lodged in court by the defendants, the owners of *The Mona*, to the credit of the suit in the books of the Paymaster-General for the Supreme Court of Judicature, after they had admitted their liability for the collision, having agreed with the plaintiffs that the action should be settled by the defendants paying to the plaintiffs 67½ per cent. of the fund as agreed damages sustained by the plaintiffs, together with costs, to be taxed.

After this agreement had been made the question of damages was referred to the registrar and merchants to report upon, and at this stage of the suit the above-mentioned amount was brought into court and tendered to the plaintiffs.

June 18.—The motion was heard before Bruce, J., sitting in court as one of the judges assigned to the Probate, Divorce, and Admiralty Division in the absence of Barnes, J.

It appeared from the report of the registrar that the registrar and merchants had assessed the amount of damages due to the plaintiffs in respect of the collision at £713 10s., together with interest, amounting in the whole to a sum less than the amount tendered.

Laing, on behalf of the plaintiffs, in support of the motion.—The rules of order 22 of the Rules of the Supreme Court as to paying money into court in satisfaction of the cause of action (rules 1 to 5) govern this case with this sole exception, that, as the action is an admiralty action, the leave of the court must be obtained before any payment out of court is made (ord. 22, r. 20), and under their provisions, there being no reason why the leave of the court should be refused in consequence of conflicting claims or other similar questions, the plaintiffs are entitled to an order that the whole of the sum paid in by the defendants should be paid out to them.

He referred to *The Dunbeth*, not reported; *Wheeler* v. *United Telephone Co.*, 33 W. R. 295, 13 Q. B. D. 597; *Hennell* v. *Davies*, 41 W. R. 284, [1893] 1 Q. B. 367; *Dunn* v. *Devon and Exeter Gazette*, 63 L. J. Q. B. 342, 38 SOLICITORS' JOURNAL, 351, where, after a trial for libel at which the jury had given the plaintiff a verdict for less than the sum paid in by way of amends, the plaintiff was held by the judge

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister at-Law.

at *Nisi Prius* entitled to take out the whole of the sum so paid in.

Butler Aspinall, contrà, on behalf of the defendants.—The rules of order 22, relied on by the plaintiffs, do not apply to an admiralty action where, as in the present case, there has been a tender by act in court, the practice as to tenders in admiralty actions being preserved under the provisions of ord. 72, r. 2, of the Rules of the Supreme Court, which provides for the old practice, where not altered, still continuing in force. Under the practice so preserved the court has power, in its discretion, to make an order that the plaintiffs should only take out of court so much of the fund as the registrar has found due to them. Indeed, the prohibition of money in court being paid out in admiralty actions without an order seems to have been made to meet cases such as the present. Further, the tender was not made in an action, but in the reference, in what has been called "a new litigation" (*The Consett*, 28 W. R. 622, 5 P. D. 77), after liability had been admitted, and the rules on which the plaintiffs rely do not refer to money lodged in court in such cases. But, moreover, the plaintiffs actually agreed that the action should be settled by the defendants paying a certain percentage of the damages for which they should be found liable, and if they receive the whole of the tender they will recover more than the agreement gives them.

Cur. adv. vult.

June 25.—BRUCE, J.—This is an action of damage, in which the parties, on the 5th of January, 1894, agreed, by an agreement filed in court, that the action should be settled by the defendants paying to the plaintiffs 67½ per cent. of the proved or agreed damages and their taxed costs of the action. The parties were unable to agree upon the amount of damages, and by consent the question of the amount of the damages was referred to the registrar and merchants upon the basis of the said agreement. After the making of this agreement, but prior to the reference, which was held on the 24th of May, the defendants filed notices of tender of sums of money, amounting in all to £750, and lodged the same with the Paymaster-General. The notices of tender expressed the tenders to be tenders brought into court in satisfaction of the plaintiffs' claim. The registrar and merchants on the reference found that, in accordance with the terms of the agreement of settlement, there was due to the plaintiffs, in respect of their claim, the sum of £713 10s., and interest. The amount lodged in court is more than sufficient to meet the amount so found to be due to the plaintiffs, with interest thereon; but, notwithstanding, the plaintiffs claim to be entitled to the whole amount lodged in court, and have applied to me to direct that it should be paid out to them. The plaintiffs contend that the tender in court amounts to an admission by the defendants that the amount tendered is due. The defendants contend that the tender was nothing more than an offer, and that when the offer was not accepted they were at liberty to establish, if they could, that a smaller sum was due. They ask that the balance remaining, after satisfying the amount found to be due, should be paid to them. The argument of the plaintiffs' counsel was based mainly upon order 22 of the Rules of the Supreme Court. The main question for consideration is whether rules 1 and 5 of that order govern the practice of tender by act in court in the Admiralty Division in cases where liability has been admitted prior to the tender, and the only question remaining is as to the amount of the damage to be fixed by the registrar. Rule 1 of order 22 provides that a defendant in actions of debt or damages may, before or at the time of delivering his defence, or at any latter time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action, or he may, with a defence denying liability, pay money into court, which shall be subject to the provisions of rule 6.

It seems to me to be doubtful whether the rule I have referred to applies to actions of salvage, which do not, I think, come under the category of actions brought to recover a debt or damages, and if it does not apply to one large class of actions in the Admiralty Division it may be open to contend that it was not meant to apply to other actions in this division. But it is sufficient for the present purpose to observe that the provisions of rule 1 of order 22 seem, when read in connection with rule 2 of that order, to be applicable only to actions where the claim or cause of action in respect of which the money is paid in is admitted or denied by the defence. The rule in question does not seem to contemplate a payment into court in an admiralty action after the question of liability has been determined by agreement between the parties and the question of the amount of damages has been referred. The same may be said of rule 5 of the order, which provides for the case when payment into court is made with a defence setting up a tender of the sum paid. That rule, I think, clearly applies only to a "tender"—*i.e.*, a tender before action as understood in the common law courts. The defence of tender at common law was highly technical, and did not apply to an action for unliquidated damages. If the debt or duty was of such a nature as to be discharged by a tender and refusal, the plea of tender was a plea in bar, but in other cases it was necessary in a tender to plead *uncore prist*, that is, to allege that the defendant was still ready and willing to pay, and so the plea amounted to an admission that the amount tendered was due, and the plaintiff was entitled to the amount tendered though he should be nonsuited or a verdict found against him (see Bacon's Abridgement, Tender). The long-established practice in the High Court of Admiralty was altogether different from the rules which regulated tenders at common law, and I do not think that it can be gathered from any reasonable construction of the provisions of order 22 that it was intended to abrogate the old practice which prevailed in admiralty actions. According to the old practice in admiralty a tender was nothing more than an offer. If the offer was accepted there was an end of the action, and if it was not accepted the fact that a tender had been made was a circumstance to be taken into consideration by the court in the exercise of its discretion in awarding costs.

It seems, according to the old practice, that tenders were often made informally out of court, but, disputes arising in many cases as to whether alleged tenders had really been made or not, the court, in order to prevent this inconvenience, required the tender to be made by act in court, and the money tendered to be brought into court, so that no doubt could arise as to the fact of tender or the amount tendered: see *per* Lord Stowell, *The Vrow Margaretha*, 4 C. Rob. at p. 106. And where a tender was made by act in court it was usual for the court to name a day on or before which the plaintiffs should declare whether they accepted or rejected the tender. In *The General Palmer*, 2 Hagg. Adm. 180, Sir Christopher Robinson said he should hold neither the court nor the owners bound in any manner by a tender not accepted in due time, and the learned reporter, in the marginal note to the case, interprets the words of the judge to mean that a tender not accepted in due time may be reduced by the court. In *The Johannes*, 6 Notes of Cases, 288, a tender of

fifteen guineas had been made by the defendants to the plaintiffs in a salvage suit. Sir John Nicholl pronounced against the claim, and directed the tender to be paid out, not to the plaintiffs, but to the defendants, to go *pro tanto* in payment of their costs. I cannot find any case in which it has been held that a tender made in an admiralty action, not accepted by the plaintiffs, has been held to operate as a binding admission of the amount due. In Coote's Admiralty Practice, at p. 37 of the edition of 1860, it is stated: "If the tender is rejected the suit is prosecuted to a judicial determination. The money remains in the hands of the registrar until the end of the suit, when, after certain formalities, it is delivered over to the defendant who has paid it in, or to the plaintiff to whom it is awarded." I cannot think that it was intended by order 22 of the Supreme Court Rules to alter the old practice in admiralty actions respecting tenders, or to assimilate it to the technical rules regulating tenders at common law. With regard to the tenders in this case having been made after admission of liability in the Admiralty Registry, I may observe that, although order 56 of the Supreme Court Rules lays down rules to regulate the procedure in such cases, there are not among such rules any relating to a tender in a reference, and that, I think, affords some ground for holding that tenders in such references were intended to be left to be regulated by the old practice. Order 22, no doubt, provides the manner in which the money tendered is to be lodged in court, but rule 20 of that same order makes an express provision with respect to the payment of money out of court in an admiralty action, and in the absence of any express rule regulating in other respects the practice as to tenders in court in an admiralty action, I think it is reasonable to conclude that it was intended, in accordance with the provisions of ord. 77, r. 2, of the Supreme Court Rules, that the old procedure and practice as to tenders in admiralty actions should remain in force, except so far as the rules affect the manner in which the money is to be lodged in court.

But the matter seems to be concluded by authority. I do not rely upon the case of *The Dunbeath*, not reported, which was referred to in the argument, because the order made by Barnes, J., in that case was made by consent. But the case of *The R. W. Boyd*, not reported, seems to be on all fours with the present case. It was an action of damage. There was an admission of liability by the defendants, and afterwards notice of a tender of £125. The registrar in the reference found that less than £125 was due. The plaintiffs moved that the amount of the tender should be paid out to them. The motion was argued before Butt, J., and rejected by him, and it was ordered that the £125 should be paid out to the plaintiff's solicitors only on the terms of their undertaking to pay the balance to the solicitors for the defendants. This was a decision in June, 1886, and is, I think, a decision binding upon me in this case.

I must, therefore, reject the motion.

Solicitors for the plaintiffs, *Farnfields*.

Solicitor for the defendants, *Charles E. Harvey*.

Lunacy.

(Lindley, Lopes, and Davey, L.JJ) July 30; Aug. 6, 1894.

In re BROWNE. (*a*.)

Lunacy—Practice—Master in Lunacy—Title of order—Securities in books of the Bank of England—Appointment by master of receiver of dividends—No transfer of securities into court—Jurisdiction to make order—Lunacy Act, 1890 (53 *Vict. c.* 5), *ss.* 116, 120, 133—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-section* 4—*Rules in Lunacy*, 1892.

A lady of advanced years, and very infirm, was entitled to certain stock standing in her name in the books of the Bank of England. The Master in Lunacy, on the application of her niece, made an order which was intituled in the matter of the old lady and in the matter of the Acts 53 *Vict. c.* 5 *and* 54 & 55 *Vict. c.* 65, *and which, after stating that the master was satisfied that the old lady was a person who, through mental infirmity arising from age, was incapable of managing her affairs, authorized the niece, on behalf of her aunt, to receive and give a discharge for the dividends accrued and to accrue on the said stock. The bank objected that the title of the order was wrong, and, further, that the master had no jurisdiction to make the order.*

Held, that the order was properly intituled, being in the form given in the schedule to the Lunacy Rules, 1892.

Held, further, that, having regard to section 116 *of the Lunacy Act*, 1890, *section* 27, *sub-section* 4, *of the Lunacy Act*, 1891, *and rule* 56 *of the Lunacy Rules*, 1892, *it was the intention of the Legislature that persons who, through mental infirmity arising from disease or age, were incapable of managing their affairs were, for the purposes of management and administration, to be regarded and treated as lunatics, and that therefore the master had jurisdiction to appoint a receiver of dividends alone, but that the usual practice, both in chancery and lunacy, which was not to appoint a receiver of dividends alone, but to order the stocks to be transferred into court and then to let the receiver obtain the dividends from the paymaster, ought not to be departed from without sufficient reason, and that there was no reason for not adhering to such practice in the present case.*

On the 24th of May, 1894, an order was made by Master Bulwer, on the application of Miss Mary Anne Browne, a niece and one of the next of kin of Miss Frances Browne, a lady who was eighty-four years of age and very infirm. The order was intituled "In the matter of Frances Browne, spinster, and in the matter of the Acts 53 Vict. c. 5 and 54 & 55 Vict. c. 65," and contained (*inter alia*) the following:—"And it having been established to my satisfaction that the said Frances Browne is a person who, through mental infirmity arising from age, is incapable of managing her affairs, I do order that, upon the certificate of the said master that she has completed her security, the said Mary Anne Browne be and is hereby authorized, on behalf of the said Frances Browne, to receive and give a discharge for the dividends accrued and to accrue upon the under-mentioned securities standing in the name of the said Frances Browne."

The securities referred to included certain sums of Colonial Inscribed Stock which were registered in the books of the Bank of England, and the dividends on which were paid there.

Objection was taken by the bank to the order, on the ground, in the first place, that its title was

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

wrong; and, in the second place, that the master had no jurisdiction to make the order in its then present form.

Latham, Q.C., for the Bank of England.—It would be convenient if the title of the order indicated the jurisdiction. The master had no jurisdiction to make this order: Lunacy Act, 1890, s. 116 (1) (*d*). The powers and provisions of the Act relating to management and administration are those enumerated in section 120 in a case like the present, and that section does not authorize the appointment of a person to receive dividends. The only power to receive dividends is by vesting order under section 133; but there the stock must be transferred: *In re Noyce*, 40 W. R. 371, [1892] 1 Q. B. 642. But section 133 does not apply, because it is not a provision relating to management and administration; and, further, it is not applicable to persons under section 116 (1) (*d*), but only to the case of the stock of a lunatic. A vesting order can only be made on petition: Lunacy Orders, 1892, r. 17. The indemnity clause, section 333, extends only to the property of lunatics, and so will not protect the bank.

Swinfen Eady, Q.C., and *Sebastian*, for Miss M. A. Browne.—The title of the order is in accordance with the form in the Lunacy Rules, 1892. Section 120 of the Lunacy Act, 1890, merely deals with acts for the performance of which the order of the judge is necessary, and does not affect ordinary everyday acts of a committee. We rely on section 108, which gives the judge jurisdiction in the widest terms in respect of a lunatic's estate, and that section, taken in conjunction with section 116, enables a receiver to be appointed to receive dividends only. Orders to that effect were made in *In re Starl*, 2 Mac. & G. 174; *In re Elias*, 3 Mac. & G. 234; and *In re Morgan*, 1 Hall & Tw. 212. The bank would be sufficiently protected under section 146 of the Act of 1890.

Latham, Q.C., in reply.—In the cases above cited only back dividends were dealt with.

Cur. adv. vult.

Aug. 6.—LINDLEY, L.J., after stating the facts and reading the master's order, continued:—The first objection taken was to the title of the order. But the order is in the form given in the schedule to the Rules in Lunacy, 1892, and those forms were carefully settled. In cases of this description it is not thought desirable to head the forms of orders "in Lunacy," so as to publish more than is necessary the fact that the person named in the title is in the unfortunate condition in which that person really is. This objection is untenable, and very properly was not seriously insisted on. The next objection was that there was no jurisdiction to make the order. This is, of course, an important matter. The general jurisdiction of a judge in lunacy is conferred by section 108 of the Lunacy Act, 1890, and extends, *inter alia*, to the management of the estates of lunatics, and by section 341 "lunatic" includes a person of unsound mind. The general jurisdiction of masters is conferred by section 111, and by rule 10 of the Rules in Lunacy of 1892. The Act is divided into parts. Part 4 is headed thus—"Judicial powers over person and estate of lunatics," and is subdivided into groups of sections; one group, commencing with section 116 and ending with section 130, is headed "Management and Administration." This group of sections, it will be observed, applies (1) to lunatics so found by inquisition; (2) to lunatics not so found; and (3) to persons who are, through mental infirmity arising from disease or age, incapable of managing their affairs. Such persons may be lunatics in the common acceptation of the term, or they may not. They are on the border line, but, even if they are not insane enough to be found lunatic by inquisition, they may for many purposes be treated as lunatic, though not so found by inquisition. This is plain from the language of section 116 of the Lunacy Act, 1890, and section 27 (4) of the Lunacy Act, 1891, and of rule 56 of the Rules in Lunacy, 1892. The power of a judge in lunacy to appoint a receiver of the property of a person subject to his jurisdiction under the Act is conferred generally by sections 108 and 116 of the Lunacy Act, 1890, and rule 83 of the Rules in Lunacy, 1892. Rule 83 expressly says, "A receiver, may be appointed in every case in which such appointment shall be deemed expedient." Certain specific powers are authorized to be conferred on committees by section 117 and subsequent sections of the Lunacy Act, 1890, and section 120, which does not mention the appointment of a receiver, does not, by implication or otherwise, negative the power of the judge to appoint a receiver under the general authority to which I have alluded. The power to appoint a receiver is clearly a power relating to "management and administration," and, although not specially mentioned in the group of sections so headed, is within the general words with which section 116 commences.

This being so, the power can be exercised by a master, and it need not be exercised by a judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a master had jurisdiction to make a vesting order under sections 133 *et seq.* of the Lunacy Act, 1890, and, after carefully examining the Acts and Rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly. Section 133 and rule 54 authorize orders for transfer into court and vesting orders in cases to which section 116 applies. The jurisdiction to make the order being clear, it is also clear that the Bank of England may safely act upon it. Section 146 alone is enough to protect the bank. Section 333 is still more explicit, and, although the expression there is "so far as relates to any property in which a lunatic is interested," that expression clearly, in my judgment, includes all persons who, whether lunatic or not, are subject to the jurisdiction conferred on the judges in lunacy, and can be treated as if they were lunatic under section 116 of the Lunacy Act, 1890. The practice of appointing a receiver of the dividends of Government and other securities, without ordering a transfer of them into the name of the receiver, is not, however, usual in Chancery, nor has it been usual in lunacy. The practice has been to order the stocks, &c., to be transferred into court, and then to let the receiver obtain the dividends from the Paymaster-General. A settled practice like this ought not to be departed from without sufficient reason, and, in general, it ought to be adhered to. Nor is there any reason for not adhering to it in this case. The order, therefore, will be remitted to the master for alteration accordingly. I have no doubt, however, of the jurisdiction of the master to make an order in the form adopted in this case, nor of the safety of the bank in acting upon it, and, if hereafter an order in this form should be deliberately made for any special reason, the bank ought to act upon it and to pay the dividends to the receiver, treating him as an agent duly appointed to receive dividends only. In cases of shares, &c., in companies, a transfer into court might be inexpedient, if not impossible, and yet a receiver of the dividends might be highly desirable.

LOPES, L.J.—There are three classes of persons mentioned in section 116—(1) lunatics so found by inquisition; (2) lunatics not so found; (3) persons

who, through mental infirmity arising from disease or age, are incapable of managing their affairs. Having regard to the language of section 116 of the Lunacy Act, 1890, and section 27, sub-section 4, of the Lunacy Amendment Act, 1891, and of rule 56 of the Rules in Lunacy of 1892, I am of opinion that it was the intention of the Legislature that the last-mentioned class, for the purposes of management and administration, were to be, in all respects, regarded and treated as lunatics. If this is correct, all difficulty is removed, and the same power and the same jurisdiction in respect of management and jurisdiction exist in respect of the last class as exist in the case of the two former classes of persons, and the bank is indemnified under sections 146 and 333. In my judgment there is jurisdiction to appoint a receiver of the dividends alone, and, in some cases, that would be the proper course to adopt. But, in this particular case, I see no reason to depart from that which appears to have been the usual practice. The objection to the title of the order cannot be supported. The title is in accordance with the form given in the schedule to the Rules in Lunacy of 1892.

LOPES, L.J., read the following judgment of DAVEY, L.J.:—The question in this case is whether the Bank of England is bound to act upon an order of Master Bulwer, appointing a receiver of the dividends on certain stocks standing in the name of Miss Browne in the books of the bank. Mr. Latham first objected to the title of the order; but it appears to be in the form provided for such cases as the present in the rules, and therefore no objection can be made to it. [His lordship read section 116 (1) of the Lunacy Act, 1890, and continued:—] Mr. Latham contended that the "powers and provisions" so made applicable are only those which are found in the group of sections under the heading "Management and Administration." In my opinion this is wrong. I think that the Act means what it says, and that all powers and provisions relating to "management and administration" which are found in Part IV. of the Act are included. Section 108 (2) enables the judge in lunacy to make orders for the custody of lunatics so found by inquisition, and the management of their estates. By the 83rd of the rules made in pursuance of the Act "a receiver may be appointed in any case in which such appointment shall be deemed expedient." I agree that, if there was jurisdiction to make the order impeached it might be made by the master. And I am of opinion that, by the joint effect of section 108 (2), rule 83, and section 116 (1) (*d*), the order for a receiver in the present case could be made. And I also think that the court can make a vesting order under section 133. Mr. Latham may be right, and I rather think he is right, in construing section 116 (2) with reference to section 120 as enabling the judge to confer, in a case like the present, all or any of the powers in section 120 on a person to be named. But I think he is wrong in treating section 120 as exclusive. As I have already said, I think the judge may make orders for the management of the estate of the *quasi*-lunatic generally, and I think that section 116 (2) is not a limiting section, but is inserted *ex majori cautela*, to enable the judge to confer the additional or special powers enumerated in section 120.

But, says Mr. Latham, the bank will not be indemnified in acting on the order, because section 333 confines the indemnity to any acts "so far as relates to any property in which a lunatic is interested," and the person in question in this case is not a lunatic, and he refers to section 27 (4) of the amending Act of 1891. In my opinion, the bank will be amply protected by section 146, but I also think that section 333 applies to the case, and that a person within the description in section 116 (1) (*d*) is a lunatic for the purposes of that section. Lastly, it was said that the order was wrong in appointing a receiver of the dividends only of stocks standing in the books of the Bank of England in the name of the person whose property the court has taken under its protection. No statutory provision relating to the bank which prohibits or prevents such an order being made was brought to our attention. And I am of opinion that the court has jurisdiction, and I think it important that we should not allow any doubt to be entertained as to our jurisdiction to appoint a receiver of dividends only. There may be many cases in which it would be highly desirable to adopt that course. The receiver is but the statutory or judicial agent, or attorney, to receive dividends due to the person in whose name the stocks are standing. But, as it appears to be unusual to appoint a receiver of dividends on stocks in the books of the Bank of England, and there is no sufficient reason in the present case why the stocks should not be brought into court, it will, perhaps, be better to follow the usual practice, and direct the stocks to be transferred into the name of the Paymaster-General.

Solicitors, *Freshfields & Williams; Kingsford, Dorman, & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 6.

GRAY v. BARTHOLOMEW. (*a*.)

Practice—Payment of money into court—Liability not denied—Verdict for smaller sum—Power to order balance to be paid back to defendant—R. S. C., 1883, *ord.* 22, *r.* 5 (b).

Where the defendant does not deny liability, but pays a sum of money into court, and at the trial the jury find a verdict for the plaintiff for a smaller sum, the judge has power, under ord. 22, *r.* 5 (b), *to order that the sum awarded by the jury be paid out to the plaintiff, and that the balance be paid to the defendant.*

Dunn *v.* Devon and Exeter Constitutional Newspaper, 38 *S. J.* 351, *commented on.*

Appeal from a judgment of Hawkins, J.

This was an action of slander. The defendant did not deny liability, but paid into court the sum of £5 in full satisfaction of the plaintiff's cause of action. The plaintiff did not take the money out of court, but proceeded to trial. The case came on before Hawkins, J., and a jury, when a verdict was returned for the plaintiff for one farthing damages. The learned judge directed judgment to be entered for the defendant, and ordered that one farthing should be paid out of court to the plaintiff, and that the balance of the sum of £5 should be paid to the defendant, and that the plaintiff should pay the defendant's costs.

The plaintiff appealed.

W. H. Nash, for the plaintiff.—In accordance with the new rule (ord. 22, r. 22) the jury were not informed of the fact that any money had been paid into court. Since the passing of that rule it has been held by Wills, J., in *Dunn* v. *Devon and Exeter*

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Constitutional Newspaper, 38 SOLICITORS' JOURNAL, 351, that, where in an action of libel the defendant has paid a sum of money into court, the plaintiff is entitled to have that sum paid out to him, notwithstanding that the jury have only awarded him a smaller sum. The plaintiff was entitled to have the £5 paid out to him at any time under ord. 22, r. 5, and under rule 44 of the Supreme Court Funds Rules, 1886. The learned judge had no jurisdiction to order the £4 19s. 11¾d. to be paid to the defendant.

Leslie, for the defendant.

Lord ESHER, M.R.—I am disposed not to agree with the judgment of Wills, J., in *Dunn* v. *Devon and Exeter Constitutional Newspaper*. In my opinion rule 22 of order 22 has nothing to say to the matter. Rule 5 was already existing when rule 22 was made, and the makers of the new rule did not in any way alter the earlier rule, which therefore remains unaffected. Rule 5 (*b*) says that "when the liability of the defendant in respect of the claim or cause of action in satisfaction of which the payment into court is made is not denied in the defence"—which is this case—"the money paid into court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the court or a judge shall otherwise order." But if the judge does otherwise order, as happened in this case, what is to be the result? It seems to me that if the money is not paid out to the plaintiff it must, of necessity, be paid back to the person who brought it into court. I think that the order to pay the £4 19s. 11¾d. to the defendant was not really required. If the judge says nothing except that the money is not to be paid to the plaintiff, it must necessarily be paid to the defendant.

The appeal must be dismissed.

LOPES, L.J.—I am of opinion that *Dunn* v. *Devon and Exeter Constitutional Newspaper* is distinguishable from this case. There the payment into court was made under the statute 8 & 9 Vict. c. 75, s. 2. Here money was paid into court under the Rules and Orders, and, there being no denial of liability, ord. 22, r. 5 (*b*), applies to this case. It is clear that under that rule the judge has power to order that money paid into court shall not be paid out to the plaintiff, and in that case it must be paid to the defendant.

The appeal therefore fails.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *H. P. Becher*.

Solicitors for the defendant, *Ranger, Burton, & Frost*.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Dec. 4.

NORTON *v.* THE COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY. (*a.*)

Building society—Arbitration—Withdrawing member—Dispute with society—Appointment of arbitrators after issue of writ—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16 (9), 34.

By one of the rules of a benefit building society it was provided that disputes should be settled by reference to arbitration; that five arbitrators should be elected by the board of directors, and that in each case of dispute three of such arbitrators, chosen by lot, should decide the matters in difference; and that vacancies in the office of arbitrators should be filled up by the board of directors.

A dispute having arisen between a member who had given notice of withdrawal and the society, the member brought an action against the society for the amount which she alleged to be due to her. The writ was issued on the 18th of September, 1894. On the 24th of October, 1894, the society took out a summons to stay all proceedings in the action, and to refer the matters in dispute to arbitration. At the date of the issue of the writ there were only three arbitrators, but on the 29th of November, 1894, the directors appointed two additional arbitrators, making the number up to five, as required by the rules.

Held, that all proceedings in the action should be stayed, and that the matters in dispute should be referred to arbitration pursuant to the rules of the society.

Christie *v.* Northern Counties Permanent Benefit Building Society, 38 *W. R.* 280, 43 *Ch. D.* 62, *disapproved.*

Appeal from Day, J.

The Counties Conservative Permanent Benefit Building Society was incorporated on the 18th of December, 1880, under the Building Societies Act, 1874. Rule 77 of the society was in the following terms:—"Disputes shall be settled by reference to arbitration. Five arbitrators shall be elected by the board of directors, but none of the arbitrators shall be beneficially interested directly or indirectly in the funds of the society, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or by someone appointed by such party, shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties. In case of a vacancy or vacancies in the office of arbitrator, another shall be elected by the board of directors."

The plaintiff, Mrs. Emily Norton, was entitled to the following shares in the society: (1) Sixteen fully paid-up £50 shares in the capital stock of the society; (2) four shares of £50 each in the capital stock of the society, class 3; (3) twenty-four certificates of £5 each in the investment fund, No. 2, of the society.

On the 18th of September, 1894, the plaintiff issued a writ against the society, by which she claimed £1,120 payable in respect of the above-mentioned shares and certificates, alleging that the necessary notice of withdrawal had been given and had expired. On the 24th of October, 1894, the society took out a summons for an order that all proceedings in the action might be stayed and all disputes between the plaintiff and defendants be referred to arbitration, pursuant to rule 77 of the rules of the society, and that the plaintiff might be ordered to pay to the defendants their costs of the action and of the application.

The master adjourned the summons to the judge, and on the 12th of November, 1894, Day, J., made an order in the terms of the summons.

Shortly after the incorporation of the society—viz., on the 22nd of January, 1881—five arbitrators were duly appointed pursuant to rule 77.

At the date of the issue of the writ this number had, by death and other causes, been reduced to three, and that number of arbitrators remained until the 29th of November, 1894, when, at a meeting of the board of directors, it was resolved that, owing to the number of arbitrators having been reduced to three, and as rule 77 required five to be appointed, two additional arbitrators should be appointed.

The plaintiff appealed from the order of Day, J.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

E. Morten and *E. Shortt*, for the appellant.—When the writ was issued there were only three arbitrators, and therefore no tribunal existed capable of deciding the dispute as provided by section 34 of the Building Societies Act, 1874, and the rules of the society. When a dispute has once arisen it is too late for the society, being parties to the dispute, themselves to appoint arbitrators: *Christie* v. *Northern Counties Building Society*, 38 W. R. 280, 43 Ch. D. 62.

Tindal Atkinson, for the defendants.—The whole course of legislation with regard, first, to friendly societies, and then to building societies which have succeeded friendly societies, has been to oust the jurisdiction of the High Court: see 10 Geo. 4, c. 56, s. 37; 6 & 7 Will. 4, c. 32, s. 4; and Building Societies Act, 1874, ss. 16, 34. The same tendency is shown in the cases: *Municipal Building Society* v. *Kent*, 32 W. R. 681, 9 App. Cas. 260; *Hack* v. *London Provident Building Society*, 31 W. R. 392, 23 Ch. D. 103; *Wright* v. *Monarch Building Society*, 5 Ch. D. 796, 25 W. R. Dig. 9.

E. Shortt, in reply.—The Legislature contemplated a board of arbitrators always in existence. There was no tribunal at the date of Day, J.'s order, and the plaintiff is entitled to fall back upon her common law rights.

LINDLEY, L.J., stated the facts, and continued:—The appeal is based upon the ground that there was no arbitration tribunal capable of determining the dispute between the parties at the date of the writ, and that it was not competent to the society to appoint arbitrators subsequent to that; and reliance was placed on the decision of North, J., in *Christie* v. *The Northern Counties Permanent Benefit Building Society*. This society is governed by the provisions of the Building Societies Act, 1874, which are familiar to most of us. The Act has been judicially construed in several decisions, and I cannot read *Wright* v. *The Monarch Investment Building Society*, *The Municipal Permanent Investment Building Society* v. *Kent*, and *Hack* v. *The London Provident Building Society* without seeing that the construction which we are asked to put upon the Act would be inconsistent with its general scope, which is, that parties under such circumstances as the present should not come to the High Court at all to settle their disputes.

There are various modes provided by the Act for settling disputes. Section 16 (sub-section 9) enacts that the rules of every society shall set forth "whether disputes between the society and any of its members, or any person claiming by or through any member or under the rules, shall be settled by reference to the court"—the court there being the county court (section 4)—"or to the registrar or to arbitration." Here the rules state that disputes are to be settled by arbitration. The decisions to which I have referred establish that where the rules do state that there is to be arbitration, that is the only tribunal capable of settling disputes. The cases above mentioned would be precisely in point here if at the time the writ was issued there had been five arbitrators.

But it is said that, there not being five, then an action in the High Court will lie. North, J., took that view in *Christie* v. *The Northern Counties Permanent Benefit Building Society*, on which the appellant relies, but I do not find that his attention was called to the authorities to which I have referred, and there seem to me to be two passages in his judgment which are open to criticism. He says: "At the time when the writ was issued the dispute could not be settled by arbitration, because there were no arbitrators to whom it could be referred, and it is impossible for me to say that it was not open to the plaintiff to issue a writ, for if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all. In my opinion, therefore, the plaintiff was perfectly justified in commencing this action." I confess I cannot see that. I think it is a mistake. The remedy would be by way of *mandamus* to compel the society to appoint arbitrators. Then he goes on to say this: "In my opinion the tribunal contemplated by the rule to decide a dispute between a member and the society is to consist of three persons to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons three of whom are to be the judges of the dispute." Then he says that he sees no reason for doubting that the persons appointed were honest and impartial men, but that still they may have been selected because of their known views on the subject. North, J., seems to have thought that it was not fair, after the dispute had arisen, for the society to appoint its own tribunal.

Let us see how that stands. It is clear from the correspondence in the present case that the quarrel had been in existence for some time. We put it to counsel whether any objection could have been made if the two new arbitrators had been appointed just before the writ was issued. What magic is there in the actual date of appointment? As a matter of principle there is nothing in it. It does not matter whether the tribunal is appointed a day or two sooner or later. Of course, if there is anything improper in the appointment, that is another question. When once we get hold of the principle on which the Act is based—namely, that the High Court is not intended to interfere in these disputes, but the tribunal nominated by the society's rules is—then the decision arrived at by North, J., cannot be supported. The proper course was, instead of commencing an action, to apply for a *mandamus* calling upon the society to appoint the necessary arbitrators.

In my opinion the appeal fails and must be dismissed with costs.

A. L. SMITH, L.J.—I am entirely of the same opinion. The first point taken on behalf of the respondents, who have obtained a stay of proceedings in the action, was that by the Building Societies Act, 1874, by which the court and the society and its members are bound, it is in effect provided that no action in the High Court shall be brought in a case like the present against the society by a member, and sections 16 and 34 were referred to on that point. In my opinion, it is settled that this is so by the decision of the House of Lords in *The Municipal Building Society* v. *Kent*, in which it was expressly held that no action could be brought in the High Court against a building society by one of its members in such a case as this. In that case Lord Blackburn and Lord Watson held that *Wright* v. *The Monarch Investment Building Society*, decided by Sir G. Jessel, M.R., and *Hack* v. *The London Provident Building Society*, decided by Sir G. Jessel and Lindley, L.J., were rightly decided, and they approved both cases, and held that an action could not be maintained in the High Court by a member like the appellant against a society which is subject to the Building Societies Act, 1874.

Now, that being the law, when the writ was issued the defendants made an application for a stay of proceedings on that ground. The answer set up by the plaintiff was, that although it had been decided in those cases that the jurisdiction of the High Court was ousted by the substitution of another tribunal,

both those cases were always subject to this, that there must be some tribunal other than the High Court to which the plaintiff could go, that is to say, a tribunal as provided by the rules of the society. But here the plaintiff had no such tribunal, because at the time when the writ was issued the tribunal provided by the rules of the society did not exist. Now section 16, sub-section 9, of the Building Societies Act of 1874 requires the rules to state whether disputes shall be settled by the county court, or by the registrar, or by arbitration, and then section 34 says that where the rules direct disputes to be referred to arbitration, arbitrators shall be named and elected, of whom a certain number, not less than three, shall be chosen by ballot to act in each case of dispute. The rules of the society in this case required the existence of five, but at the time of issuing the writ there were, as a matter of fact, not five, but only three, and one of them, as alleged by counsel, a very inefficient one. It is said that, there being thus no proper tribunal to which the plaintiff could resort, and the society having no power to fill up the number of arbitrators to five after the writ was issued, the plaintiff was entitled to come to the High Court, and the case of *Christie* v. *The Northern Counties Building Society* was relied on, where it was no doubt held that there was no power to fill up the requisite number after the writ was issued. But the point which has been argued before us was not argued before the court in that case—viz., that the intention of the Act was to prevent an action being brought in the High Court at all by a member against the society. I do not agree with what North, J., said in that case, and I am not certain that if the case had been argued before him, as it has been argued before us, he would have arrived at the conclusion at which he did arrive. The main point argued before him was, whether or not a member was bound by the new rules of the society. It seems to me, looking at the statute and the decisions, culminating with that of the House of Lords, that if a sufficient arbitration tribunal was not in existence, the plaintiff's duty was to come to the court for a *mandamus* to compel the society to have the numbers filled up. It is conceded here, and it must have been conceded before North, J., that if the vacancies had been filled up by the society a day before the writ was issued, even though the society knew what the question pending between them and the member was, it would have been sufficient, but, if a day after the writ, it would not. It cannot, however, in my opinion, make any difference whether this was done a day before or a day after the writ was issued. The order of Day, J., must stand, and the appeal be dismissed, with costs.

Solicitors, *Smith, Fawdon, & Low*, for *Becke & Green*, Northampton; *Ford, Lloyd, Bartlett, & Michelmore.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 3.

BURT, BOULTON, & HAYWOOD *v.* BULL & WARD. (*a.*)

Receiver and manager appointed by court—Personal liability on contracts.

A person who is appointed by the court receiver and manager to carry on a business is primâ facie *personally liable on contracts entered into by him as receiver and manager, and must look to the assets for an indemnity.*

Therefore, where, in an action in the Chancery Division by debenture-holders of a company, the court appointed the defendants receivers and managers to carry on the business of the company, and the defendants ordered goods of the plaintiffs for the purposes of the business, the order being expressed to be for the company and the defendants signing it as receivers and managers,

Held, that the defendants were personally liable for the price of the goods so ordered.

Appeal from the judgment of Mathew, J., at the trial of the action without a jury.

Joseph Bull, Sons, & Co. (Limited) carried on business as builders and contractors, and had issued certain debentures. On May 6, 1892, an order was made by the Chancery Division in a debenture-holder's action appointing the defendant Bull and one Bird receivers and managers on behalf of the debenture-holders of the business of the company, with power to raise £5,000, it being considered desirable to complete certain contracts which the company then had in hand. On May 14, 1892, a creditors' petition to wind up the company was presented, when it was arranged that second debentures should be issued to the unsecured creditors in respect of their debts, and that a nominee of the second debenture-holders should be appointed receiver and manager instead of Bird to act with the defendant Bull, and an order was made by consent that the petition should stand over, and nothing further was done under it.

Accordingly, on the 2nd of June, 1892, an order was made by the Chancery Division appointing the defendant Ward receiver and manager instead of Bird. At this time a committee of the unsecured creditors, of which one of the plaintiffs' firm was a member, was formed to assist in raising the above-mentioned sum of £5,000, and generally to look after the interests of the creditors.

The defendants ordered timber of the plaintiffs, the order being on a printed form, and signed by the defendants as follows:—"For Joseph Bull, Sons, & Co. (Limited). Edward C. Bull, Robt. Jas. Ward, receivers and managers."

The plaintiffs having sued to recover the price of the timber supplied under the above order, Mathew, J., held that the defendants were personally liable, and gave judgment for the plaintiffs.

The defendants appealed.

Farwell, Q.C. (*T. Beven* with him), for the defendant Bull.—A receiver and manager appointed by the court to carry on a business is not personally liable on contracts entered into by him as receiver and manager. If the receiver and manager were appointed, not by the court, but by debenture-holders under a trust deed, he would not be personally liable: *Owen & Co.* v. *Cronk*, 11 Times L. R. 76. It is not material, in considering the relation between him and persons supplying goods upon his order, whether he is appointed by the court or by the parties. The mere fact that he is appointed by the court can make no difference. He is not bound to pledge his personal credit, and he would not commit a breach of duty by refusing to do so. The defendants had no property vested in them as receivers and managers. The case might be different if the business and property of the company were vested in them. The plaintiffs did not give credit to the defendants personally; they looked to the £5,000 as the fund out of which they would be paid, as in the case of *In re Anglo-Moravian Hungarian Junction Railway Co., Ex parte Watkin*, 24 W. R. 122, 1 Ch. D. 130. One of the plaintiffs' firm was a member of the committee of creditors, and knew all about the fund. The defendants were either managers and agents for the company, which was still in existence, and whose business they were carry-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ing on, or they were agents for the debenture-holders. If they were not agents for either, then they ordered the goods upon the terms that the plaintiffs should be paid out only of the fund.

He also referred to *Redpath* v. *Wigg*, 14 W. R. 866, L. R. 1 Ex. 335; *Sargant* v. *Read*, 1 Ch. D. 600, 24 W. R. Dig. 198; *Taylor* v. *Neate*, 37 W. R. 190, 39 Ch. D. 538.

Upjohn, for the defendant Ward.

J. Lawson Walton, Q.C. (*C. A. Russell* with him), for the plaintiffs.—The nearest authorities upon the position of a receiver and manager appointed by the Court of Chancery are *Sargant* v. *Read*, where Jessel, M.R., said (at p. 604) that it is "so well known that I might almost take judicial notice of it, that brokers in this class of business cannot carry on the business at all without pledging their personal credit to their bankers. You cannot get an indifferent person as receiver to take such an onerous duty upon himself"; and *Taylor* v. *Neate*, where Chitty, J., said that "the court must take into its own hands, by the appointment of a proper officer, the management of such a concern as this is, and that manager must of necessity enter into subordinate contracts." Those authorities go to show that a receiver and manager is personally liable.

Farwell, Q.C., replied.

Lord ESHER, M.R.—This is an action to recover the price of timber supplied for the business of a company. The business had passed out of the hands of the company to this extent, that the Chancery Division had appointed a receiver and manager of the business. The meaning of that is, as Chitty, J., pointed out in *Taylor* v. *Neate*, that the court has taken into its own hands, by the appointment of a proper officer, the management of the business. The question we have to determine is, What is the position of a person so appointed? He cannot be considered as the agent of the company to carry on the business, for if that were so he would be bound to obey the orders of the company as to the management. But the company cannot interfere with him in its management; they do not appoint him, and they cannot dismiss him; and therefore he cannot be considered as their agent. The court can give him directions as to the management; the court appointed him, and can discharge him from the office. But the court cannot be supposed to make itself in any way liable upon his contracts. Therefore, the conclusion must be that the court, by appointing a manager, leaves him to order goods and enter into contracts upon his personal responsibility. Accordingly, if orders for goods are given under such circumstances by a manager, it must be taken, in the absence of any stipulation to the contrary, that they are given on his personal responsibility. It is not necessary to consider whether the manager is bound to give orders that are requisite for carrying on the business. I apprehend that, at any rate, he can always apply to the court for directions, or may ask to be relieved of his office. As to the authorities, I think that what Jessel, M.R., said in *Sargant* v. *Read* tends to show that a receiver and manager makes himself personally liable on his contracts, and that what Chitty, J., said in *Taylor* v. *Neate*, as to the necessity of the manager entering into subordinate contracts, points to the same conclusion, for I understand him as referring to the manager pledging his personal credit. That seems to me, therefore, to be the position of a manager of a business appointed by the court. But the manager may give orders upon the terms that he is not to be personally liable. He may give an order upon the terms that the vendor is to be paid if a certain fund is sufficient, and the vendor who supplies goods upon those terms cannot make the manager personally liable, but must look solely to the fund. Therefore there may be cases in which the order is given and accepted upon the terms of the manager not being personally liable. But if no such stipulation is made, and if the only fact proved is that the order is given by a person as receiver and manager appointed by the court, then the only true inference is that the manager pledges his personal credit, looking for an indemnity to the assets of the business. The consequences of holding otherwise would produce grave difficulties, because tradesmen would have in each case to inquire as to the condition of assets of the business, and the servants he employed would be in the same difficulty as regards their wages.

We must now see whether in this particular case the order was given under such circumstances as to exclude personal liability. The order is given "for Joseph Bull, Sons, & Co. (Limited)." But the defendants were not agents for the company, and the plaintiffs could not have sued the company for the price of the goods, nor could they have sued the defendants as upon a breach of an implied warranty. That is not the meaning of the order. The expression "receivers and managers" is not a business but a legal expression. The order means that the defendants are receivers and managers appointed by the court, and as such give the order. That being so, the defendants are personally liable. It is true that the question is one of fact in each case, because the facts in any case may take it out of the general rule. The learned judge has found that there are no facts to take this case out of the general rule. With that conclusion I agree, and the appeal must therefore be dismissed.

LOPES, L.J.—I am of the same opinion. The question is one of fact in each case—namely, upon whose credit were the goods supplied? In the present case, if the goods were not supplied upon the defendants' credit, I ask, upon whose credit were they supplied? Upon the hypothesis I have a difficulty in answering that question. It is said that the defendants are merely agents for someone else. For whom are they agents? They cannot be agents for the company. It cannot successfully be contended that they are agents for anybody. The whole control of the business, subject to any directions which the court might give, is vested in the defendants. In my opinion, therefore, the goods were supplied upon the credit of the defendants. They gave the order to the plaintiffs, as receivers and managers for the company. It is said that it would be a "hardship upon the persons appointed receivers and managers to hold them personally liable. The answer that I give to that suggestion is that receivers and managers have full opportunity of protecting themselves. If they have not sufficient funds in hand to pay for the requisite goods, I presume that they may decline to give the order, or if they do give the order they may give it in such a form and in terms so expressed as to prevent any personal liability at all. To my mind the true inference from the facts in the present case is that the defendants thought that there were sufficient assets to indemnify them against any personal liability in respect of this order, and that they intended to incur personal liability. I agree, therefore, with the judgment of the learned judge.

RIGBY, L.J.—This is an action for the price of goods sold and delivered. The order is in a printed form, the signature of the defendants being in writing, which shows that in all probability many of these orders are given in this form. I think that the

words "receivers and managers" after the defendants' signatures would be sufficient to put the person to whom the order is given upon inquiry as to what those words meant. If it turned out that these defendants were mere servants of the firm of Joseph Bull, Sons, & Co., it might be unfortunate for the plaintiffs, who acted without inquiry upon such an order. The case of *Owen & Co.* v. *Cronk* is an illustration of that. There the defendant was the receiver and manager appointed by trustees for debenture-holders under a trust deed, and we held that he did not bind himself as principal, and was not personally liable, as he was only an agent for those who appointed him, who themselves could be made liable as principals. But here the defendants were not agents in the proper sense for anybody. They had been appointed by the Chancery Division in a debenture-holder's action for the purpose of carrying on an existing business. To induce them to accept such an office, a fund was promised to be provided which would afford an indemnity to them. Relying upon that fund, they undertook the office of receivers and managers.

Now it was never intended to appoint and put forward an officer of the High Court to carry on a business involving almost of necessity the making of daily, or, it might be, hourly contracts, in a way which would or might deceive the public who deal with him into the belief that there was someone else behind him personally liable upon his engagements. I wish to guard myself against saying that there might not be special cases in which a receiver and manager might be sent forth with instructions not to deal with anyone, except upon the terms of not being personally liable. It might be that no person would accept the office except upon those terms. There might, as I say, be special cases in which a receiver and manager might be appointed to deal and held forth as dealing only upon the terms of not being personally liable. I do not remember such a case, but I think such a case might be possible. But in the ordinary course of the business of the court, unless I am very much mistaken as to the meaning of the appointment of a manager to carry on a business, it is intended that the manager should appear before the world as the person who is carrying on the business, making himself personally liable on all contracts entered into by him where he did not stipulate to the contrary, and looking for indemnity to the assets of the business or to the persons for whose benefit the business is being carried on. It would be practically impossible for ordinary trade customers to make inquiries as to who were the persons for whose benefit the business was being carried on, or what were the available assets at the disposal of the manager. I do not for a moment think that the Court of Chancery ever intended to hold out its officer as being in such a position as that. I do not say that it is the duty of the manager to incur heavy personal responsibilities, but I am inclined to think that he must be understood to take upon himself the ordinary daily and necessary responsibilities which would fall upon a person *bonâ fide* carrying out the order of the court without which the business could not be carried on. I go no further. Neither do I say that if he found the fund, to which he was looking for his indemnity, failing, he could not come to the court and ask to be relieved. But he cannot get rid of his personal responsibility by merely saying that he is receiver and manager. Directly it appears that he has no principal, that he is the manager appointed by the court, the contracts which he makes as such manager, in the absence of any stipulation to the contrary, are binding upon him personally, and he must look for indemnity to the assets of the business. As regards the cases I am not surprised to find so little authority upon the point.

According to my view the law has been taken as well settled. Unless I am greatly mistaken, I have known receivers and managers being over and over again held personally liable upon their contracts. I cannot concur in the view that the appointment of a manager of the Court of Chancery is a modern innovation. I have in my mind a case in Jacob and Walker's Reports in which such an appointment was made as far back at any rate as the time of Lord Eldon.* But that is not really material. The jurisdiction undoubtedly exists, and the question is upon what terms does the person accept the office. The model which the Court of Chancery followed in making the appointment was not that of principal and agent, but that of persons in a fiduciary capacity who carry on a business for others, as, for instance, executors who are directed by the testator to carry on his business, or trustees carrying on a business for their *cestuis que trust*, in which cases the rule is that the executors or trustees are *primâ facie* personally liable on their contracts. They would not get rid of that *primâ facie* liability by merely saying that they were executors or trustees. That being the model which the Court of Chancery always followed in appointing managers, the court intended the managers to be personally liable, the latter looking to the assets under their control for indemnity. As far as the cases which have been cited go, they appear to involve, if not to lay down, the principle which I have been stating. Neither Sir George Jessel in *Sargant* v. *Read* nor Chitty, J., in *Taylor* v. *Neate* thought that he was dealing with a new question, but each seems to have thought that he was merely dealing with an old question familiar to everybody, and recalled it for the purpose of explaining that part of his judgment.

In my opinion, therefore, the judgment of the learned judge was right.

Appeal dismissed.

Solicitors for the plaintiffs, *Trinders & Capron.*

Solicitors for the defendants, *W. J. Hastings Bull; Ward, Perks, & McKay.*

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Nov. 17.

NEW v. BURNS. (a.)

Practice—Evidence—Foreign defendant—Commission to take evidence abroad—Defendant temporarily within jurisdiction.

The defendant, a foreigner domiciled in Canada, was served with the writ in the action while he was on a temporary visit to England. Subsequently to the issue of the writ negotiations were entered into for a settlement, and the defendant again came to England, but the negotiations fell through and the defendant returned to Canada.

Held, that the defendant was entitled to a commission to Canada to take his evidence.

Ross *v.* Woodford, 42 *W. R.* 188, [1894] 1 *Ch.* 38, *approved.*

Appeal from Day, J.

The plaintiffs were the holders of £6 per cent. mortgage bonds of the Caraquet Railway Co., of

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* See *Jeffreys* v. *Smith*, 1 Jac. & W. 298.

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

which company the defendant was president and general manager The plaintiffs alleged that they had been induced to subscribe for these bonds on the faith of certain fraudulent misrepresentations contained in a prospectus issued by the defendant; and they claimed damages against him.

The defendant was domiciled in Canada, and the writ in the action was served upon him while he was temporarily on a visit to England in February, 1891.

Issue was joined in April, 1892. Negotiations for a settlement having been set on foot, the defendant came to England in March, 1894; but, his offer not being accepted by the plaintiffs, he returned to Canada in June following.

In August, 1894, the defendant took out a summons for a commission to Bathurst, in Canada, for the examination of himself and other witnesses. The master refused the application, and Day, J., affirmed the master's decision.

The defendant appealed.

Bigham, Q.C., and *Tindal Atkinson*, for the appellant.—The defendant is entitled to a commission. The court is not so strict in the case of a foreign defendant as in that of a foreign plaintiff: *Ross* v. *Woodford*, 42 W. R. 188, [1894] 1 Ch. 38.

Murphy, Q.C., and *J. D. Fitzgerald*, for the respondents.—In a case of alleged fraud the defendant ought to show a strong case in favour of a commission. The fact that the defendant is a foreign subject is, no doubt, to be taken into consideration, but the writ was actually served on the defendant in England. The defendant ought to have submitted himself to examination when he was in England in March, 1894.

They referred to *Emanuel* v. *Soltykoff*, 8 Times L. R. 331, and *Langen* v. *Tate*, 32 W. R. 189, 24 Ch. D. 522.

LINDLEY, L.J.—I do not think that this is a case in which the court ought to refuse a commission. It was merely by a lucky accident that the plaintiffs were enabled to launch this action in this country at all. The defendant is a Canadian subject who issued a prospectus of a railway company with a view to get English capital, and, but for his temporary visit to England, the plaintiff must have gone to Canada to sue him. Under those circumstances it is not for Mr. Burns to show why he should not come here, but it is for those who are suing him to show why he should. Mr. Burns stayed in England for a time and then went back to Canada, not to escape justice, but because negotiations for a settlement of the action had fallen through. After that the action is set down for trial, and we are asked to refuse a commission. The general principle is correctly stated by Chitty, J., in *Ross* v. *Woodfood*. In granting or refusing a commission to take evidence abroad, there is a material difference between a foreign plaintiff and a foreign defendant. *Primâ facie*, a foreigner who is sued in this country is entitled to a commission to the place where he lives. The appeal must be allowed.

A. L. SMITH, L.J.—I agree. It is not suggested that this application is made for the purpose of delay, but it is said that if an Englishman sue in this country a person domiciled abroad, he can force the defendant to come over to this country for the trial of the action. I do not think that any such right exists. It is said that the object of compelling the defendant to come over here is to induce him to pay the £1,000 required to bring the parties to a settlement, as it is said that he would sooner pay the £1,000 than come to this country. It is said, further, that there are other gentlemen in this country who have lost their money in this company, and who wish to serve writs upon the defendant. In my opinion, those are not legitimate motives for forcing the defendant to come over here. If Day, J., had been told that the defendant's presence in this country in April last was not for the purpose of defending the action, but for the purpose of carrying out negotiations for a settlement, which negotiations were still pending when he returned to Canada, that learned judge would probably have granted the commission. The appeal must be allowed.

Appeal allowed.

Solicitors, *Morgans & Harrison; G. S. & H. Brandon.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Nov. 14.

REG. *v.* JUSTICES OF ESSEX. (*a.*)

Poor rate—Appeal—Costs—Assessment committee appearing as respondents—Consent of guardians—Condition precedent — Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 2.

It is a condition precedent to the right of the assessment committee of a union to appear as respondents to an appeal against a poor rate that they should have obtained the consent of the guardians of the union as required by section 2 of the Union Assessment Committee Amendment Act, 1864.

Therefore, where an appeal was entered against a poor rate, and the assessment committee obtained the consent of the guardians to appear as respondents thereto, and it was arranged that all appeals against subsequent poor rates made in respect of the same property and upon the same valuation list should be respited from sessions to sessions and should abide the result of the test appeal, and all the appeals were eventually dismissed, with costs,

Held, that the assessment committee, not having obtained the consent of the guardians to appear as respondents to these subsequent appeals, were not entitled to the costs incurred by them in respect thereof.

Appeal from an order of the Queen's Bench Division (Mathew and Day, JJ.) discharging a rule for a *mandamus* to the Essex Quarter Sessions to direct the clerk of the peace to tax the costs of the assessment committee of the West Ham Union in certain appeals by the London County Council against poor rates.

In November, 1890, the London County Council appealed against a poor rate made upon them as occupiers of certain hereditaments in the West Ham Union district, the notice of appeal being served on the assessment committee as required by section 1 of the Union Assessment Committee Amendment Act, 1864, and on the churchwardens and overseers of the parish; and the assessment committee obtained the consent of the guardians of the union under section 2 of the Act to appear as respondents to the appeal. This appeal was respited by consent from sessions to sessions.

In May, 1891, the London County Council again appealed against another poor rate made upon them in respect of the same hereditaments, and the assessment committee, as well as the churchwardens and overseers, appeared as respondents to the appeal. It was arranged that this appeal only should be fought, and that the first appeal and all subsequent appeals against other poor rates made in respect of the same hereditaments should abide the result of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at Law.

this appeal, and should be respited from sessions to sessions. The quarter sessions dismissed the appeal subject to a special case. In September, 1893, the House of Lords affirmed the order of quarter sessions (42 W. R. 330, [1893] A. C. 562). Meanwhile the London County Council had entered appeals against eleven other poor rates made in respect of the same hereditaments, in all of which appeals the assessment committee (as well as the churchwardens and overseers) appeared as respondents, and instructed counsel to consent to their being respited from sessions to sessions. The assessment committee had not obtained the consent of the guardians to appear as respondents to these appeals. All the rates were made upon the same valuation list.

On the 18th of October, 1893, the quarter sessions dismissed all the appeals, with costs to be paid to the respondents and taxed out of sessions; all the parties appearing and consenting thereto. The costs of the churchwardens and overseers in the appeals were taxed by the clerk of the peace and paid by the London County Council, but upon the assessment committee carrying in their bill of costs in the matter of respiting and eventually dismissing the above eleven appeals, objection was taken that the assessment committee were not proper respondents to the appeals, as they had not obtained the consent of the guardians under section 2 of the Union Assessment Committee Amendment Act, 1864. The clerk of the peace thereupon refused to tax the costs of the assessment committee. The court of quarter sessions having refused to direct the clerk of the peace to tax the costs, the assessment committee obtained a rule for a *mandamus* as above. The Divisional Court having discharged the rule, the assessment committee appealed.

Jelf, Q.C., and *E. Morten*, for the appellants, contended, first, that upon the facts appearing in certain affidavits the condition as to obtaining the consent of the guardians had been waived by the London County Council: *Rex* v. *Justices of Hertfordshire*, 4 B. & Ad. 561; and, secondly, that as all the rates appealed against were made upon the same valuation list, it was sufficient for the assessment committee to have obtained the consent of the guardians once for all to appear as respondents to an appeal against a rate so made, the subsequent eleven appeals being really against the valuation list, and not against the individual rates which must be made in accordance with the valuation list.

Upon this point they referred to *Reg.* v. *Justices of Denbighshire*, 33 W. R. 784, 15 Q. B. D. 451.

Bosanquet, Q.C., and *Wedderburn*, for the respondents (the London County Council) were not called upon.

Lord ESHER, M.R.—In this case the assessment committee applied to the clerk of the peace to tax their costs incurred in the course of eleven different appeals to quarter sessions, and the clerk of the peace refused to tax the costs, upon the ground that he had no jurisdiction to do so, inasmuch as the assessment committee were not properly respondents to the appeals, and so were not entitled to appear at quarter sessions. The question depends upon section 2 of the Union Assessment Committee Amendment Act, 1864. It is said that there are certain conditions precedent in each appeal which the assessment committee must fulfil before they have any right to appear as respondents on the appeals, either to argue the appeal or to apply to respite it or to do anything else. Section 2 says that "the assessment committee may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal." Reading those words in their ordinary grammatical sense, they mean that the assessment committee cannot appear unless they have first obtained the consent of the guardians of the union in the manner there specified. Until they have fulfilled those conditions they have no right to be heard on the appeal, and the court has no jurisdiction to hear them, and it lies on them to show that the conditions have been fulfilled. They are conditions which go to jurisdiction, and no consent of the parties can dispense with the fulfilment of those conditions and give the court jurisdiction. The clerk of the peace was right in inquiring whether he had jurisdiction to act in the matter and in requiring proof that the conditions precedent were fulfilled. It is clear that the conditions were not fulfilled, and that, therefore, he had no jurisdiction to tax the costs of the assessment committee incurred in an appeal in which they had no right to appear. It is not a case, like *Rex* v. *Justices of Hertfordshire*, where the conditions were really fulfilled, and the mere fact of the proof of their fulfilment was dispensed with in court. In this case the conditions never were fulfilled. The case of *Reg.* v. *Justices of Denbighshire* was very much pressed upon us in argument, but that case was decided upon section 1, which is different from section 2. The judgment of the court below, discharging the rule for a *mandamus*, must be affirmed.

LOPES and RIGBY, L.JJ., concurred.

Solicitors for the appellants, *Hillearys*.

Solicitor for the respondents, *W. A. Blaxland*.

From Q. B. Div. (Lord Esher, M.R., and Lopes and A. L. Smith, L.JJ.) — Nov. 13.

GRAINGER *v.* GOUGH. (*a.*)

Inland revenue—Income tax—Foreign business—Foreign principal resident abroad—Agents in England—Trade exercised within United Kingdom—Foreign principal chargeable to income tax in the name of agents—Assessment of agents—Liability of agents—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 41, 44—*Income Tax Act,* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

The appellants were the agents in Great Britain for the sale of the wine of a foreign wine merchant and champagne shipper, whose chief place of business was in France. The agents obtained orders and transmitted them to their principal. The wine was invoiced by the principal to the customers in his name as vendor, but the invoices were sent by him to the agents, who forwarded them to the customers. The amounts due in respect of the wine so sold were sometimes collected by the agents, but more frequently the customers remitted the amount of their invoices by cheque or draft direct to the principal. The agents were entitled to a commission, on which they had paid income tax, and had no other interest in the sale of the wine. The cash received by them on behalf of their principal rarely exceeded the commission due to them, and that excess was occasionally absorbed in the payment of charges on the principal's behalf. An assessment to income tax was made on the foreign principal in the name of the agents, under Schedule D.

Held, first, that the foreign principal exercised a trade within the United Kingdom within the meaning of the Income Tax Acts, 1842 *and* 1853; *and, secondly, that the appellants were agents within the meaning of section*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

41 *of the Income Tax Act*, 1842, *and that the assessment was rightly made in their name.*

Appeal from the judgment of a divisional court on a special case stated by Commissioners of Income Tax under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Commissioners for the general purposes of the Income Tax Acts for the City of London, held on the 17th of February, 1887, Messrs. Grainger & Son appealed on their own behalf against assessments for each of the years 1884, 1885, and 1886 of £3,000, made as follows: "Louis Roederer, of Rheims, champagne shipper, in the name of Grainger & Son, agents, 108, Fenchurch-street."

It appeared from the special case that Mr. Louis Roederer was a wine merchant and champagne shipper, whose chief place of business was at Rheims, in the Republic of France, and that he had for many years shipped large quantities of champagne to England in the course of his business. The appellants, Messrs. Grainger & Son, were wine merchants carrying on business at 108, Fenchurch-street, in the City of London, and were the London agents of Louis Roederer. They also carried on there an extensive business of their own as wine merchants. The appellants were agents in Great Britain for the sale of Roederer's wine, and they appointed other persons in towns other than London as sub-agents. Orders were sought by the appellants on behalf of, and in the name of, their principal, and such orders when received were transmitted to him at Rheims, and he exercised his discretion as to executing them. The wine was sold to the customers as it lay in the cellars at Rheims, and was forwarded direct by Roederer to the customers at their risk and expense. The packing and arranging for transit, however, was actually performed by persons employed by Roederer, and the customers were charged a sum in respect of such work. The wine was invoiced by Roederer to the customers in Roederer's name as vendor; but the invoices were sent by Roederer to the appellants, who in their turn forwarded them to the customers. The amounts due in respect of the wine so sold were sometimes collected by the appellants on behalf of Roederer, either in cash or by cheques or drafts payable to Roederer, but more frequently the customers remitted the amount of their invoices direct to Roederer by cheques or drafts to his order. The receipts for all money paid either to Roederer or the appellants were sent by Roederer to the customers direct. The appellants were entitled to a commission upon all orders received from Great Britain if executed, and had no other interest in the sale. The cash received by the appellants on behalf of Roederer sometimes, but rarely, exceeded the commission due to them, and they occasionally incurred and paid on his behalf other charges whichabsorbed such excess. The appellants had paid income tax on their commission. The Post Office London Directory, under the head of "Trades: Wine Merchants," contained the following entry, which had been inserted by the authority of the appellants: "Roederer, Louis, Rheims, champagne merchants (Grainger & Son, agents), 21, Mincing-lane, E.C." Roederer had registered a series of trade-marks in Great Britain.

The appellants contended (1) That Roederer was not a person exercising a trade within the United Kingdom, either in the terms of Schedule D of 16 & 17 Vict. c. 34, alone or read with section 41 of 5 & 6 Vict. c. 35; (2) That the appellants were not agents within the terms of section 41 of 5 & 6 Vict. c. 35, and they claimed that the assessments should be discharged or that their names should be erased therefrom.

The commissioners were of opinion that the assessments were rightly made, and confirmed the same accordingly, but at the request of the appellants they stated a case for the opinion of the High Court.

By section 2, Schedule D, of the Income Tax Act, 1853, the duty thereby imposed is expressed to be chargeable "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation, exercised within the United Kingdom."

By section 41 of the Income Tax Act, 1842, as amended by section 5 of the Act of 1853, the trustee, guardian, tutor, curator, or committee of any incapacitated person, shall be chargeable to the duties created by that Act in like manner and to the same amount as would be charged if no such incapacity existed; "and any person not resident in the United Kingdom, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver having the receipt of any profits or gains as hereinmentioned and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in the United Kingdom, and in the actual receipt thereof; and every such trustee, guardian, tutor, curator, committee, agent, or receiver shall be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

By section 5 of the Act of 1853 the two Acts are to be construed and read together as one Act.

The Queen's Bench Division (Mathew and Cave, JJ.) held that the appellants were rightly assessed, and gave judgment for the respondent, the surveyor of taxes.

Grainger & Son appealed.

Pyke, Q.C., and *R. M. Bray*, for the appellants.—First, Roederer does not exercise a trade within the United Kingdom. The wine is grown in France, and made in France, and shipped in France, and it is bought and sold in France. The decision in *Grant* v. *Anderson & Co.*, [1892] 1 Q. B. 108, 40 W. R. Dig. 190, which was a case with regard to service on a foreign partnership, is an authority to show that the facts of this case do not constitute a carrying on of business within the United Kingdom. [They also cited *Werle & Co.* v. *Colquhoun*, 36 W. R. 613, 20 Q. B. D. 753, and *London Bank of Mexico and South America* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378.] Secondly, the appellants are not in receipt of any of the profits or gains of their principal's business. The money they receive is only sufficient to pay their commission and cover necessary expenses.

Sir R. T. Reid, A.G., and *Danckwerts*, for the respondent.

Lord ESHER, M.R.—I am of opinion that this appeal must be dismissed. Two points have been taken. As to the first, Mr. Roederer is a well-known wine merchant, who does a very large business in the sale of champagne. He grows the wine and carries on a great part of his business at Rheims; but the wine is grown for consumption in various countries, and no doubt England is the country to which it is chiefly exported. How does he deal with England? He appoints agents, and it is clear that the purpose for which they are appointed is to carry on the business of selling his champagne in this country. It is not merely that they sell his wine on casual

occasions, but the sale of wine in this country is a real part of his business, and they are appointed to look after this part of his business. We have before held that the question whether, within the meaning of this Act, a person is exercising a trade in England is a question of fact depending on the particular circumstances of each case. I am of opinion that the question whether Roederer exercises a trade in this country must be answered in the affirmative. He clearly does carry on the business of selling wine in England.

Then it is said that though Grainger & Son are the agents of Roederer, yet they are not chargeable under the Income Tax Act, because they are not agents having the receipt of the profits or gains of his business. Section 41 of the Income Tax Act, 1842, says that any person not resident in the United Kingdom, who would be charged if he were within the United Kingdom, shall be chargeable in the name of his agents in this country. The tax is to be got ultimately from the person chargeable, *i.e.*, the foreigner; but the Government is enabled to get it in the first instance from the agent in this country. Section 41 provides machinery for doing this, by declaring that the foreigner shall be chargeable in the name of the agent. Section 44 shows that the meaning of this is that the agent shall be assessed; for it enacts that where any person being trustee or agent for any other person shall be assessed under this Act in respect of such person, he may out of the moneys which shall come to his hands as such trustee or agent retain sufficient to pay such assessment. But what sort of agent can be so assessed? That we learn from section 41, which says, "any factor, agent, or receiver having the receipt of any profits or gains." A factor, in the ordinary sense of the word, always receives the profits of the sales which he effects on behalf of his principal, Therefore, the words, "having the receipts of any profits or gains," are not required to apply to "factor." Then why should they be carried back to apply to "agent"? I think that they only apply to "receiver," and that the section is intended to include a receiver appointed by a principal to receive his profits and gains. An agent, in order to come within the meaning of this section, need not, in my opinion, be anything more than an agent to carry on the business of a foreign principal in England. This view is borne out by a consideration of the last clause of the section—"and every such . . . agent shall be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act, in order to the assessing of any such person to the duties granted by this Act, and paying the same." I think that the words "such person" mean the foreigner, or they may perhaps also include the agent himself. The words, "paying the same," must, I think, be construed with "answerable for." This interpretation of the section makes it entirely consistent with section 44. None of the cases which have been cited are contrary to the view I have expressed. I am, therefore, of opinion that the appellants are answerable to the Crown to pay income tax on the assessment made in respect of the business of their principal.

LOPES and A. L. SMITH, L.JJ., concurred.

Solicitors for the appellants, *Irvine, Hodges, & Borrowman.*

Solicitor for the respondent, *Solicitor of Inland Revenue.*

High Court of Justice.

Chan. Div. North, J. — Nov. 10.

In re NATIONAL PROVINCIAL BANK OF ENGLAND AND MARSH. (*a.*)

Vendor and purchaser—Conditions of sale—Condition that defect in prior title, whether appearing in abstract or not, shall not be objected to—Defect in prior title discovered aliunde*—Action for recovery of deposit.*

A property was sold as an estate in fee simple subject to a condition that the title should commence with a conveyance on sale dated the 23rd of January, 1869, *and that the prior title, whether appearing in any abstracted document or not, should not be required, investigated, or objected to.*

The purchaser, having discovered aliunde *a defect in the prior title and founded an objection thereon, took proceedings under the Vendor and Purchaser Act for a return of his deposit.*

Held, that the condition was a valid one, and bound the purchaser; and that the purchaser's application for return of the deposit should be dismissed.

Hume *v.* Bentley, 5 *De G. & Sm.* 520, *followed.*

Darlington *v.* Hamilton, *Kay,* 550, 2 *W. R. Dig.* 88, *considered.*

This was a summons under the Vendor and Purchaser Act, 1874, in which the purchaser asked for a declaration that the vendors, the National Provincial Bank, had not shown a good title to the property, and asked for a return of the deposit, with interest.

The facts of the case were as follows. The property in dispute was conveyed by an indenture dated the 23rd of January, 1869, for valuable consideration by Miss E. W. Davis to Richard Ansty, under whom the vendors claimed. The indenture recited that E. W. Davis was seised of the hereditaments in fee simple.

The present vendors put the property up for sale by auction as an estate in fee simple. Condition 3 of the conditions of sale was as follows:

"The title shall commence with an indenture of conveyance on sale dated the 23rd day of January, 1869; and the prior title, whether appearing in any abstracted document or not, shall not be required, investigated, or objected to."

At the auction Samuel Worthey Bewsey asserted a claim to the property under the will of his grandfather, Samuel Worthey, and declared that he should claim the same on the death of the said E. W. Davis. According to the purchaser's affidavit the purchaser was informed that his deposit and fees would be returned if the title were found to be defective. Accordingly he bid for and purchased the lots in question, paying a deposit; and subsequently the vendors delivered their abstract.

The purchaser made an investigation *aliunde* into the vendors' title, and came to the conclusion that the vendors could only make out an indefeasible title to a life estate.

The purchaser having pointed out the alleged defect in the title, the vendors insisted that condition three precluded the purchaser from objecting to the prior title on account of defects discovered *aliunde*. It was not stated that the vendors were aware of the alleged defect in their title. The purchaser thereupon took out the present summons.

B. B. Rogers, for the purchaser.—The objection

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

can be supported in spite of the condition. Page-Wood, V.C., lays it down in *Darlington* v. *Hamilton*, Kay, 550, 2 W. R. Dig. 88, that "it is quite clear according to the doctrine referred to and confirmed in *Warren* v. *Richardson*, Younge, 1, and *Shepherd* v. *Keatley*, 1 Cr. M. & R. 117, that whatever may be the terms of the conditions of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct he has a right to insist upon the objection."

He referred also to *Else* v. *Else*, 20 W. R. 286, L. R. 13 Eq. 196; *Waddell* v. *Wolfe*, 23 W. R. 44, L. R. 9 Q. B. 515; *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779; *Smith* v. *Robinson*, 28 W. R. 37, 13 Ch. D. 148. [NORTH, J., referred to *Hume* v. *Bentley*, 5 De G. & Sm. 520.]

Beaumont, for the vendors.—Condition three prevents the purchaser from raising the question: *Hume* v. *Bentley*. The cases cited do not show that the condition was invalid. In Dart's Vendors and Purchasers (6th ed., vol. 1, at p. 169, note (z)) it is said that the doctrine laid down by Page-Wood, V.C., in *Darlington* v. *Hamilton* appears to be too broadly stated."

NORTH, J.—In my opinion the condition is binding on the purchaser. At the same time I do not say that this is a case in which, if the vendors were claiming specific performance, that they would be entitled to succeed. I can see that there might be a difficulty. This, however, is not an action for specific performance, but a summons under the Vendor and Purchaser Act for a return of the deposit. As *Hume* v. *Bentley* shows, the condition is valid. I am referred, however, to the remarks of Lord Hatherley, then Page-Wood, V.C., in *Darlington* v. *Hamilton* and to the judgment in that case. The judgment was clearly within the authorities, for the condition was that the purchaser should not require proof or production of the lessor's title, or of any title prior to the lease. The Vice-Chancellor says (Kay, at p. 558), "It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* and *Shepherd* v. *Keatley*, that whatever may be the terms of the condition of sale, if the purchaser obtains information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist on the objection." Mr. Rogers stated that the rule as here laid down has never been challenged.

It was pointed out on the other side that in Dart's Vendors and Purchasers it is said that the doctrine as laid down in *Darlington* v. *Hamilton* "appears to be too broadly stated." Now it will be observed that the Vice-Chancellor bases the doctrine on *Warren* v. *Richardson* and *Shepherd* v. *Keatley*. Now what do these cases say? In *Warren* v. *Richardson* the facts were these. That was a suit by the vendor for specific performance, and, as between vendor and purchaser, the purchaser had waived objections to title, and this the court held, decreeing specific performance in the first instance. At a later stage of the action the vendor had, for his own purpose, to produce a document which showed he had no title, and the court then refused to enforce specific performance. This is not the case in the present instance. Nor is the decision in *Shepherd* v. *Keatley* in point. In that case, which was an action by a vendor (the assignee of a lease) for breach of a contract by the defendant to buy the lease, one of the conditions of sale was that the vendor should not be obliged to produce the lessor's title. The defendant, the purchaser, discovered defects in the lessor's title *aliunde*, and he was held entitled to insist upon those defects as a good defence to the plaintiff's action. It thus appears that the observations of Page-Wood, V.C., are largely founded on these two cases, neither of which seem to warrant his view.

Other cases have been referred to. *Else* v. *Else* was a sale by the Court of Chancery, and the judgment cannot affect the parties in this case. In *Waddell* v. *Wolfe*, where the question was one as to the difference between the right to object to a title and to make any requisition or inquiry on it, Blackburn, and Archibald, JJ., both refer to the decision in *Hume* v. *Bentley* as good law.

In *Jones* v. *Clifford* Hall, V.C. (a very competent judge in matters of this kind), says (3 Ch. D., at p. 790), "It has been said that even if it is made out that the purchaser has bought his own property, yet, that, having regard to the terms of the contract and the law, he ought to be compelled to complete his purchase, and pay for that which is his own. The cases are divisible into two classes: first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and, secondly, cases in which the terms of the contract preclude him, not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title. A condition of the latter class is, no doubt, valid, but the court has never yet gone so far as to hold that such a condition precludes the purchaser from saying to the vendor, at any rate before the completion of the contract, "We have both been proceeding under a common mistake. You said the property was yours, but I now find by some document which I have seen that it is mine, and the contract which you are asking me to complete is one without consideration, for I shall be paying the purchase-money and getting nothing for it." The condition has never been construed to include such a case as that. And where there has been such a common mistake and no fraud, the court will not, in a suit for specific performance, compel the purchaser to complete such a contract."

Smith v. *Robinson* was an action for specific performance. In that action freehold property was sold in 1877, subject to a condition that the title should commence with a deed dated the 30th of December, 1867, and that no other or earlier title should be required or inquired into by the purchaser. In that case Fry, J., held that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered by any inquiry made by him, but was accidentally disclosed by the vendor. Under these circumstances, Fry, J., held that there could be no specific performance of the contract, but he also held that the vendor was entitled to an inquiry whether or not he could make out a good title. Nothing in these cases shows the condition of the vendor in this case to be invalid. The only objection is the doctrine laid down by Page-Wood, V.C., on the authority of two cases which give no foundation for it. I am not now deciding whether or not the vendors give a good title. I cannot now say whether the title is good or bad.

The question before me is whether the vendors can make condition 3 a valid condition of sale. I see no reason why they cannot insert such a condition in their conditions of sale, and the purchaser is precluded from taking any objection to it. Consequently, his application fails, and I must dismiss the summons, but I do so without costs, as I think this is not a case for giving them.

Solicitors, *Robins, Hay, Winters, & Lucas*, for *H. S. & S. Watts*, Yeovil; *Wilde, Berger, & Moore*, for *Bell & Freame*, Gillingham.

Chan. Div. Stirling, J. } Oct. 25; Nov. 14.

In re HUME.
FORBES *v.* HUME. (*a.*)

Charity—Will—Gift of residuary real and personal estate to charity subject to life interests—Mortmain and Charitable Uses Act, 1888 (51 & 52 *Vict. c.* 42), *s.* 4, (1), (2), (3), (6)—*Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *s.* 5.

Sub-sections 1, 2, 3, *and* 6 *of section* 4 *of the Mortmain and Charitable Uses Act,* 1888, *are inconsistent with, and must be taken to have been repealed by, section* 5 *of the Mortmain and Charitable Uses Act,* 1891.

A testatrix, who died on the 6*th of March,* 1892, *by her will, dated the* 24*th of October,* 1890, *devised and bequeathed her residuary real and personal estate upon trust, after the determination of certain life interests which she created therein, for a charity.*

Held, that the gift to the charity was valid.

Summons

The testatrix, Mrs. Charlotte Hume, by her will, dated the 24th of October, 1890, devised and bequeathed her residuary real and personal estate to trustees, upon trust either to retain the same in its actual state of investment, or to sell and convert the same into money, with full discretion to postpone such sale and conversion for such period as they should think fit. The testatrix then, after giving some pecuniary legacies, created certain life interests in the residue and directed that, upon the determination of such life interests, the whole of her residue, or such part thereof as might be lawfully applicable for the purpose, should go and belong to the charity known as The Croydon Rescue and Preventive Association, and in case such charity should have ceased to exist, then to the Croydon Hospital; and, subject as aforesaid, she declared that her trustees should hold the whole of her residuary estate in trust for the plaintiff.

The testatrix died on the 6th of March, 1892.

The Mortmain and Charitable Uses Act, 1888, s. 4 (1), provides that, "subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void." Sub-section 2 provides that "the assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof." Sub-section 3 provides that "the assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assuror, or of any person claiming under him."

The Mortmain and Charitable Uses Act, 1891, was passed on the 5th of August, 1891, and applies to the wills of persons dying after that date. Section 5 provides that "land may be assured by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners."

Graham Hastings, Q.C., and *A. Young,* for the plaintiff.—The restrictions imposed by sub-sections 2 and 3 of section 4 of the Act of 1888 are not removed by the Act of 1891. The latter Act directs that lands devised to a charity must be sold within a year, and that shows that the Legislature did not contemplate the devise of residuary estate.

Buckley, Q.C., and *Eve,* for the Croydon Rescue and Preventive Association.—The Act of 1891 is a new enactment, wholly independent of section 4 of the Act of 1888. It provides an independent remedy for the evils aimed at by the Mortmain Acts, and must be taken to have repealed the restrictions imposed by section 4 of the earlier Act.

Dibdin, for the Croydon Hospital.

Mulligan, for the trustees of the will.

STIRLING, J.—The question is whether assurances of land by will to or for the benefit of a charitable use under section 5 of the Mortmain and Charitable Uses Act, 1891, are subject to any of the restrictions contained in section 4 of the Mortmain and Charitable Uses Act, 1888, and particularly to those imposed by sub-sections 2 and 3 of that section. Part 2 of the Act of 1888 (which begins with section 4) is in substance a re-enactment of the Act of 9 Geo. 2, c. 36, entitled "An Act to restrain the disposition of lands whereby the same became inalienable." [His lordship read the preamble of that Act, and continued:—] That Act prohibited all gifts and grants of land or hereditaments, or of any estate or interest therein, or charges or incumbrances affecting lands or hereditaments, or of personal estate, to be laid out and disposed of in the purchase of lands or hereditaments, or any estate or interest therein, or any charge or incumbrance therein to or in trust for any charitable use, except in the manner and form by the Act directed, being by deed satisfying certain requirements therein prescribed. The policy and object of the Act are, if I may be allowed to say so, extremely well expressed by James, L.J., in delivering the judgment of the Court of Appeal in *Attree* v. *Hawe,* 26 W. R. 871, 9 Ch. D. 337. [His lordship read a portion of that judgment, and continued:—] The result has been that, while, ever since the passing of the Act, testators have enjoyed unrestricted power of leaving to charities personal estate unconnected with land (or, as it is often called, pure personal estate) of any amount, so long as the dispositions did not involve in the execution of them the purchase of land or interests therein or incumbrances thereon, the courts have enforced with great strictness the provisions of the statute in the case of attempted testamentary dispositions of personal estate consisting of interests in land or charges or incumbrances thereon, commonly termed impure personal estate. Considerable difficulty has arisen in many cases in determining whether particular kinds of personal estate fall within one class or the other.

Reported decisions, some of recent date, show how narrow is the line which divides the two classes. Gifts of impure personal estate have been held invalid where the connection with land was extremely remote, and judges of great eminence have expressed their astonishment at the great extent to which the Act has been carried. See, for example, the judgment of the present Master of the Rolls in *Ashworth* v. *Munn,* 28 W. R. 965, 15 Ch. D. 371. The Act of 1891 appears to have been passed with the object of restraining within narrower limits the application of the prohibitory legislation of 9 Geo. 2, c. 36. By section 3 the definition of land contained in the Act of 1888 is altered so as to exclude from it money secured on land and other personal estate arising from and connected with land, and all such personal estate has ceased to be subject to the restrictions originally imposed by the Act of George II. and re-enacted by that of 1888.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Again, section 7 renders valid bequests in favour of charities of personal estate to be laid out in the purchase of land. It provides that such bequests shall be held to or for the benefit of the charitable uses as though there had been no direction to lay out the personal estate in the purchase of land. The question in the present case arises on section 5, which provides that "land may be assured by will to or for the benefit of any charitable use," words which in themselves appear to me to confer the widest power of testamentary disposition of land in favour of charities—that is to say, to enable testators to devise land in favour of charities for any estate or interest therein. The section goes on to provide that such land shall, notwithstanding anything in the will contained, be sold within one year from the death of the testator or such extended period as may be determined by the court or the Charity Commissioners, and section 6 provides that so soon as the time limited for the sale of land by any such assurance shall have expired without completion of the sale the land unsold shall vest in the official trustee of charity land. These enactments (like the concluding provision of section 7) appear to be directed to the prevention of the mischief pointed out in the judgment in *Attree* v. *Hawe*—viz., the increase of inalienable land by means of charitable gifts; and so far as I can see the remedy thus provided by the Legislature is perfectly adequate for that purpose. Sub-sections 1, 2, 3, and 6 of section 4 of the Act of 1888 effect the main object of the Act—viz., the prohibition of charitable gifts of land otherwise than by acts *inter vivos;* but they are inconsistent with and must be treated as repealed by section 5 of the Act of 1891.

It was conceded in argument that sub-section 6 must be treated as repealed, but it is said that this repeal by implication does not extend to sub-sections 2 and 3, and that the testamentary assurances authorized by section 5 of the Act of 1891 must satisfy the requirements of those sub-sections. These, however, are merely subsidiary to the attainment of the object arrived at by sub-section 6; they are (in the language of James, L.J.) regulations securing that charitable gifts *inter vivos* "shall not be in substance posthumous merely by avoiding the form" and naturally fall with the removal of the restriction imposed by sub-section 6. If indeed the Act of 1891 had omitted to provide any remedy for the mischief which the provisions of the Act of 1888 were intended to prevent there might be ground for placing a limited meaning on the wide terms of section 5; but where a new and apparently adequate remedy is afforded, I fail to see why that section should be read in a narrower sense than its language warrants. The statutory provision that land assured by will in favour of charities shall be sold within one year from the death of the testator is relied on as showing that the estate or interest so assured must take effect in possession within that period. I am, however, unable to follow that argument. A future interest in land may be sold no less than an immediate interest. Moreover, a sale within a year is not absolutely imperative. The Legislature recognizes that in particular cases reasons may exist which render a sale within that time undesirable, and has provided the means for extending the term. I am, therefore, of opinion that the charitable gifts contained in the will of the testatrix are valid. I may add that in point of decision the present case is covered by *In re Bridger*, 41 W. R. 104, 42 W. R. 179, [1893] 1 Ch. 44, [1894] 1 Ch. 297. Inasmuch, however, as the question discussed before me does not appear to have been raised in argument, and is certainly not expressly dealt with by the judgments delivered in *In re Bridger*, I have thought it right to express my opinion on it without relying on that case as an authority: at the same time I find great difficulty in supposing that, if the contention of the present plaintiffs had any solid foundation, it would have escaped the attention of all the learned judges before whom *In re Bridger* was argued.

Solicitors, *Last & Sons; S. M. & J. B. Benson; West, King, Adams, & Co.; Patey & Warren.*

Chan. Div. }
Kekewich, J. } Dec. 7.

BOAKE, ROBERTS, & CO. v. STEVENSON & HOWELL. (*a.*)

Practice—Motion to discharge order in chambers—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *ss.* 1, 4.

The power of a judge of the Chancery Division to hear a motion to discharge an order made in chambers is not affected by the Supreme Court of Judicature (*Procedure*) *Act*, 1894.

Motion.

This was an application to discharge an order made in chambers disallowing certain interrogatories.

Sir R. Webster Q.C., and *Carpmael*, for the applicant.—This is not an appeal, but an application to re-hear and vary: *In re Giles, Real and Personal Advance Co.* v. *Michell*, 38 W. R. 273, 43 Ch. D. 391.

J. C. Graham, for the respondent.

Sir R. Webster, Q.C., replied.

KEKEWICH, J.—Until last session of Parliament it was competent for any litigant in the Chancery Division to move to discharge any order made by the judge in chambers. He was at liberty to argue in court that the hasty conclusion arrived at in chambers was wrong. That right was expressly reserved by section 50 of the Judicature Act, 1873. Now the Supreme Court of Judicature (Procedure) Act, 1894, in dealing with interlocutory appeals of all characters (sections 1 (*b*) and 4), provides that all such interlocutory matter shall go straight to the Court of Appeal, and should not be subject to a series of intermediate appeals. No reference is made in the Act to the liberty to move to discharge an order made in chambers by a judge of the Chancery Division. I presume it was desired that the judges of that division should still follow the old practice which gave the unsuccessful litigant in chambers three alternatives—viz., (1) to move to discharge the order; (2) to adjourn the matter into court; and (3) leave to appeal direct on the certificate of the judge that no further argument was required. I certainly still have the power to do the two latter, and as there is no provision taking the right away, I think I have power to hear a motion to discharge an order made in chambers. Such a motion is not an appeal, as appears from the case cited. But this is not a motion to discharge an order, but really for leave to substitute new interrogatories. It is a new application which might be made in chambers.

Solicitors, *Wilson, Bristows, & Carpmael; Neish, Howells, & Macfarlane.*

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Kekewich, J. } June 28, 1894.

In re BUTLER.
LE BAS *v.* HERBERT. (*a.*)

Administration—Will—Direction to pay debts—Specific bequest of personalty already charged.

As between specific legatees or devisees, the specific legatee of property on which a charge is existing at the death must bear that charge where the general personal estate not specifically bequeathed is insufficient for payment of debts.

Adjourned summons.

The testatrix, by her will, after directing payment of her debts and specifically devising certain properties, gave her "invested moneys" to her sister, E. C. West, for life with remainder over. The "invested moneys" were held to include a sum of Great Indian Peninsular Railway Stock which was deposited with her bankers as a security for a loan.

The general personal estate was insufficient for the discharge of the amount due to the bankers in addition to other debts, and the question for determination was as to the manner in which such deficiency was to be made good.

Daniel Jones, for the plaintiffs, the executors.—The specific legatee of the stock ought to bear the charge: *O'Neal* v. *Mead*, 1 P. Wms. 693; *Halliwell* v. *Tanner*, 1 Russ. & My. 633.

Vernon R. Smith, for a defendant.

E. Beaumont, for other defendants.—The direction to pay debts makes the doctrine of marshalling applicable.

D. Jones replied.

KEKEWICH, J.—Where a testator's general estate is insufficient, the order of application of his property in discharge of his debts is not satisfactorily settled by the authorities. My attention has been called to two decisions which seem to establish a tolerably plain proposition running counter to the general rule. To put the case in a concrete form. A man has two properties, personal estate only—viz., railway debenture stock and Consols—which practically constitute the whole of his estate. He gives the debenture stock to A. and the Consols to B. The debenture stock is pledged to his bankers. The result is, the legatee of the stock in the first place gets only the stock less the sum charged thereon to the bankers. Can he throw the burden of the debts on the Consols to this extent, that the Consols shall contribute to the debt rateably in proportion to the two values? That is, I think, the general law. The debts must be paid out of the personal estate; if there is no general personal estate they must be paid out of such personal estate as has been specifically bequeathed. And, further, the general law is that the legatee of a chattel or other personal estate takes with it the privilege of having any debt charged on it paid out of the personal estate. But the two decisions referred to seem to me to establish an exception in such a case, and on this ground, that it must be the intention of the testator that neither legatee shall be defeated, and that you would defeat the legatee of the Consols in the case I put if you made him pay part of the debt which the testator contracted on the debenture stock. This is the argument as I understand it in *Halliwell* v. *Tanner* and *O'Neal* v. *Mead*. It is a presumed intention of what it is to be supposed a testator in such special circumstances would be likely to do, there being nothing showing the intention on the face of the will. The property is given here in such a way that the testatrix intended that each legatee or devisee should take the property which is bequeathed or devised to him, and the direction to pay debts is the only indication of intention the other way. Treating it as a question of intention, I hold that the property specifically charged to the bankers must bear the burden of that charge. This exception to the general rule only applies where there is an insufficiency of the general personal estate.

Solicitors, *Murray, Hutchins, Stirling, & Murray; Barlow & James.*

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Chan. Div.
Vaughan Williams, J. } Nov. 2.

In re TUTICORIN COTTON PRESS CO. (LIMITED). (*a.*)

Company—Deceased shareholder—Scotch sequestration—Title to shares—Winding up—Surplus assets—R. S. C., 1883, *ord.* 16, *r.* 46.

A domiciled Scotchman was, at the date of his death, the registered holder of shares (of which he was a trustee) in an English company which was in voluntary liquidation. After his death sequestration was issued in Scotland against his estates, and a trustee was appointed to the sequestration proceedings. By Scotch law the legal interest in the shares was vested in the sequestrator, and he was able to give a title to a purchaser of the shares from himself without the assistance of the Scotch legal personal representative. No legal personal representative had been constituted in England.

Held, that the title to the shares vested in the sequestrator, and that it was unnecessary to make any order under R. S. C., 1883, *ord.* 16, *r.* 46.

This was a summons by the liquidator of the above named company, which was in course of voluntary liquidation, for directions as to who was entitled to receive the dividend or share of the net surplus assets of the said company in respect of 1,230 shares standing registered in the books of the company in the name of the late John Patrick Alston.

The company was registered in England on the 16th of February, 1882, as a company limited by shares with a capital of £25,000 divided into 2,500 shares of £10 each. At meetings held on the 20th of April and 16th of May, 1892, resolutions were duly passed that the company be wound up voluntarily. At the commencement of the winding up 1,230 shares in the company stood in the sole name of Alston, who was at the time of his death, domiciled in Scotland. He died on the 29th of May, 1891, and no legal personal representative was ever constituted in England. At the time of his death he was a partner in a firm of Campbell, Rivers, & Co., merchants in Glasgow. The firm of Campbell, Rivers, & Co. and H. C. Buchanan and F. W. Bois carried on business in partnership under the firm of Alstons, Scott, & Co. in Calcutta. Alston left a trust disposition and settlement in Scotch form, dated the 1st of September, 1883, by which he nominated trustees and executors, of whom W. H. Alston alone accepted office, and the others disclaimed. On the 6th of August, 1891, the estates of A. were sequestrated in Scotland, and on the 31st of the same month the estates of W. H. Alston were likewise sequestrated. James Muir was appointed trustee in both sequestrations. H. C. Buchanan and F. W. Bois were rendered bankrupt according to the

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

of Ceylon as partners of Alstons, Scott, & Co. and as individuals on the 6th of September, 1891, and R. L. M. Brown was appointed assignee of their estates. The firm of Campbell, Rivers, & Co. was rendered bankrupt according to Scotch law, and Muir was appointed trustee of their estates and those of the individual partners. By his judgment, dated the 2nd of June, 1893, in an action of multipoinding and exoneration, the Lord Ordinary found that Muir, as trustee of the sequestered estate of Campbell, Rivers, & Co., and Brown, official assignee of the insolvent estates of Buchanan and Bois, were entitled to be "ranked and preferred jointly to the fund *in medio*" (*i.e.*, the shares aforesaid).

The liquidator had in his hands a sum of £3,690 applicable as dividend at the rate of £3 per share on the 1,230 shares. Under the articles of the company the legal personal representatives of a deceased shareholder were the only persons to be recognized as having any title to his shares. Affidavits were made by Scotch lawyers to the effect that the title to the shares was in Alston during his life:—"Upon the occurrence of the sequestration of his estates after his death—*i.e.*, from the date of the first deliverance in the petition for sequestration—viz., the 6th of August, 1891—Muir, as trustee in the sequestration, while having no beneficial right to the shares in a question with the beneficiaries or *cestuis que trust*, became, and still was, in all questions with the company, the party legally entitled to hold or deal with the said shares and to discharge the company of all sums payable in respect thereof." Further, they stated that the judgment of the Lord Ordinary did not operate to transfer or affect the bare legal title to the shares which remained vested in Muir.

J. G. Wood, for the summons.—The name of the legal personal representatives should be on the register, as no other person can receive the money. [VAUGHAN WILLIAMS, J.—If there had been no sequestration in Alston's lifetime the sequestrator would be entitled to be on the register. Why should not his name be on now?] The title of the Scotch sequestrator is not good as to *choses in action* in England. The Scotch proceedings do not vest property in England, and have no extra-territorial operation.

A. W. Watson, for Muir.—The case must be treated as one of a member of the company who is bankrupt, not as of one who is dead. On the principle *mobilia sequuntur personam* the Scotch court is the court to say where the legal title is.

He referred to the Bankruptcy Act, 1883, s. 50, sub-section (3), s. 125, sub-section (1), and Companies Act, 1862, s. 77.

J. D. Crawford, for Brown.

Wood, in reply.—Under ord. 16, r. 46, your lordship may dispense with a legal personal representative. A sequestrator could not demand a transfer of the shares in the lifetime of the shareholder. After the shareholder's death the right of the sequestrator would be subordinate to that of a legal personal representative, who could demand a transfer under the articles.

VAUGHAN WILLIAMS, J., said that it was unnecessary to make any order under ord. 16, r. 46, and that the title to the shares was vested in the Scotch sequestrator. His lordship directed the money in the liquidator's hands to be paid to the Scotch sequestrator on the joint receipt of himself and Brown.

Solicitors, *Faithfull & Owen; Munton & Morris.*

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 7.

In re KELLY. (*a.*)

Solicitor—Misconduct—Permitting unqualified person to use name—Punishment—Discretion of court—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 32.

It being proved to the satisfaction of the court that a solicitor has been guilty of the offence specified in section 32 *of the Solicitors Act*, 1843—*viz., that of permitting his name to be used by an unqualified person—the court has, under that section, no discretion as to the punishment, but is bound to strike the solicitor off the roll.*

Application to strike a solicitor off the rolls.

The committee appointed under the Solicitors Act, 1888, reported that the charge against the respondent was that "the respondent, being a solicitor, wilfully and knowingly permitted his name to be made use of in certain actions, suits, and matters upon the account and for the profit of one Henry Thomas Haslewood, an unqualified person."

For the purposes of this report it is unnecessary to set out the facts of the case, but it is sufficient to state that the committee found that the charge was proved, and that the respondent had been guilty of the professional misconduct alleged.

Hollams, in support of the application.—It is a question whether the court is not bound, under section 32 of the Solicitors Act, 1843, to strike the solicitor off the rolls. The words of the section are that, upon proof of the offence, the offending solicitor "shall and may be struck off the roll, and for ever after be disqualified from practising as an attorney or solicitor." The decisions are somewhat in conflict. In *In re Two Solicitors*, 28 SOLICITORS' JOURNAL, 90, the court held that there was no alternative left to the court as to the punishment; but in *In re Grayson*, 32 SOLICITORS' JOURNAL, 680, and in *In re Sykes*, 34 SOLICITORS' JOURNAL, 285, the punishment inflicted was that of suspension, and not that of striking off the roll. But in these latter cases the point as to discretion was not argued. In *In re Lamb*, 37 W. R. 665, 23 Q. B. D. 477, the point was raised in the Court of Appeal, but not decided.

Overend, for the respondent, argued that the use of the words "may be" gave the court a discretionary power as to the punishment. [POLLOCK, B., referred to 22 Geo. 2, c. 46, s. 11.]

POLLOCK, B.—I regret to say that in this case the facts that have been proved against the solicitor in question are so clearly established, and the character of the offence is so continuous, that the court can have no option but to say that it is shown the solicitor is unfitted, and permanently unfitted, to hold the office and position of a solicitor of this court, and therefore it is our duty to say that he must be struck off the rolls. That is our decision, apart from what we think to be the proper construction of the statute. But, the question of discretion having been brought to our attention, and cases having been cited, I am bound to say that my brother Grantham and myself have no doubt that the true meaning of the words "shall and may be struck off the rolls" is that the court has no discretion, but that, in obedience to the statute, we are bound, if the facts are proved to our satisfaction, to strike off the rolls. The word "shall" is so absolutely clear that there could be no doubt whatever except for the words "shall and may be." There is no doubt some little difficulty in seeing why

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

those words should be inserted at all; but I think some ground is given to the course of legislation by the earlier statute of 22 Geo. 2, c. 46, s. 11, because it shows that so many years ago as that time the Legislature had dealt with this very offence apart from any judicial discretion, and apart from the sort of domestic forum by which these matters were governed by the courts, and that Act provided that, where this offence was proved to the satisfaction of the court, "every such attorney or solicitor shall be struck off the rolls." Therefore it is no new thing; and I confess myself I cannot see how it can be contended that, because we have a discretion in other matters when there is no statute, we can say we have a discretion when there is a statute containing extremely plain words.

GRANTHAM, J.—I have also no doubt upon this question. With regard to the facts of the case, the facts proved are very serious, not only in one instance, but in many cases, and, therefore, under those circumstances, there is no doubt that we should punish him as directed by the Act. But I think we should express an opinion upon this point, which is said to be a doubtful one, and from the expressions of opinion of some of our brothers it may be doubtful as to what is the meaning of the words "shall and may." In the case of *In re Lamb* Cotton and Fry, L.JJ., say that, whatever may be the meaning of the words "shall and may," they are quite clear that where a person is struck off the rolls, he is for ever after disabled from practising as an attorney or solicitor, and if you look at the language of the section, it appears to me that interpretation would necessarily hold good if there were any value in the word "may." It seems to me, if the view taken by Lopes, L.J., in the same case is correct, that there is a discretion in the court in every case, notwithstanding this section, then it should read, "Every such attorney or solicitor shall and may be struck off the rolls, and if so struck off shall for ever after be disabled from practising as attorney or solicitor." But there is no alternative. The words are "shall and may be struck off the rolls, and for ever after be disqualified from practising as an attorney or solicitor."

In my opinion there is no alternative punishment provided by the section, and therefore the court has no discretion but to strike the solicitor off the rolls.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

The respondent in person.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Oct. 25.

In re ADAMSON.
Ex parte VINEY. (*a.*)

Bankruptcy—Act of bankruptcy—Privity of petitioning creditor to deed of assignment by debtor for benefit of creditors.

The debtor had executed a deed of composition providing for the payment of a composition by instalments, and that if he made default in payment he would, within ten days after demand by the trustee, execute a deed of assignment of all his property for the equal benefit of his creditors. The petitioning creditors assented to this deed. The debtor made default, and executed a deed of assignment not in accordance with the provisions of the deed of composition, from which the petitioning creditors dissented.

Held, that, although the deed of assignment was not in accordance with the deed of composition, and did not bind the petitioning creditors, yet that they were not entitled to rely upon it as an act of bankruptcy, because its execution had been demanded by the trustee of the composition deed as their agent, and they were therefore privy to it.

Appeal from a receiving order made by the registrar of the county court of Barnet. The appellant was the trustee under a deed of assignment executed by the debtor for the benefit of his creditors.

The debtor was a draper in Finchley, who got into financial straits early in 1894, his principal creditors being the Fore-street Warehouse Co. (the petitioning creditors in this case) and Messrs. Spencer, Turner, & Boldero. Viney, an accountant, went through his books, and found that his debts amounted to £690.

Upon the 6th of April a meeting of the creditors was held, when the debtor offered a composition of 15s. in the pound, payable by instalments at three, six, nine, and twelve months. At a second meeting, upon the 13th of April, the creditors resolved to accept the composition offered, and upon the 23rd of May a deed was executed in accordance therewith, which contained the following covenant:—

"4. The debtor hereby covenants with the trustee, and by way of separate covenant with the creditors, and each and every of them, that in case at any time two of the instalments shall be behind and unpaid, he, the debtor, will, within ten days after being called upon so to do by the trustee, make and execute an assignment of all his property and effects to the trustee for the equal benefit of creditors."

Viney was the trustee under this deed, and it was signed by the manager of the Fore-street Warehouse Co. on their behalf.

The debtor failed to pay any instalment of the composition, and upon the 24th of July, having been called upon by the trustee so to do, he executed a deed of assignment to the trustee for the benefit of his creditors, which contained a provision that any creditors for amounts under £10 who dissented from the deed might be paid in full; a provision excepting leaseholds and other onerous property from the assignment; and a provision for the payment of the accountant's and solicitors' costs in priority.

A meeting of the committee of inspection under the deed of composition was held upon the 27th of July, when the manager of the Fore-street Warehouse Co. refused to sign the deed of assignment, and advised the debtor to file his petition. Four other creditors, all for amounts under £10, also refused to sign the deed.

Upon the 27th of July the Fore-street Warehouse Co. filed a petition setting up the deed of assignment as the act of bankruptcy relied upon.

The registrar made a receiving order.

The trustee under the deed appealed.

Herbert Reed, Q.C., and *C. B. Marriot*, for the appellant.—The petitioning creditors are privy to the deed of assignment, and cannot rely upon it as an act of bankruptcy: *Ex parte Stray*, 1 W. R. 600, L. R. 2 Ch. App. 374; *In re Michael*, 8 Morr. 305. They allege that this deed is not in accordance with the provision in clause 4 of the composition deed, because it contains a provision for the payment of dissenting creditors under £10 in full, and is, therefore, not "for the equal benefit of creditors." This is a usual clause in such deeds, and within the provision of the deed of composition. The petitioning creditors signed the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

deed, and are, therefore, privy to this deed of assignment, which has been made in accordance with the provisions thereof. [They were stopped by the court.]

Bigham, Q.C., and *Carrington*, for the respondent.—We object upon three grounds that the deed of assignment is not within the provisions of the deed of composition: (1) It does not assign "all the property," but excepts the leaseholds, which in this case are valuable, not onerous, property. [VAUGHAN WILLIAMS, J.—There is nothing in that point.] (2) The deed of assignment is not "for the equal benefit of creditors," because it provides for the payment in full of dissenting creditors under £10. This is an inducement to all creditors under £10 to dissent. (3) It provides for the payment of the solicitors and of the accountant (in this case the trustee) in priority.

Reed, Q.C., in reply.—Leaseholds are excepted in every deed of assignment. It is usual in the draper's trade to provide for the payment in full of dissenting creditors under £10. [VAUGHAN WILLIAMS, J.—Is the provision so usual that the creditors who assented to the composition deed must have been taken to contemplate it?] The evidence is that it is usual in this trade. If the debtor had not covenanted to pay the costs while the estate was in his hands, the creditors would have been responsible for them. The proper costs are rightly deducted from the trust estate, and the deed of assignment is such a one as must have been contemplated.

Bigham, Q.C. (further heard).—We never agreed to this deed, and what we contemplated must be inferred from the deed of composition. The creditors under £10 might have formed the bulk of the creditors, and we dispute that it is usual to provide for their payment in full, nor did we contemplate the provision for the payment of costs in priority: *Ex parte Marshall*, 1 M. D. & De G. 575; *Ex parte Hallowell*, 3 Mont. & A. 538.

Reed, Q.C., replied.

VAUGHAN WILLIAMS, J.—In my judgment there should have been no receiving order. The question is not whether this deed is so far in accordance with the deed of composition as to bind the petitioning creditors or not. Though it may not bind them, they may not be entitled to treat it as an act of bankruptcy. This distinction is to be found in *Ex parte Stray*. I will assume for the purposes of my judgment that it was not for the equal benefit of creditors, and did not assign all the property; but even if that is so, yet, if the petitioning creditors did invite the debtor to execute it as and for a deed made in pursuance of the composition deed, they cannot rely on it as an act of bankruptcy. Now, although the evidence here does not go so far as to show that the petitioning creditors personally called upon the debtor to execute this deed, it does seem to me that it shows that they did what amounted to assenting to it.

Clause 4 of the deed of composition makes the trustee the agent of all the creditors who assented to that deed to demand the execution of the deed of assignment, and that is the same as if the creditors demanded it themselves. Therefore, in my judgment, whether this deed is in accordance with the composition deed or not, no creditor who assented to that deed can rely upon this as an act of bankruptcy; because its execution was demanded by the trustee. As to whether it is in accordance with the deed of composition or not, I say, as to the first point, that it does not assign "all the property"; that it is the usual course for the debtor to except onerous property and to declare that he holds it in trust for the trustee. There is nothing in the point as to payment of costs in priority.

As to the third point, I doubt whether the provision for the payment of dissenting creditors under £10 in full is in accordance with clause 4 of the composition deed. It cannot be assumed that the creditors contemplated a provision which is directly opposed to the terms of the composition deed, and for that reason I doubt whether the deed of assignment binds the Forestreet Warehouse Co., but, whether it does or not, they cannot rely upon it as an act of bankruptcy, because they invited the debtor to execute it by the mouth of the trustee.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors, *Crouch, Edwards, & Heron; Ashurst, Morris, & Crisp.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 18.

MAY AND ANOTHER *v.* LANE. (*a.*)

Assignment of debt—Building agreement—Promise by landowner to lend money to builder—Assignment by builder to third person—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.

A builder was erecting houses on the defendant's land under an agreement by which the defendant was to grant him leases of the houses when completed. The builder requiring money to complete the houses, the defendant promised to lend him £250, to be advanced by weekly sums as the work progressed. The houses having been almost completed, the builder, who was indebted to the plaintiffs, by an instrument in writing directed the defendant to pay to the plaintiffs £50 out of the moneys due or to become due from the defendant to the builder, and notice in writing of this instrument was given to the defendant.

Held, that the promise to advance the £250 did not create any "debt or other legal chose in action" *capable of being assigned within section* 25, *sub-section* 6, *of the Judicature Act*, 1873.

Judgment of the Divisional Court, ante, *p.* 58, *reversed.*

Appeal from the judgment of the Queen's Bench Division (Matthew and Charles, JJ.) reversing the judgment of his Honour Judge Hooper, the county court judge of Bournemouth (reported *ante*, p. 58).

The defendant, who was the owner of certain land, entered into an agreement with a builder whereby the latter agreed to build certain houses upon a plot of land belonging to the defendant and the defendant agreed to grant leases of the houses, when completed, to the builder, at a yearly rent. During the progress of the work the builder required money to complete the houses, and applied to the defendant, who promised to lend him £250, to be advanced by weekly sums as the work progressed. The builder, being indebted to the plaintiffs for materials supplied, gave them an order in writing, addressed to the defendant, in the following terms: "We do hereby authorize, order, and request you to pay to Messrs. May & Hassel the sum of £50 out of

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the moneys due or to become due from you to us on the buildings we are erecting on plot 16, and their receipt for the same shall be a good discharge." Notice in writing of this order was given to the defendant. The houses having been almost completed, the plaintiffs brought this action to recover the £50.

The county court judge held that there was no "debt or other legal *chose in action*" capable of being assigned within the meaning of section 25, sub-section 6, of the Judicature Act, 1873, and that the plaintiffs were not entitled to recover. The Divisional Court reversed this judgment, and entered judgment for the plaintiffs.

The defendant appealed.

J. A. Foote, for the defendant.

Brooke Little, for the plaintiffs.

The arguments were the same as in the court below.

Lord ESHER, M.R.—In this case an agreement was entered into between the defendant, the owner of certain land, and a builder, that the latter should erect certain houses on the land, and that the defendant should grant leases of the houses, when completed, to the builder at a rent. Under that agreement there was no obligation upon the defendant to advance the builder any money. The builder subsequently applied to the defendant for a loan to enable him to complete the houses, and so to carry out the agreement. The defendant promised to lend the money. It is impossible to say that that creates a debt. The defendant was not obliged to lend the money. There was no consideration for the defendant's promise, and it could not be enforced by action. And, even assuming that an action could be maintained upon it, the action would be for damages for the breach of contract, and such a right could not be assigned. The appeal must therefore be allowed.

LOPES, L.J.—I am of the same opinion. Even assuming that there was a contract to make a loan, such a contract created no debt, and there could not be an equitable assignment of it.

RIGBY, L.J.—I am of the same opinion. Section 25, sub-section 6, of the Judicature Act, 1873, has been relied upon, and it is said that this is a "legal *chose in action*" within the meaning of that section. A legal *chose in action* is a thing which is not in possession, and to recover possession of which an action must be brought. It does not mean such a right of action as, for instance, a right to recover damages for breach of contract. An assault may give rise to a legal right of action, and according to the argument that right to recover damages is assignable. If that were true, the law of champerty and maintenance would be most materially affected by this section of the Judicature Act.

Appeal allowed.

Solicitors for the plaintiffs, *Peacock & Goddard*, for *Trevanion, Curtis, & Ridley*, Bournemouth.

Solicitors for the defendant, *Prior, Church, & Adams*, for *H. S. Dickinson*, Poole.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 18.

VESTRY OF ST. MARTIN-IN-THE-FIELDS *v.* BIRD. (*a.*)

Metropolis—Sewer—"Drain"—Drainage of Arcade—Liability to repair—"Premises within the same curtilage"—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

An arcade consisted of a central passage, arched over by a common roof, with a number of houses and shops on each side, the defendant being the owner of the whole. The houses and shops were let on leases to different occupiers. The passage, over which there was no public right of way, gave access to the houses and shops. A central drain ran down this passage into a main sewer in the street outside, receiving in its course the drainage of the houses and shops forming the Arcade.

Held, that the central drain was not used for the drainage of "one building only or premises within the same curtilage," and was therefore a "sewer," and not a "drain," within the meaning of section 250 *of the Metropolis Management Act*, 1855, *and that the vestry was liable for its repair.*

Judgment of the Queen's Bench Division, ante, *p.* 9, *affirmed.*

Appeal by the plaintiffs from the judgment of the Queen's Bench Division (Mathew and Kennedy, JJ.), reported, *ante*, p. 9.

The Lowther Arcade was a passage, arched over by a common roof, with a range of houses and shops on each side, and ran from the Strand on the east to Adelaide-street on the west. The Arcade was constructed and drained before January 1, 1856, and the whole was held by the defendant under a lease granted by the Commissioners of Woods and Forests in 1832, and the defendant, for the purposes of the present case, was to be deemed the owner thereof. There were twenty-five houses and shops in the Arcade, and these were let to eighteen different occupiers on leases or agreements. Some of the occupiers lived in the houses over the shops. The houses and shops were approached by the passage aforesaid, which was used in common by those occupying the houses and shops, and the use of the passage was essential to the enjoyment of each of the houses and shops, and had to be passed along by all people resorting thereto. At each end of the passage were gates enabling the passage to be closed, so as to exclude the public, and these gates were closed to the public every evening at nine, and during the whole of Sunday. The passage giving access to the houses and shops was wholly on the property of the owner, and there was no public right of way over it, and it was paved, repaired, and lighted by the owner at his own expense, and the plaintiffs had never exercised any power over the premises nor spent money in repairing or maintaining the Arcade. The drainage of the Arcade commenced in a dead head on the premises at the Adelaide-street end, and ran down the centre of the Arcade to the main sewer in the Strand, receiving in its course the drainage of the houses and shops forming the Arcade.

The question was whether the central drainage arrangement of the Arcade was, as the plaintiffs contended, a "drain" within the meaning of section 250 of the Metropolis Management Act, 1855, and therefore not vested in them, or, as the defendant contended, a "sewer" vested in the plaintiffs, who were liable to repair it, within the meaning of that section.

The Divisional Court gave judgment for the defendant (see *ante*, p. 9). The plaintiffs appealed.

By section 250 of the Metropolis Management Act, 1855, the word "drain" shall mean and include any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed; and the word "sewer" shall mean and include sewers

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies. By sections 68 and 69 sewers are vested in the vestry, who must repair and maintain them.

Finlay, Q.C. (*T. Beven* with him) for the plaintiffs, contended that the central drainage arrangement was a "drain" within the meaning of section 250 of the Metropolis Management Act, 1855, as it was used for the drainage of one building only—namely, the whole Arcade, or at any rate of "premises within the same curtilage," the houses and shops being within the curtilage of the Arcade.

He referred to Tomlin's Law Dict. "Curtilage"; Sheppard's Touchstone, p. 94; *Grosvenor* v. *Hampstead Junction Railway Co.*, 5 W. R. 812, 1 De G. & J. 446; *Marson* v. *London, Chatham, and Dover Railway Co.*, L R. 6 Eq. 101, 16 W. R. Ch. Dig. 80; *Pilbrow* v. *Vestry of St. Leonard's, Shoreditch*, [1895] 1 Q. B. 33.

J. Lawson Walton, Q.C. (*Macmorran* with him), for the defendant.

Lord ESHER, M.R.—It is impossible to call this Arcade, which consists of a number of shops and houses occupied by different tenants, with a wide open passage down the middle, one building. Nor, in my opinion, would it be any more reasonable to call these houses and shops "premises within the same curtilage." Therefore the central drainage arrangement is not a "drain" but a "sewer" within the meaning of section 250 of the Metropolis Management Act, 1855.

LOPES, L.J.—I am of the same opinion. The real contention here has been that these houses and shops in the Lowther Arcade are "premises within the same curtilage" within the meaning of section 250 of the Metropolis Management Act, 1855. I shall not attempt to define the word "curtilage." There are here a number of houses let on leases to different tenants, and there is one central drainage arrangement, receiving in its course the drainage from the different houses on each side of the central passage. I have no hesitation in saying that these houses are not "premises within the same curtilage."

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Fladgates.*

Solicitor for the defendant, *Shepheards & Bird.*

From Q. B. Div. (Bankruptcy) (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 12.

BURNS-BURNS (TRUSTEE IN BANKRUPTCY OF) v. BROWN. (a.)

Bankruptcy—Act of bankruptcy—Goods taken in execution—Possession by sheriff for twenty-one days and subsequent sale—Notice—Title of trustee in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11 (2).

By section 1 *of the Bankruptcy Act*, 1890, *a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold, or held by the sheriff for twenty-one days.*

Held, that where the sheriff has been in possession of the debtor's goods for more than twenty-one days, an available act of bankruptcy has been committed to the knowledge of the execution creditor, of which the sheriff has notice; so that, under section 45 *of the Bankruptcy Act*, 1883, *the execution creditor is not entitled to retain the benefit of the execution as against the trustee in bankruptcy.*

Figg *v.* Moore Brothers, [1894] 2 *Q. B.* 690, *approved.*

Ex parte Villars, In re Rogers, 22 *W. R.* 397, *L. R.* 9 *Ch. App.* 432, *distinguished.*

This was an appeal of the defendants from a decision of Vaughan Williams, J., on an interpleader issue.

The question at issue was whether certain goods which had been seized by the Sheriff of Northamptonshire under a writ of *fi. fa.* were the property of the plaintiff, the trustee in bankruptcy of the debtor, or of the defendants, the execution creditors.

The execution was levied upon a judgment which the defendants had recovered in an action against the Brapston Foundry Co., and the question arose whether the business of that company really belonged to John Burns-Burns alone, or whether it was the business of one John Neilson. The learned judge in the court below found as a fact on the evidence that the business was exclusively that of Burns-Burns, and that the goods which had been seized were his exclusive property, and passed into the hands of his trustee in bankruptcy. Hence the present appeal.

Section 45 of the Bankruptcy Act, 1883, provides that "(1) Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act an execution against goods is completed by seizure and sale."

Section 1 of the Bankruptcy Act, 1890, provides that "a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

Section 11, sub-section (2), of the Bankruptcy Act, 1890, provides that "where under an execution in respect of a judgment debt exceeding £20, the goods are sold . . . the sheriff shall deduct the costs of the execution . . . and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented . . . and a receiving order is made thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance . . . to the trustee in bankruptcy, who shall be entitled to retain the same as against the execution creditor."

The sheriff levied under the *fi. fa.* on the 6th of April, 1893, but he withdrew on the instructions of the creditors on the 8th of April, power being reserved to him to re-enter. The sheriff accordingly re-entered on the 11th of September, 1893, and seized the goods again under the writ, and, with the knowledge of the defendants, held possession of them for more than twenty-one days. On the 10th of November, 1893, the sheriff sold the goods. On the 11th of November, 1893, a bankruptcy petition was presented against Burns-Burns, notice of which was served on the sheriff. On the 29th of November, 1893, a receiving

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

order in bankruptcy was made against Burns-Burns upon his own petition, notice of which had been served on the sheriff, and the first petition was by consent withdrawn. On the 2nd of February, 1894, Burns-Burns was adjudicated a bankrupt, and the plaintiff was on the 5th of February appointed trustee in the bankruptcy. Under an order of a master made on the 14th of March, 1894, the proceeds of sale were paid into court, to await the decision, on this interpleader issue, as to who was entitled to the money.

Herbert Reed, Q.C., and *Gore Browne*, for the defendants.—The learned judge came to a wrong conclusion on the facts. But even if the goods were the exclusive property of Burns-Burns, the seizure and sale of the goods by the sheriff, although creating an act of bankruptcy, was not necessarily a void proceeding, and the execution creditor was entitled to the proceeds of the sale, notwithstanding the supervening bankruptcy: *Ex parte Villars, In re Rogers*, 22 W. R. 397, L. R. 9 Ch. App. 432. No new disability was imposed on the execution creditor by virtue of section 45 of the Bankruptcy Act, 1883, and section 11 of the Bankruptcy Act, 1890: see *Dibb* v. *Brooke & Sons*, 42 W. R. 495, [1894] 2 Q. B. 338; the case of *Figg* v. *Moore Brothers*, [1894] 2 Q. B. 690, was wrongly decided.

Lawson Walton, Q.C., and *E. Clayton*, for the respondent, were not called upon.

Lord HALSBURY.—[His lordship stated the facts, and said that on them he came to the conclusion that the business of the company belonged to John Burns-Burns alone, and continued:—] As to the other point, it seems to me too clear for argument. I think it is expressly determined by section 45 of the Bankruptcy Act, 1883, which provides that an execution creditor shall not be entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (that is, by seizure and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor. If while the sheriff has the goods in his possession an available act of bankruptcy comes to his knowledge, it is his duty to hold the goods for the creditors generally, and not for the execution creditor. But the Bankruptcy Act, 1890, has created a new act of bankruptcy, viz., the holding of the goods by the sheriff under an execution for twenty-one days. I cannot read in the Act anything which exempts the execution creditor himself from the full effect of this clause. In the present case the sheriff had possession of the goods in question for more than twenty-one days. To my mind it is clear that an act of bankruptcy was thus committed to the knowledge of the execution creditor, and the sheriff had notice of it. The result is that, under the combined operation of the Bankruptcy Acts of 1883 and 1890, all the conditions are satisfied which are necessary to give the trustee in the bankruptcy a title to the goods. Putting the two sections together, the point taken by the appellants appears to me unarguable. Therefore on both grounds I think that Mr. Lawson Walton is right, and that the appeal must be dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. [His lordship stated the facts, and continued:] I am satisfied upon the evidence that the business was really that of John Burns-Burns alone. As to the other point, it is contended that the decision of Vaughan Williams, J., in *Figg* v. *Moore Brothers* was erroneous, and that even if the facts are as I have stated them, the trustee in the bankruptcy is not entitled to the goods. In my opinion that decision was perfectly right, and I agree in the reasons which the learned judge gave for his decision. I do not see how it is possible to construe the Act of Parliament in any other way. *Ex parte Villars* was decided upon a different Act, and it is not applicable to the altered state of the law.

A. L. SMITH, L.J.—I am of the same opinion, and have nothing to add upon the question of fact. With regard to *Figg* v. *Moore*, on reading section 45 of the Bankruptcy Act, 1883, with section 1 of the Bankruptcy Act, 1890, I think they show that that case was rightly decided. Section 1 of the Act of 1890 makes the holding of the goods by the sheriff for twenty-one days an act of bankruptcy. That has taken place in the present case. Here the goods in question were held by the sheriff for twenty-one days. I turn to section 45 of the Act of 1883 to see what is to happen. An execution creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor if, before the completion of the execution, he has notice of the commission of any available act of bankruptcy by the debtor. It is clear that the defendants had notice of an available act of bankruptcy committed by the debtor before the execution was completed, for they themselves put in the execution and must be taken to have had notice that the sheriff had held the goods for twenty-one days. The case is, therefore, brought entirely within section 45, and I think that *Figg* v. *Moore* was rightly decided.

Appeal dismissed.

Solicitor for the appellant, *Thomas A. Jones.*

Solicitors for the respondent, *Ward, Perks, & McKay.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 5.

ALABASTER v. HARNESS. (a.)

Maintenance—Action of libel—Defamation of two persons—Action brought by one maintained by other—Common interest.

The plaintiffs published in a newspaper an article condemning as worthless certain electropathic belts of which the defendant was maker and vendor. The defendant employed T. to write a favourable report of the belts. The plaintiffs then published another article, in which they reflected seriously on the character and conduct of T. in connection with the report, and on the conduct of the defendant as vendor of the belts. An action of libel in respect of this article was brought against the plaintiffs by T. at the instigation of the defendant, who undertook to pay the expenses. This action was dismissed with costs. The plaintiffs brought an action of maintenance against the defendant to recover the costs which they had been unable to obtain from T.

Held, that the defendant had no common interest with T. in the action for libel, and was therefore liable in the action for maintenance.

Appeal from a judgment of Hawkins, J.

This was an action of maintenance brought by the plaintiffs, the proprietors of the *Electrical Review*, against Cornelius Bennett Harness and the Medical Battery Co. (Limited), of which company Harness was, at the time when the cause of action arose, the managing director. The plaintiffs alleged that the defendants had unlawfully maintained an action of

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

libel brought against them, the plaintiffs, by Dr. Herbert Tibbits, and they sought to recover as damages the sum of £596, being the amount of costs incurred by them in that action.

The Medical Battery Co. was a company incorporated for the purpose of carrying out the treatment of diseases by means of electric and magnetic appliances. They manufactured and dealt in electric belts and other apparatus suitable for such treatment; and they founded an institute called The Electropathic and Zander Institute, of which Harness was the president.

In January, 1892, the plaintiffs published in the *Electrical Review* an article protesting against certain belts which had been recently exhibited by the company, as being constructed in direct opposition to the most elementary laws of electricity, and they subsequently published other articles highly disparaging to the Institute and to Harness. In order to meet these charges, the company employed Dr. Tibbits, as an expert in electricity, to write a report upon their belts, with the view of showing that they were useful appliances. Dr. Tibbits accordingly wrote a report in which he testified to the great value of the Institute and to the efficiency of the electropathic belts; and this report was published by the company.

In September, 1892, the plaintiffs published in the *Electrical Review* another article commenting in very strong and adverse terms upon the report, and reflecting seriously upon the character and conduct of Dr. Tibbits in connection with the report, and also upon the Institute and its appliances and upon the conduct of Harness as its manager and as the vendor of the electropathic belts. In respect of this article Dr. Tibbits brought an action of libel against the present plaintiffs. That action was tried before Mathew, J., when the jury returned a verdict for the then defendants on the ground of fair comment, and judgment was entered for them with costs. Dr. Tibbits being unable to pay the costs, they commenced this action of maintenance. The Medical Battery Co. having gone into liquidation, the action as against them was discontinued. The maintenance alleged against Harness consisted in the facts that he had suggested to Dr. Tibbits to commence the action of libel, and that the action was conducted under the instructions of his solicitors and at his sole expense.

The defence was that Harness had a common interest with Dr. Tibbits in bringing and prosecuting the action of libel, or honestly believed on reasonable grounds that he had such interest.

Hawkins, J., who tried the action without a jury, was of opinion that Harness had no common interest, nor reasonably and *bonâ fide* believed that he had, and gave judgment for the plaintiff.

The defendant appealed.

Jelf, Q.C., and *F. Dodd*, for the defendant.—The defendant had a common interest with Dr. Tibbits in the action for libel, and was, therefore, justified in maintaining that action. All the authorities on the subject, beginning with *Wallis* v. *Duke of Portland*, 3 Ves. 494, which are collected and considered in *Bradlaugh* v. *Newdegate*, 31 W. R. 792, 11 Q. B. D. 1, recognize the case of common interest as being an exception to the general rule of the law of maintenance. Even if no such common interest really existed in this case, the defendant *bonâ fide* and reasonably believed that it did. The cases of *Findon* v. *Parker*, 11 M. & W. 675, and *Harris* v. *Brisco*, 34 W. R. 729, 17 Q. B. D. 504, show that such belief is a sufficient defence to an action of maintenance.

Lawson Walton, Q.C., J. E. Bankes, and *R. V. Bankes*, for the plaintiffs, were not called upon.

Lord ESHER, M.R.—This seems to me to be a clear case. The action is brought against the defendant Harness for maintaining an action of libel brought by Dr. Tibbits against the plaintiffs, the proprietors of the *Electrical Review*. An action of libel is a personal action concerning only the person who brings it. The plaintiff in an action of libel cannot recover damages in respect of the defamation of anyone but himself. Dr. Tibbits, in order to succeed in his action, had to make out that a libel had been published on himself, and all that he could be entitled to in that action would be damages for himself.

It has now been proved how that action was commenced. A meeting took place at the office of Harness's solicitors, at which it was arranged that an action should be brought by Dr. Tibbits in respect of the libel published upon him in the *Electrical Review*, and that the solicitor to appear for him should be a Mr. Cridland; but that Mr. Cridland should act under the instructions of Harness's solicitors, and that Harness should pay all the expenses. This, being an action for a defamatory libel on Dr. Tibbits, was an action which, according to the law as laid down by Lord Loughborough in *Wallis* v. *Duke of Portland*, ought to have been brought by Dr. Tibbits himself, "upon his own bottom and at his own expense"; and any persons who should by their countenance aid the prosecution of such an action would, according to that authority, be guilty of maintenance. The facts show that Harness instigated this action, which Dr. Tibbits ought to have brought on his own account and at his own expense, and to which Harness could not have been a party, but in which, at the utmost, he could only have been a witness. The object of this, of course, was that if the action should be unsuccessful, the failure should have no adverse effect on Harness. Is not this a case in which the court is bound to say that the defendant has been guilty of maintenance?

The law of maintenance has been discussed in a number of authorities, one of the earlier of which was *Wallis* v. *Duke of Portland*. These authorities have been introduced into the text-books; and the whole matter was exhaustively considered by Lord Coleridge in the case of *Bradlaugh* v. *Newdegate*. This law does not seem to me to be based on any question of general principles of right and wrong. If it were not for the specific law laid down in the authorities, I cannot see that there is anything wrong in one man helping another man in his litigation. I do see, however, that it would be against public policy to allow this to be done without any check. And I think that the foundation of the doctrine is that which was stated by Lord Loughborough. The law so laid down in the cases is this, that anyone who interferes in another's dispute, and makes that other's dispute his own to the extent of paying the costs of his litigation, does an illegal act, for which he may be made liable in an action of maintenance. But the law, even in early times, allowed some relaxation from the strictness of this general rule. In some particular cases a man who maintained the action of another was excused from liability. One such case was where a landlord maintained an action brought by his tenant; another case was that of a master maintaining an action brought by his servant; another was that of a commoner maintaining an action brought by a fellow-commoner. Then there was the case of charity, where a rich man, acting from charitable motives, maintained an action brought by a poor man, which was also specifically allowed as an exception to the general rule. These and other cases have been accepted in the text-books as exceptions, and they are allowed as such down to the present day. But if any case cannot be brought

within the exceptions specified in the authorities, then it is difficult to say that you can get away from the strictness of the general rule. These exceptions are treated as being particular instances of the principle that the existence of a common interest between the parties, or even a reasonable belief in such existence, will make justifiable that which would otherwise be unlawful maintenance. But I agree with what Lord Coleridge said in *Bradlaugh* v. *Newdegate*: "But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him"—perhaps that is too large, but it is not this case—"or the interest arising from the connection of the parties—*e.g.*, as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them." Admitting only these exceptions, the present case is clearly not within any of them. The action was not brought because Dr. Tibbits wished to clear his character. It was instigated by Harness, and was really his action though brought in the name of Dr. Tibbits, the object being that if the action were unsuccessful Harness should not be liable to pay the costs of the other side. Harness had no such legal interest in the action as is recognized by the law, and is therefore guilty of maintenance.

I am therefore of opinion that the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. It seems to me that this is a case of maintenance of the worst kind. In *Prosser* v. *Edmonds*, 1 Y. & C. Exch. 481, the doctrine as to maintenance was thus laid down by Lord Abinger, C.B.: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." It is said, however, that the defendant was justified in this case, on the ground that he had a common interest in the action which he maintained. I think that he had no such common interest in the action as would exempt him from liability on a charge of maintenance. In order that he might be justified it was necessary that he should have some interest recognized by law in what the authorities call "the thing in variance," which, I think, means the subject-matter of the action then in issue between the parties. I am of opinion that the defendant had no such legal interest in the subject-matter of that action, in which the only issue was whether or not a libel had been published on Dr. Tibbits. It would be strongly in violation of public policy that a man should be allowed, without risking anything, to come in and enable another to support an action which that other, if left to himself, never would have brought. The present case is not within the exception which is founded on the existence of a common interest. Other exceptions to the general rule of the law of maintenance have been introduced and recognized besides that of common interest. But this case does not come within any of them. Speaking for myself, I should be sorry to see any additions made to those exceptions.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Lewis & Lewis.*

Solicitor for the defendant, *Richard Furber.*

High Court of Justice.

Chan. Div. } North, J. } July 27, 1894.

ATTORNEY-GENERAL v. DEAN AND CHAPTER OF CHRIST CHURCH, OXFORD. (*a.*)

Charity—Charity Commissioners—Jurisdiction—Endowment—College—Exhibition—Public school—Endowed school—Endowed Schools Act, 1869 (32 & 33 *Vict. c.* 56), *ss.* 4, 5, 6, 8, 24—*Endowed Schools Act*, 1873 (36 & 37 *Vict. c.* 87), *s.* 9—*Endowed Schools Act*, 1874 (37 & 38 *Vict. c.* 87), *s.* 6.

Where under a charitable trust a fund was applicable to the maintenance of exhibitions tenable at the University of Oxford which were open to the competition of schools, some of which were included in the Endowed Schools Acts, and one of which, being a public school, was excluded from their operation,

Held, that such exhibitions were educational endowments within the meaning of the Endowed Schools Acts; and that the Charity Commissioners had exclusive jurisdiction to deal with the whole fund, including that part of it available for exhibitions applicable to the public school.

Summons.

This was a summons for directions by the present relators in this suit, which was commenced in 1808. The facts were as follows.

Edward Careswell, of Bobbington, in the county of Stafford, by his will dated the 3rd of February, 1689, devised certain lands in the county of Salop to be chargeable with the payment of certain sums for the maintenance of exhibitioners at Christ Church, Oxford; and by a codicil he gave a stipend to the minister at Bobbington, Staffordshire, to be deducted from such exhibitions. The fee simple of the lands was vested in trustees; and at the present time the charity was regulated by a scheme made in the suit on the 11th of February, 1861.

By the provisions of this scheme the entire net income of the property of the charity was applied first in augmenting the salary of the incumbent at Bobbington by the annual sum of £40 a year, and next in the maintenance (subject to certain regulations and qualifications) of eighteen exhibitioners, being natives of Shropshire, from the following six free grammar schools: four from Shrewsbury School, three from Bridgnorth, four from Newport, three from Shifnal, two from Wem, and two from Donnington. In case of no proper candidate offering himself from Shropshire, the exhibitions were open to other boys of the same school. If no fitting candidate offered himself from the school the exhibition was open to the general competition of all the schools subject to the regulation last above mentioned.

Under the same scheme there was also a prize, called the Careswell prize, open to the competition of all the schools, of the value of £100.

Between the years 1866 and 1890 fifty-one exhibitions were offered—eleven for Shrewsbury School, ten for Bridgnorth School, ten for Newport School, nine for Shifnal School, five for Wem School, and six for Donnington School. None of the three last schools took any of these exhibitions; Newport School took seven, Shrewsbury eleven, and Bridgnorth one. Of the exhibitions that thus became open for general competition Shrewsbury School took thirty and Newport School two.

Shrewsbury School was a "public school" within

(*a.*) Reported by J. A. PRICE, Esq., Barrister-at-Law.

section 3 of the Pubic Schools Act, 1868; the other five schools were "endowed schools" within the Endowed Schools Acts, 1869, 1873, and 1874.

In 1890 the Charity Commissioners, under section 9 of the Endowed Schools Act, 1869, prepared a scheme for the reorganization of the charity. The relators, who were the present trustees of the charity, took out this summons, by which they sought to have it declared that the action of the commissioners was *ultrà vires*, on the ground that the jurisdiction of the commissioners was excluded by section 8 of the Endowed Schools Act, 1869, which enacts: "Nothing in this Act shall apply to any school mentioned in section 3 of the Public Schools Act, 1868, or to the endowment thereof."

Section 6 of the Endowed Schools Act, 1869, provides that: "In this Act, unless the context otherwise requires, the term 'endowed school' means a school which is . . . wholly or partially maintained by means of any endowment; provided that a school belonging to any person or body corporate shall not by reason only that exhibitions are attached to such school, be deemed to be an endowed school."

The Charity Commissioners appeared on the summons, reserving their right of appeal.

Swinfen Eady, Q.C., and *Stallard*, for the relators.—The court only, has a right to deal with this charity, for under section 8 of the Endowed Schools Act the Charity Commissioners are excluded.

They also referred to *Attorney-General* v. *Moises*, Tudor's Charitable Trusts, 3rd ed. p. 855.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners.—This is not an endowment of Shrewsbury School—at least, it is not an exclusive endowment. If the contention of the trustees is right, the Charity Commissioners cannot make a scheme affecting a mixed endowment. The fund is not an educational endowment of Shrewsbury School, for the money is not received by any pupil of Shrewsbury School until he has left the school. Under section 6 of the Endowed Schools Act, 1874, the court can have no jurisdiction. [They referred to section 9 of the Endowed Schools Act, 1873.] At the present time the exhibitions are practically monopolized by Shrewsbury School, and the object of the commissioners is to give the other schools some benefit from the endowment by a modification of the scheme on which it is applied.

Swinfen Eady, Q.C., in reply.—The exhibitions are educational endowments, for they are competed for at the school, and they are a pecuniary resource of the school, as they induce parents to send their sons there. Under section 6 of the Endowed Schools Act, 1874, the court is deprived of jurisdiction only in cases where a scheme can be framed under the Endowed Schools Acts.

NORTH, J.—In this case it is not necessary to refer to anything earlier than the scheme of 1861. That refers to the original foundation of the charity two centuries before. [His lordship stated the scheme, and continued:—] The effect of the scheme was that the benefit of the exhibitions and prizes was not to be enjoyed by any scholar while at any of the schools, but at the University after leaving the school. Now the question is as to the position of Shrewsbury School, which is one of the schools mentioned in section 3 of the Public Schools Act, 1868, and, therefore, within the exception contained in section 8 of the Endowed Schools Act, 1869. [His lordship read that section.] The 4th section of that Act defines what an endowment is, and there is no doubt that the Careswell trust funds form an endowment. The 5th section defines what an educational endowment is. But before coming to that section I should say that for the purpose of considering the position of these schools it is necessary to look at them separately. Let me take as an example one of those which is not within the exception I have read—Bridgnorth. What is the position of Bridgnorth under the scheme. I think that if the endowment were wholly in respect of exhibitioners from Bridgnorth School it would clearly be within the Act of 1869. Now, as regards section 5 of the Act it is well to bear in mind the observations of Lord Hatherley, L.C., in *In re Meyricke Fund*, 20 W. R. 258, L. R. 7 Ch. App. 500, showing the universality of that section. [His lordship read the paragraph beginning "The section speaks," and ending "to which the attention of the Legislature was expressly directed" (see L. R. 7 Ch. App., at p. 502).]

That is the spirit in which the section I have just read is to be construed. [His lordship then considered section 6, and continued:—] It was said that it was impossible to hold that either Shrewsbury or Bridgnorth, supposing this to be the only endowment it had, was maintained by means of any endowment, inasmuch as this endowment is not for the maintenance of the school at all, but for the maintenance of persons who have been scholars in the school after they have left. I do not think that that is the only meaning of the term maintenance in section 6; it is one of its well-known meanings, but I think it has very clearly a larger meaning in that section. I think that is shown by the proviso in section 6: "Provided that a school belonging to any person or body corporate shall not, by reason only that exhibitions are attached to such school, be deemed to be an endowed school." That is to say that a school which has exhibitions only, is not thereby made an endowed school; but if it is an endowed school on other grounds, then I take it that the exhibitions as well as anything else are part of the educational endowment to which the provisions of the Act are to apply. There would be no reason for making the exception that the school should not by reason only that exhibitions are attached to it, be deemed to be an endowed school, unless but for the exception the previous definition would have had that result. It will be noticed that the phrase is "exhibitions attached to such school," and I take it it is clear that it refers to exhibitions, such as these are, for the maintenance of the scholars at the University or elsewhere than *at the* school; and it shows, I think, that the exhibitions attached to a school in this sense, would clearly bring it within the words "maintained by endowment" in the earlier part of the section, upon which this proviso is an exception.

I think, therefore, that the exhibitions in question, if attached only to Bridgnorth, would not alone make it an endowed school, but would, having regard to the position the school occupies of being otherwise endowed, be part of its educational endowment, and would be applied for the maintenance of the school within the meaning of the Acts, or, in other words, that the school is in part maintained by them. This is not at all an unreasonable meaning to give to the words, because you may well say that the school is maintained, not merely by the funds which pay the masters and maintain the boys, but by any larger application of a fund which has the effect of increasing the attraction of the school, and of benefiting it by leading to the increase of its pupils in that way. If, therefore, we had to deal with Bridgnorth alone, I think that the Charity Commissioners would have the sole jurisdiction to make schemes with reference to this trust. I do not think that it is necessary to decide what the position of matters would be if the Shrewsbury School were the only school to which the

exhibitions were attached. It may be assumed for my present purpose that, if Shrewsbury alone had the benefit of the trust, it would not come within the powers of the commissioners. But the case I have to deal with, is a case where Shrewsbury is only one of the schools within the scheme of the trust, which includes also five other schools which, in my opinion, are clearly endowed schools within the Act.

The question is, What jurisdiction have the commissioners as regards framing a scheme for an educational fund applicable for the benefit partly of a school which is a public school under the Public Schools Act, and partly of other schools which are not? In my opinion the 24th section of the Act of 1869 shows that the commissioners have jurisdiction to deal with this case. I think this section shows that the power of the commissioners is not confined to that part of the fund which is an educational endowment. I should say, indeed, that if the words of section 5 stood alone, they would rather favour the view that it is so confined. But I think section 24 makes it clear that the commissioners have power over the part of the endowment which is not educational, subject to the limitation and control imposed by that section. To begin with, I do not see the sense of saying in sub-section (1) of section 24 that the part of the endowment which is applicable to uses other than educational is not to be diverted from such uses by the scheme, if the power to make the scheme was limited to that part of the fund which was applicable to educational uses. Then sub-section 3 of section 24 provides that if the proportion applicable to other charitable uses exceeds one-half of the whole endowment, the governing body shall, so far as regards the non-educational purposes, remain unaltered by the scheme. One is at once led there to consider the other alternative. Supposing that the proportion applicable to the other charitable uses does not exceed one-half of the whole endowment, then this provision does not apply, and apparently the governing body may, as regards its non-educational purposes, be affected by the scheme. But if the jurisdiction of the commissioners had been confined, in the first instance, to the part devoted to educational endowment, this sub-section would have no place. I think, therefore, looking at that section, that the jurisdiction of the commissioners is not limited to that part of the exhibitions in question available for the five schools which are not public schools, excluding the part available for Shrewsbury which is a public school.

I think that this is made clearer still by the 9th section of the Endowed Schools Act, 1873. At the time when that Act was passed the Public School Commissioners appointed by the Public Schools Act, 1868, were in existence. It is said on one side that that is an enabling section, and on the other side that it is a disabling section. The meaning, I think, is this. It is intended to say, that where two or more schools are jointly interested, one being a public school within the Act of 1868 and the other not, the power of the Charity Commissioners of dealing with the educational fund applicable to both schools is limited to the case in which the consent of the Public Schools Commissioners is obtained. It can be exercised with their consent, but not without it; and I think that a fair construction of that section is that it is a section having the effect of preventing something being done which could be done before. It is first of all disabling beyond all question. It says, first, that something is not to be done, and then it goes on to point out under what special circumstances that thing may be done. To my mind it throws a great light upon the construction of the 24th section of the Act of 1869, which, independently, I think, had not the effect of limiting the commissioners' jurisdiction, and section 9 confirms my construction strongly. Section 9 has been repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39), but that is simply for this reason, that the Public Schools Commissioners had ceased to exist. There was no longer any reason for section 9, and if it were left standing it would come to this, that it would constitute an absolute veto on any dealing with such funds as I am referring to, because such dealing could not be done without the consent of the Public School Commissioners, and their consent could not then be had because there was no such body; therefore the effect of continuing section 9 would be to prevent the fund being dealt with at all, and its revocation indicates again to my mind that when it is out of the way the jurisdiction of the Charity Commissioners to deal with such a joint fund exists. Then, if that is so, section 6 of the Endowed Schools Act of 1874 seems to me to apply; that provides: "The power of making schemes under the Endowed Schools Acts as amended by this Act shall continue in force for a period of five years from the said 31st day of December, 1874; and during the continuance of such powers any court or judge shall not, with respect to any endowed school or educational endowment which can be dealt with by a scheme under this Act and the Endowed Schools Act or any of such Acts, make any scheme or appoint any new trustees without the consent of the Committee of Council on Education." Therefore, such consent not having been obtained, the court or judge is forbidden to act.

Then the case of the *Attorney-General* v. *Moises* was referred to as leading to a contrary conclusion, which case is stated at page 855 of Tudor's Charitable Trusts, 3rd ed., and not reported elsewhere that I know of. In that case the Master of the Rolls read section 24, sub-section 3, and pointed out that in that case there was more than half the fund that was not applied to educational purposes, and that consequently sub-section 3 applied: "It is plain, therefore, that if there was no other Act, the corporation, through its head, refusing to assent, the commissioners could not by any scheme whatever appoint new trustees who would have the management of the charity estates, or alter the mode of dealing with them." I think that it is only a fair inference to say that when the Master of the Rolls puts that on the existence of the fact of the fund being more than a moiety, his view would, in my opinion, have been different in case it had been less than a moiety (the section contemplating the alternative state of things). Then, farther on, in regard to section 6 of the Act of 1874, he says: "An educational endowment in this section clearly means what I will call a pure educational endowment. Now, I am not going to interfere with respect to the endowment of the school or the educational endowment. I am not going to appoint new trustees of them. If I appoint new trustees at all, it is only of the old charity estates. The educational endowment consists merely of certain sums out of the charity estates and the school-house. There is no other educational endowment. It appears to me, therefore, that that section does not apply to the case of a mixed endowment, where, by reason of the dissent of the governing body, the Charity Commissioners cannot make a scheme affecting the property. Consequently, in my opinion, the jurisdiction remains." That paragraph was relied on a good deal, but it must be read with the preceding paragraph, which shows to what extent he considered the jurisdiction existed. It was not to interfere in any way with the educational

endowment, but to do something wholly outside of it.

In my opinion, therefore, the present case is a case in which, under the 6th section of the Act of 1874, the endowment being one which can be dealt with by scheme under the Endowed Schools Acts, the court or judge is not to exercise jurisdiction.

Solicitors, *H. Andrews; Clabon; Solicitor to the Treasury.*

Chan. Div. }
Romer, J. } July 5, 1894.

WOOD *v.* COOPER. (*a.*)

Landlord and tenant—Lease—Covenant—"Building"—"Annoyance"—Injunction.

A lessee (the defendant) covenanted with his lessor (the plaintiff), his heirs and assigns, to build a house on the land demised, and that he would not, without the plaintiff's licence, erect or build "any other building whatsoever," and that he would "not do or suffer to be done on the said premises, or any part thereof, any act, matter, or thing which may be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor." A similar lease was granted to another person of the adjoining land. The defendant, after a house had been built on the adjoining land, put up, without the consent of the plaintiff, a permanent trellis-work on his land close to the boundary wall, which interfered with the access of light, and injured shrubs growing on the adjoining tenant's land.

Held, that the trellis-work was a "building," and also created an "annoyance" within the meaning of the covenant; and an injunction to restrain the same was granted.

Trial of action.

This was an action brought by the lessor of a messuage and land against the lessee for an injunction restraining him from erecting on the land leased to him, a trellis-work, which would have the effect of excluding light and air from the adjoining premises, in the occupation of another lessee of the plaintiff's.

By a lease dated the 11th of November, 1878, and made between the plaintiff, E. Wood, of the one part, and A. Bailey (the predecessor in title of the defendant) of the other part, the plaintiff, in consideration (*inter alia*) of Bailey erecting and finishing the dwelling-house therein mentioned, demised to him the piece of ground and dwelling-house in question for ninety-nine years from Michaelmas, 1878, at the rent therein mentioned.

The lease contained a covenant by Bailey for himself, his executors, administrators, and assigns, with the plaintiff, his heirs and assigns, to complete and finish all the external and internal works of the said dwelling-house and buildings, fences and fence walls, in a sound and workmanlike manner, and not to erect, build, or cause to be erected or built upon the said piece of ground thereby demised, without the previous licence in writing of the lessor, "any other building whatsoever," and not to do or suffer to be done on the said premises, or any part thereof, any act, matter, or thing which may be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor parties.

Divers mesne assurances of this lease took place, whereby ultimately it became vested in the defendant Cooper.

By another lease, dated the 14th of September, 1881, and made between the plaintiff of the one part, and R. Grice of the other part, the piece of land adjoining that demised to the defendant was demised to Grice for ninety years from Michaelmas, 1881, and the lease contained a covenant to build a house of the value of £1,200 on the land within twenty-one years, and a covenant similar in terms to that contained in the lease to the defendant. This lease eventually became vested in one Neale, who built a house in accordance with covenant and went into occupation of it on the 24th of February, 1894.

The defendant shortly afterwards, on the 27th of February, began to erect a trellis-work or screen along the northern frontage of his own land, adjoining that of Neale, and about one foot from the boundary wall, which was eight feet high and of brick. The screen stretched along the boundary wall for about fifty-eight feet, and was about twelve feet higher than the wall.

The plaintiff was communicated with by Neale, and requested the defendant to desist from going on with the trellis-work, but he still went on, and finished it. The plaintiff then commenced this action, alleging that the trellis-work was an annoyance, nuisance, and disturbance to Neale, and interfered with the enjoyment by him of his house, and that it constituted an infringement of the covenant in the lease of 1878 against building, and that he had never consented to the erection.

Neville, Q.C., and *T. H. Carson*, for the plaintiff.—This trellis-work is a building within the meaning of the covenant of the lease. It is meant to be a permanent structure, and is an annoyance and nuisance to the tenant of the adjoining land, as it interferes with the access of light, and blights the growth of the shrubs along the wall on that side. "Annoyance" is a term of wider connotation than nuisance, and the covenant clearly is directed to preventing acts which strictly might not be a "nuisance" in the ordinary legal sense: *Tod-Heatly* v. *Benham*, 37 W. R. 38, 40 Ch. D. 80.

Bigham, Q.C., and *O. L. Clare*, for the defendant.—The trellis-work is not a "building," and if it is an "erection" it does not come within the covenant, as that word, though used elsewhere in the lease, does not occur in the covenant: *Foster* v. *Fraser*, 42 W. R. 11, [1893] 3 Ch. 158. The evidence shows that the trellis-work stops very little light, and no claim can be made here as for an ancient light.

Neville, Q.C., replied.

ROMER, J.—In my opinion what the defendant has done is a breach in two respects of the covenants that are binding upon him. In the first place, although the case is somewhat on the border line, I come to the conclusion that this screen, which has been put up is a "building" within the meaning of the covenant which binds the lessee not, without the license and consent in writing of the "lessor parties" being first obtained, "to erect or build, or cause or permit to be erected or built, upon the said piece or parcel of ground hereby demised, or upon any part thereof, any other building whatsoever save and except a stable and coachhouse." This screen is a very substantial erection, and a firm one. It seems to me that it is intended to be, and unless restrained would remain, a permanent part of the wall close to or against which it is erected. At any rate it will act in the same way, as far as the plaintiff's house is concerned, as if it had been a wall added to a portion of the former existing wall. I think, undoubtedly, if it had been built of brick it would have been admitted to have been a breach of the covenant, and I do not think the fact that it is made of wood makes any difference under

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

the circumstances. As I have said, it is a permanent erection and a substantial one, and intended to act as such, and is, therefore, under the circumstances, a breach of the covenant to which I have just referred. In the second place I have no doubt whatever that it is a breach of the covenant that the lessee "will not do or suffer to be done on the premises any act, matter, or thing which might be or become an annoyance to any tenant of the lessor." In my opinion, undoubtedly, what the defendant has done is an annoyance to Mr. Neale, the tenant of the lessor. In the first place, it does substantially interfere with the access of light to the windows on the ground floor of Mr. Neale's building, and, notwithstanding some parts of the expert evidence, I feel satisfied, beyond and irrespective of that, that it causes an annoyance to Mr. Neale, the tenant, within the meaning of the words used in the covenant. It falls within the definition of the word "annoyance" in a covenant like this which was given by the three Lords Justices in the case of *Tod-Heatly* v. *Benham*. To adopt the language of Cotton, L.J. (40 Ch. D., at p. 94), I am satisfied by the evidence before me that "reasonable people," having regard to the ordinary use of Mr. Neale's house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the defendant. It would be "an annoyance or grievance to reasonable, sensible people." It is an act which is an interference with the pleasurable enjoyment of the house. Then, to adopt the words of Lindley, L.J. (40 Ch. D., at p. 96), I think it does "raise an objection in the minds of reasonable men," and is an annoyance within the meaning of the covenant. Lastly, as pointed out by Bowen, L.J. (40 Ch. D., at p. 98), "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house, if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort." I have come to the conclusion, therefore, that this is a clear breach of the last-mentioned covenant as well as of the first, and on both grounds I think the plaintiff is entitled to succeed. The defendant will have to pull it down, and to pay the costs.

Solicitors for the plaintiff, *Hulberts & Hussey*.

Solicitors for the defendant, *Simpson & Cullingford*.

Chan. Div. } June 21, 22, 1894.
Romer, J. }

COLLIS v. LAUGHER. (a.)

Easement—Light—Enjoyment for twenty years—Date of commencement of period of prescription—2 & 3 Will. 4, c. 71, ss. 3, 4.

A house was built on a piece of land adjoining the defendant's premises. Its external walls with the window openings and the roof were completed on the 13th of December, 1873. Early in 1874 the house was finished, and the plaintiff (the owner) entered into occupation. In May, 1893, the defendant erected on his land a hoarding which obstructed the windows, and on the 16th of January, 1894, an action was begun by the plaintiff to restrain this interference with the access of light and air to the windows.

Held, that the period of twenty years prescribed by 2 & 3 Will. 4, c. 71, as giving an indefeasible right to the access of light began to run from the 13th of December, 1873, when the external walls, window openings, and roof were completed, and that there had not been during that period any interruption within section 4 of the Act.

Courtauld v. Legh, 17 *W. R.* 466, *L. R.* 4 *Ex.* 126, *followed.*

Trial of action.

This was an action brought by J. Collis and C. Brand, the owner and tenant respectively, of a freehold tenement, to restrain the defendant, H. Laugher, the owner of the adjoining premises, from obstructing the access of light and air to the plaintiffs' windows.

The land upon which the plaintiffs' house stood originally belonged to the trustees of the will of one Tucker.

In 1873 a house which then stood on that land was destroyed by fire, and in October of that year Tucker's trustees entered into a contract with the builder for the present house to be erected on the premises, on the site of the house so burnt.

On the 13th of December, 1873, the exterior walls of the house and the roof were completed, no sashes or glass being yet in the window openings, which were made, nor was the interior portion of the house then finished. The house was actually finished in 1874, and in May of that year the plaintiff J. Collis went into occupation. He subsequently purchased the fee simple of the property from Tucker's trustees.

In May, 1893, the defendant erected on his land adjoining the house a hoarding which obstructed the access of light to two windows in the north side of the plaintiffs' house.

On the 16th of January, 1894, the plaintiffs commenced this action.

The question raised for the decision of the court was whether the plaintiffs had acquired an easement for the access of light over the defendant's premises to the two windows in question by an uninterrupted enjoyment for twenty years within 2 & 3 Will. 4, c. 71, ss. 3, 4.

The material sections of the Act are as follows:—

3. When the access of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been, or shall be, submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Neville, Q.C., and *Howland Jackson*, for the plaintiffs.—The period of twenty years runs from the date of the completion of the external walls of the house, *i.e.*, 13th of December, 1873. It need not be habitable: *Courtauld* v. *Legh*, 17 W. R. 466, L. R. 4 Ex. 126. An enjoyment for nineteen years and one day from that date secures to the plaintiff the right of access of light, because no interruption supervening after that period could last for one year within the period of twenty years from the inception of the right. There was not

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

acquiescence by the plaintiff in the erection of the hoarding; but the action could not be commenced until the full twenty years had expired: *Flight* v. *Thomas*, 11 A. & E. 688.

Oswald, Q.C., and *O. L. Clare.*—The house was not externally complete on the 15th of January, 1874, when the period begins to run, and *Courtauld* v. *Legh* does not apply.

Neville, Q.C., replied.

ROMER, J.—I think the plaintiffs are entitled to succeed. It appears to me that the plaintiffs' dwelling-house has, within the words of section 3 of the Prescription Act, enjoyed the access and use of light by means of these two windows for the whole period of twenty years before the commencement of this action, and that without interruption, treating interruption as defined by section 4. The evidence adduced on behalf of the plaintiffs has, I think, satisfactorily and completely established that their house was finished as a building by the 13th of December, 1873—completed, I mean, in this sense, that all external work was done, the walls were finished, and the windows placed in the position they have ever since occupied as and for windows, the joists were in for the different landings, and the roof was put on and completely tiled. The building externally, for all external purposes, was completed and wind and weather tight. It is true that it was not completely finished inside so as to be actually fit for habitation by the 16th of January, 1874. For example, in the windows the sashes were not put in, and still less the glass, the floors were not completely laid on the joists, and it is plain that the gas and the water were not completely laid on.

But it is not necessary in order that time may run in favour of the owners of a building like this that it should either be occupied or be completely fit for habitation. That is shown by the case of *Courtauld* v. *Legh*, from which the present only differs in matters, in my opinion, of unimportant detail. Through these windows—and I use that term, of course, not as meaning a complete window in the most modern sense, as fitted with sashes and glass, but as meaning an opening for the building through which light can be obtained and the benefit of the light—through these windows as from the 13th of December, 1873, this building has enjoyed the light. For example, how was it that the gas man, who went in to lay the gas on the 5th of January, was able to do it completely? Doubtless he availed himself of the light coming through these windows when he had to do that part of his work which was on the part of the house adjacent or near to these windows. The plaintiffs have, in my opinion, established their right to come to the court on the 16th of January, 1894, and seek for the injunction they ask as against the defendant. The obstruction put up by the defendant has been removed under an arrangement between the parties by which it has been agreed that the question of right should be tried as if the obstruction still continued. Under those circumstances, all I need do is to grant an injunction against this defendant to restrain him from interfering with the plaintiff's ancient lights in question.

Solicitors, *Thorneycroft & Willis*, for *Baker & Thorneycroft*, Bishop's Stortford; *Walker, Son, & Field*, for *W. Gee & Son*, Bishop's Stortford.

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 6, 13.

BURY v. THOMPSON. (a.)

Landlord and tenant—Notice of determination of lease—Sufficiency of notice—Option—Alternative.

A tenant gave notice in writing to his landlord of his intention to determine a lease in the following terms:—"I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are able to let for now. I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt."

Held, that the notice was sufficient and effectual to determine the lease.

Special case stated by order of Master Wilberforce.

By the writ in the action, issued the 8th of August, 1894, the plaintiff claimed a declaration that the term of years created by a certain indenture of lease, dated the 25th of February, 1888, and made between the plaintiff and defendant, had been determined by the plaintiff on the 25th of December, 1894, by notice pursuant to a proviso contained in the lease.

By the terms of the lease the defendant demised to the plaintiff certain premises known as 33, Courtfield-road, in the parish of St. Mary Abbotts, Kensington, for a term of twenty-one years from the 25th of December, 1887, at a yearly rent of £270. The proviso in question declared that "if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term, and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year, then and in such case at the end of such seventh or fourteenth year . . . the said term . . . shall absolutely cease and determine. . . ."

On the 21st of October, 1893, the plaintiff wrote a letter to the defendant, which contained this passage: "I have just been looking at my lease, and I see that my first seven years will be determined on the 25th of December, 1894. I have been making inquiries for some time past, and I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are able to let for now. I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt."

The defendant, in answer to this letter, wrote on the 23rd of October, 1893: "I think your idea of rent is considerably too low, but I should be glad to meet your views if possible; therefore, if you will at once waive your right to determine the lease at Christmas next year I will agree to take a reduced rent of £20 per annum, making it £250 in lieu of £270."

On the 10th of January, 1894, the defendant wrote to the plaintiff, acknowledging the receipt of a quarter's rent, and saying "I did not receive any reply to mine of the 23rd of October last."

On the 2nd of April, 1894, the plaintiff wrote: "With regard to the rent, I think £230 is quite enough, as the house is really very badly built and necessitates constant expenditure in repairs."

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

On the 3rd of April, 1894, the defendant wrote: "I think your proposal to reduce the rent to £230 is too low, but in order to meet your wishes so far as I can, I will agree to reduce the rent to £240 for the second period of seven years if you will at once waive your right to determine the lease at Christmas next."

There was no answer to this letter, but on the 6th of July, 1894, the plaintiff wrote: "Mrs. Bury . . . is still very uncertain where she will live, and is not willing at present therefore to take a seven years' lease of this house. If, however, you care to let us go on for another year from the 25th of March next at the rent of £240 on the terms of the old lease, I would be willing to remain a tenant at this rent."

The defendant wrote in answer to this on the 7th of July, 1894:—"As you did not give me notice to determine the tenancy, I quite understood that you had made up your mind to continue for another seven years, and I can see no reason now for altering the terms of the lease."

The questions for the opinion of the court were:

(1) Whether the letter of the 21st of October, 1893, was sufficient and effectual to determine the term of years?

(2) Whether the defendant was estopped by his conduct from denying that it was a notice sufficient and effectual for that purpose?

R. M. Bray and *Edward Bray*, for the plaintiff.—The letter of the 21st of October, 1893, constitutes a sufficient notice, and that notice is not affected by the offer to continue the lease at a reduced rent: *Ahearn* v. *Bellman*, 27 W. R. 928, 4 Ex. D. 201. Bramwell, L.J., in that case says, at p. 214: "I should wish to add one remark. Let us suppose that the tenant had given a notice to quit sufficient in its terms, and had said, 'But I am willing to continue in possession, and will, if you will let me, at the diminished rent of so much.' Could there have been any doubt that that would have been a good notice on the part of the tenant?" That is exactly the position here.

Hon. A. Lyttelton, for the defendant,—If the notice was clear and unambiguous, it was sufficient, but this was an optional notice. Brett, L.J., who dissented in *Ahearn* v. *Bellman*, lays down the law as follows: "If the notice to quit gives the tenant permission to remain in possession if he will accept terms then offered to him it is an optional notice, and an optional notice, as Lord Mansfield says, is a bad notice according to the law of England between landlord and tenant." The notice must be such a one that the landlord could have maintained an action of ejectment. In this case the tenant would clearly not have been liable to such an action. A notice which merely expresses dissatisfaction, or a notice which says, "unless you do so and so I shall determine the tenancy," is bad. Cotton, L.J., in *Ahearn* v. *Bellman*, puts this very plainly at p. 212 (4 Ex. Div.). He refers there to *Muskett* v. *Hill*, 5 Bing. N. C. 694. The position of the tenant here is the same as that of the defendant in *Muskett* v. *Hill*. The tenant here says, "Unless you reduce my rent I will determine the tenancy." The only point decided in *Ahearn* v. *Bellman* was that a good notice was not invalidated by a proposal to initiate a new tenancy.

Edward Bray replied.

Cur. adv. vult.

Dec. 13.—POLLOCK, B.—In this case the plaintiff by the writ in the action claimed a declaration that the term of years created by a certain indenture of lease, by which the plaintiff held under the defendant, had been determined by the plaintiff on the 25th of December, 1894, by notice in accordance with the terms of a proviso in the lease.

The defendant, the landlord, contended that no sufficient notice had been given. The terms relating to the determination of the lease were of the usual kind, and were contained in a proviso as follows: "Provided always . . . that if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term"—twenty-one years from the 25th of December, 1887—"and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year, then and in such case at the end of such seventh or fourteenth year . . . the said term . . . shall absolutely cease and determine."

The notice upon which the plaintiff relies is contained in a letter from him to the defendant on the 21st of October, 1893, more than a year before the first seven years would expire. The passage upon which the plaintiff bases his contention is this: "I have just been looking at my lease, and I see that my first seven years will be determined on the 25th of December, 1894. I have been making inquiries for some time past, and I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are let for now. I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt."

The defendant's answer to this letter was a suggestion that the rent should be reduced £20 per annum.

The only question is whether the plaintiff's letter, taken as a whole, is such a notice as was contemplated in the proviso in the lease—whether, in fact, the plaintiff's letter is in itself a sufficient notice to quit. The proviso does not make any form of words necessary, nor does it require the notice to be in writing.

It is clear that a notice in the alternative would not be sufficient. Lord Mansfield in *Doe* v. *Jackson*, 1 Dougl. 175, where the notice contained the words "or I shall insist on double rent," pointed out that if the landlord's notice really contained the option of a new agreement, the ejectment could not be supported—that is to say, that the offer of an alternative in a notice will not do. His decision was considered in the case of *Ahearn* v. *Bellman*, and the court came to the same sort of opinion as Lord Mansfield, and held, further, that a clear notice to quit was not rendered invalid by a statement to the effect that the rent would be increased "should you retain possession of the premises."

I think that, by the light of the cases, we ought to read the notice in this way, "I shall not stop in your house," and we ought to hold that the plaintiff did not offer an alternative. I confess to a certain doubt in the case upon another ground.

The notice must be in such a form that the landlord will be entitled to act upon it. Here it might well be argued that the landlord could not treat the letter of the 21st of October, 1893, as a notice to quit, and that the tenant might possibly say, "I only meant that I should not be able to keep the house if you would not give me a reduction of rent." But on the whole I think that the notice is certain, and not in the alternative, and, therefore, a good and sufficient one; and though influenced by the reasons expressed very clearly by Brett, L.J., in *Ahearn* v. *Bellman*, I think

the plaintiff is entitled to the declaration which he asks for.

GRANTHAM, J.—[His lordship stated the facts.] How can it be said that this was not an unambiguous notice? The tenant stated in his letter that he was prepared to go on with his tenancy if his rent was reduced. Here is one gentleman writing to another, and the tenant says plainly, "I shall not stop in your house." To my mind this is a clear notice—in the words of Bramwell, L.J., in *Ahearn* v. *Bellman*, "clear and intelligible," "not ambiguous and not optional." The landlord thereupon accepts the proposition of the tenant, and offers a reduction of £20. The tenant declines, the landlord then makes an offer of £30 reduction, which is not accepted. He will not come down any lower, and then he says, "You must go on, you have not given notice." It is a piece of sharp practice on the part of the landlord, but if the law compelled the tenant to go on with the lease there would be no help for him. He would have to pay the penalty of trusting his landlord.

The plaintiff is entitled to judgment.

Judgment for the plaintiff.

Solicitor for the plaintiff, *T. F. Adshead.*

Solicitors for the defendant, *Gush, Phillips, Walters, & Williams.*

Q. B. Div. (Grantham and Lawrance, JJ.) — Dec. 3.

HOLMES v. FORMSBY. (a.)

Landlord and tenant—Compensation to tenant for improvements—Larger sum due to landlord for breach of covenant—Summary proceedings by landlord to recover balance—Agricultural Holdings Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 6, 24.

Where a tenant has made a claim for compensation for unexhausted improvements under the Agricultural Holdings Act, 1883, *and the landlord has made a counter-claim for damages for breach of covenant, and an arbitrator has awarded that the sum due to the landlord exceeds that due to the tenant, the landlord cannot make use of the summary procedure of the Act to recover the balance due to him.*

Application by the defendant for a prohibition to the county court of Norfolk.

The defendant, having been the tenant of a farm, on the expiration of his tenancy made a claim against the plaintiff, the landlord, under the Agricultural Holdings Act, 1883, for compensation for unexhausted improvements. The plaintiff made a counter-claim against the defendant for damages for breach of covenant to repair. The claim and counter-claim were referred to arbitration. By the award £18 6s. 5d. was given to the defendant, and £49 7s. to the plaintiff, and it was awarded that the defendant should pay the balance of £30 10s. 7d. to the plaintiff.

The plaintiff instituted proceedings under the Act in the county court to enforce payment of this sum; and the defendant thereupon applied for a prohibition.

The Agricultural Holdings Act, 1883, s. 6: "In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement there shall be taken into account in reduction thereof:

"(c) Any sums due to the landlord in respect of rent or in respect of any waste committed or permitted by the tenant or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant."

Section 7 provides that a tenant claiming compensation shall give notice in writing of his intention to the landlord. "Where a tenant gives such notice the landlord may . . . . give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement."

Section 8: "The landlord and tenant may agree on the amount . . . of compensation to be paid under this Act."

If in any case they do not agree the difference shall be settled by a reference.

Section 24: "Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise is not paid within fourteen days . . . it shall be recoverable upon order made by the judge of the county court as money ordered by a county court to be paid is recoverable."

Channell, Q.C., and *Low*, for the defendant, the tenant, in support of the application.—The county court has no jurisdiction to entertain these proceedings. Section 6 only enables the landlord to reduce the tenant's claim. There is no provision in the Act by which the landlord is enabled to make use of the summary procedure of the Act in order to enforce payment of any balance that may be found to be due to him.

They referred to *Farquharson* v. *Morgan*, 42 W. R. 306, [1894] 1 Q. B. 552.

Jelf, Q.C., and *H. F. Wilson*, for the plaintiff, the landlord.—The contention raised by the defendant, if successful, will render the Act unworkable. The language of section 24 is wide enough to include the case of a balance due to the landlord. If the landlord cannot obtain payment under the Act, how is he to do so? By section 19 the award shall specify the particulars of the compensation, and it will be impossible for the landlord to say which part of his counter-claim has been set off against the tenant's claim, and which part is left to be recovered by proceedings outside the Act. The right principle to apply to the construction of the Act is that introduced by the Judicature Act—viz., that where a counter-claim exceeds the claim judgment may be given for the balance.

GRANTHAM, J.—The Agricultural Holdings Act, 1883, was passed for the benefit of tenants, and by the provisions of the Act they can obtain compensation for unexhausted improvements, which previously they had been unable to get. It was seen that it would be a hardship for the landlord to be saddled with the cost of these improvements, when he might at the same time have a claim against the tenant for damages for breach of covenant. Therefore, two provisions were introduced into the Act, by one of which the landlord was enabled to charge his estate with the cost of these improvements. The other provision is contained in section 6, which enacts that the effect of that section was to give the landlord a set-off to the extent of the tenant's claim for compensation, but there are no words in the Act by which the landlord is enabled to enforce payment under the Act of any balance that may be due to him from the tenant after the set-off.

LAWRANCE, J.—I am of the same opinion. There are two answers to the argument put forward on behalf of the landlord. In the first place, the Act contains no provision by which a landlord is enabled to state a claim against a tenant. If the Act were one for the adjustment of accounts between landlord

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

and tenant, there would be many cases where a tenant would not be entitled to any compensation, although the landlord might have a claim for damages for breach of covenant. But the Act only deals with those cases in which the tenant has a claim for compensation, and then the landlord may raise his counter-claim, if he has one. If the Act had taken away from the landlord any remedies which he formerly possessed, I should have been more disposed to agree with Mr. Jelf's contention; but what does the Act say? The landlord may, by his counter-claim, reduce or equal the amount of compensation due to the tenant, but if he exceeds it, then, as to the balance, he is in the same position as he was before the Act was passed, and has all the remedies which he formerly possessed.

Order for prohibition to issue.

Solicitors for the applicant, *Crowders & Vizard*, for *Mills & Reeve*, Norwich.

Solicitors for the respondent, *White & Borrett*, for *Jarrod & Wilson*, Diss.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Oct. 26; Dec. 21.

In re SMITH.
Ex parte TARBUCK. (*a.*)

Bill of sale—Consideration truly stated—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 10 (3)—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 8.

Six persons joined together to advance the sum of £600 *to S. They contributed the loan in different amounts and at different times. When the whole* £600 *had been advanced, S. gave a bill of sale to T., one of the six, to secure the loan of* £600. *The consideration was therein stated as "* £600 *now paid by T."*

Held, that this was a true statement of the consideration, and that T. was not a trustee, but merely a collector for the six lenders.

Appeal from his Honour Judge Shand, in the county court of Liverpool, declaring a bill of sale void against the trustee in bankruptcy upon the ground that the consideration was not truly stated therein.

Upon the 9th of December, 1890, the firm of Ironside & Smith, printers, of Liverpool, assigned their property to one Stubbs for the benefit of their creditors. Six friends of Smith, the debtor in this case, thereupon clubbed together to re-purchase the plant and stock-in-trade for him in order that he might continue the business. The price was fixed at £600, which was contributed in various amounts, Tarbuck, the appellant in this case, who was one of the six, contributing £90. The money was paid at different times, some direct to Stubbs, some to the debtor, and some to Tarbuck.

Upon the 6th of July, 1891, when all the money had been paid, Stubbs assigned the property to Smith, who, on the 7th of July, gave a bill of sale upon it to Tarbuck, wherein the consideration was stated as "£600 now paid by Tarbuck."

Upon the 1st of September Tarbuck gave a memorandum to the other contributors acknowledging that he held the bill of sale as trustee for them.

Upon the bankruptcy of the debtor the trustee in bankruptcy moved to have the bill of sale declared void, upon the ground that the consideration was not truly stated.

The county court judge declared the bill void.

Tarbuck appealed.

Cooper Willis, Q.C., and *Arthur Russell*, for the appellant.—The loan in this case was a present advance, and therefore the consideration was truly stated as "£600 now paid" within the decisions in *The Credit Co.* v. *Pott*, 29 W. R. 326, 6 Q. B. D. 295; *In re Munday, Ex parte Allam*, 33 W. R. 231, 14 Q. B. D. 43; *In re Chapman, Ex parte Johnson*, 32 W. R. 693, 26 Ch. D. 338; *In re Hockaday, Ex parte Nelson*, 35 W. R. 264, 4 Morr. 12. It is also substantially correct to set forth the sum as being paid "by Tarbuck"; he found £90 of it, when repaid he was to distribute the money *pro rata* among the lenders, who had a perfect right to make him their nominee for the purposes of taking the bill of sale, and to assign to him all their rights thereunder: *Davis* v. *Burton*, 32 W. R. 423, 11 Q. B. D. 537; *Melville* v. *Stringer*, 32 W. R. 890, 13 Q. B. D. 392.

Reed, Q.C., and *F. A. Davis*, for the respondent.—The consideration is not truly stated in this bill of sale, for the money was not paid or lent by Tarbuck. [VAUGHAN WILLIAMS, J.—Suppose six persons contribute £100 each to lend to A. B. in one sum, and arrange that the loan is to be from one C. D. Could not an action be brought by C. D.?] Apart from the Bills of Sale Act it could, but the fact that an action would lie does not make the statement of the consideration true; the intention of the Bills of Sale Act is that the real transaction should appear on the face of the bill of sale. [KENNEDY, J.—Is not the substantial truth set out in the bill of sale? *In re Haynes, Ex parte National Mercantile Bank*, 28 W. R. 848, 15 Ch. D. 42.] That decision has been modified in *Richardson* v. *Harris*, 37 W. R. 426, 22 Q. B. D. 268; and *The Credit Co.* v. *Pott* has been varied in *Ex parte Berwick, In re Young*, 29 W. R. 292. Moreover, this was a bill of sale given to a trustee, and by section 10 (3) of the Bills of Sale Act, 1878, if the bill is given subject to any declaration of trust not contained in the body thereof, such declaration shall be deemed part of the bill and shall be written on the same paper or parchment therewith before the registration, and shall be set forth in the copy filed under the Act. This was not done here, consequently any of the contributors could have sued Smith for money lent, and he would not have been protected by payment to Tarbuck. Even in equity no one but the real owner can give a good discharge: *Weatherby* v. *St. Giorgio*, 2 Hare, 624. The memorandum given by Tarbuck was a contemporaneous deed constituting a defeasance under section 10 (3) of the Act, and ought to have been written on the same paper and registered with the bill of sale: *Melville* v. *Stringer*; *Edwards* v. *Marcus*, 38 SOLICITORS' JOURNAL, 234, [1894] 1 Q. B. 587.

Cooper Willis, Q.C., replied.

Cur. adv. vult.

Dec. 21.—KENNEDY, J.—I am of opinion, after consideration, that this appeal should be allowed. The material facts are that Tarbuck and five other friends of the debtor agreed to buy up for him £600 worth of property; they advanced the amounts in unequal shares and arranged that Tarbuck should see that the moneys were paid to the vendor. The moneys were to be paid as if on account of Tarbuck and were to be repaid to him as a trustee by instalments of £100 secured by this bill of sale. I differ in some respects from the county court judge in the inferences he drew from these facts. He found that

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

each loan was a separate one, to which I do not agree. I do find that the arrangement was that if the matter went through, the money was to be repayable as stated in the bill of sale. Tarbuck was not strictly a trustee, but took such a part as made him responsible to the whole party for seeing that the money was paid to the vendor Stubbs. As I understand the evidence, some cheques were handed to Tarbuck, some to Smith, and some to Stubbs. Tarbuck saw that the transaction was properly carried out, and upon the conclusion of the payments it became the duty of Smith to give, and of Tarbuck to take, the bill of sale in dispute. It is said that the consideration therein was not truly stated. The statement is "£600 now paid by Tarbuck to Smith."

It has been urged, firstly, that "now paid" is untrue. I do not think there is anything in that objection. The important point in regard to time is whether the advance is present or past. In this case the advance was really a present one. In point of truth, both for legal and business purposes, it was "now paid." See *The Credit Co.* v. *Pott, In re Munday, Ex parte Allam, In re Chapman, Ex parte Johnson.*

Secondly, it was contended that the money was not "paid by Tarbuck." I believe that it did in fact pass largely through his hands. The transaction was an honest one, and it would be wrong for the court to say that this bill of sale is bad on the ground that the money was not paid by him. He did, in fact, act as an agent responsible to see that the moneys were duly applied. I think it was an honest transaction, and not in contravention of the statute.

VAUGHAN WILLIAMS, J.—I agree. I think the consideration was truly stated. Tarbuck was in the position of a collector, and if a bill of sale is given to a person in that position it is true to state the consideration therein as now paid by the collector. We do not think there is anything in the point as to a defeasance under section 10 (3) of the Act, there was no declaration of trust.

Appeal allowed.

Solicitors for the appellant, *Snowball, Lewes, & Woodcott.*

Solicitors for the respondent, *Chappell, Griffiths, & Broadbridge*, for *Nield*, Liverpool.

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Dec. 15.

In re MAUND.
Ex parte MAUND. (a.)

Bankruptcy—Amendment of petition—Adding creditors after expiration of three months from date of act of bankruptcy alleged in petition—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 6, *sub-section* 1 (a), (c); *ss.* 105 (3), 107.

A petition cannot be amended by the addition of creditors after the expiration of three months from the act of bankruptcy alleged therein.

Appeal by the debtor against an order made by the registrar of the county court at Tredegar, allowing the creditors to amend their petition by adding three other creditors.

Upon the 5th of March, 1894, the debtor executed a deed of assignment for the benefit of his creditors, which was the act of bankruptcy relied upon in the petition.

Upon the 16th of May the petition was presented by four creditors for small sums, amounting in all to £56 5s.

Upon the 6th of June the debtor gave notice that he intended to dispute the debts alleged to be due to two of the creditors, to the amount of £10 4s. 2d. The creditors thereupon, being aware that they could not successfully oppose the debtor's contention, and that the amount of debts alleged in the petition would thereby be reduced below £50, applied for leave to amend, and upon the 22nd of June an order was made allowing them to amend by adding three other creditors for a total amount of £9 15s. 5d.

The debtor appealed.

Corner, for the appellant.—The registrar had no power to allow these three creditors to be added after the expiration of three months from the act of bankruptcy alleged in the petition, for they would have no right to take advantage of it.

Muir Mackenzie, for the respondent.—The debtor did not give any notice to dispute the petition until the 6th of June, which was after the expiration of three months from the date of the act of bankruptcy. The court has power to amend the petition by the terms of section 105 (3) of the Bankruptcy Act, 1883: "The court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may see fit." These words are as wide as they can be. The court clearly has power to add a petitioner, though he is too late to petition alone: *Ex parte Dearle*, 33 W. R. 440, 14 Q. B. D. 184; *In re Ellis, Ex parte Hinshelwood*, 4 Morr. 283.

VAUGHAN WILLIAMS, J. (after stating the facts).—I am of opinion that this order for amending ought not to have been made. It has been urged that section 105 (3) of the Bankruptcy Act, 1883, gives the court power to make any amendment without any limitation whatever, but it is clear that it cannot be construed so as to give the court power to allow the presentation of a petition inconsistent with the powers given in that respect by the same Act. If such an amendment were allowed it would be possible for a number of small creditors to present a petition, and then, after the expiration of three months from the date of the act of bankruptcy alleged therein, to add another creditor for an amount exceeding £50. Then all the small creditors might fail to prove their debts at the hearing, yet the added creditor, who could not have presented the petition alone, might succeed.

The case of *In re Maugham, Ex parte Maugham*, 36 W. R. 846, 21 Q. B. D. 21, is against the contention of the respondent in this case. It is plain from the judgment of Cave, J., in that case that the power given to the court by section 107 of the Bankruptcy Act, 1883, to substitute another creditor where the petitioner does not proceed with due diligence ought not to be exercised after the expiration of three months from the date of the act of bankruptcy upon which the petition is founded.

WRIGHT, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Bridges, Sawtell, & Co.*, for *Hodgens*, Abergavenny.

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Q. B. Div.
(Vaughan Williams and Wright, JJ.) Dec. 14.

In re WAITE.

Ex parte BENTLEY BREWERIES (LIMITED). (*a.*)

Bankruptcy—Act of bankruptcy—Notice of intention to suspend payment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (h).

Circular by trader to his creditors held to be a notice of his intention to suspend payment within section 4 (h) *of the Bankruptcy Act*, 1883.

In re Lamb, Ex parte Gibson & Bolland, 4 *Morr.* 25, *and* Crook *v.* Morley, [1891] *A. C.* 316, 40 *W. R. Dig.* 15, *followed.*

Appeal from the registrar of the county court at Leeds, refusing to make a receiving order.

The petition was presented upon the 3rd of May, 1894. No notice to dispute was given, and the debtor did not appear at the hearing.

The act of bankruptcy relied upon was a notice of intention to suspend payment alleged to be contained in a letter sent by the debtor's solicitor to each of his creditors, of which the material parts were as follows:—"I have been consulted by Mr. Waite, and I find that his affairs are in so complicated a state that it is only right that his creditors should be called together to decide if the serious loss to them in bankruptcy can be avoided. I therefore request your attendance at a meeting . . . when a statement of affairs will be submitted."

The registrar held that this letter did not constitute a notice of intention to suspend payment, and refused to make a receiving order.

The petitioning creditor appealed.

Muir Mackenzie, for the appellant.—This letter was clearly a notice of intention to suspend payment within the decisions in *In re Lamb, Ex parte Gibson & Bolland*, 4 Morr. 25; *Crook* v. *Morley*, [1891] A. C. 316, 40 W. R. Dig. 15; *In re Simonson, Ex parte Bull*, [1894], 1 Q. B. 433; *In re Selwood, Ex parte Dash*, 1 Manson, 66.

The debtor was not represented.

VAUGHAN WILLIAMS, J.—In this case a receiving order ought to be made, and in coming to this conclusion I do not act upon my own recent decisions, but follow the cases of *In re Lamb, Ex parte Gibson & Bolland* and *Crook* v. *Morley*. The older decisions required a formal deliberate notice in the words of the section, but the modern rule is that, provided the notice is unqualified and is a notice of something which the debtor absolutely intends to do independently of the happening of any future event, then it is enough to make it an act of bankruptcy if it is so worded that an ordinary business man would infer from it an intention to suspend payment.

The cases have not decided that it is impossible to give a notice which is not an act of bankruptcy, but when a man calls in a solicitor or accountant and sends a notice to his creditors, it requires very little to make that notice a notice of intention to suspend payment.

WRIGHT, J.—I concur. The test appears to me to be that if a man notifies his creditors that unless something is done he does not see his way to go on, such a notice is equivalent to a notice of intention to suspend payment.

Appeal allowed.

Solicitors for the appellant, *Walter & E. H. Foster*, Leeds.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Q. B. Div.
(Vaughan Williams, J.) Nov. 27.

In re MARSH.

Ex parte THE TRUSTEE. (*a.*)

Bankruptcy — Practice — Costs — Small bankruptcy — Review of taxation—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 72, 73, 121—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 15—*Bankruptcy Rules*, 1886, *rr.* 112 (2), 124.

By rule 112 (2) *of the Bankruptcy Rules*, 1886, "*where the estimated assets of the debtor do not exceed £300 a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate—namely, three-fifths of the charges ordinarily allowed, disbursements being added.*"

Held, that the word "proceedings" in this rule includes litigious proceedings.

Appeal from the taxing master of the High Court.

This was a small bankruptcy in the country, and the assets did not amount to £300.

The trustee had been compelled to take certain litigious proceedings, in which he was defeated, and the costs had to be paid out of the estate.

The local registrar taxed the costs and allowed them at their full amount. The Board of Trade, acting under the provisions of rule 124 of the Bankruptcy Rules, 1886, required the taxation to be reviewed by a bankruptcy taxing master of the High Court, who, following rule 112 (2), reduced the amount allowed by two-fifths.

The trustee appealed.

R. W. Barnett, for the trustee, cited *In re Dowson, Ex parte Jaynes*, 36 W. R. 864, 21 Q. B. D. 417, and submitted that this was a case in which the court had discretion to allow the full amount of costs.

Muir Mackenzie, for the Board of Trade, cited *In re Procter*, 39 W. R. 655, [1891] 2 Q. B. 433, and urged that it was for the benefit of small estates that rule 112 should be strictly applied.

VAUGHAN WILLIAMS, J.—I am afraid I must support the decision of the taxing master, but I do so with regret, for I fear the decision serves no useful purpose. I doubt myself whether it was ever intended that rule 112 should apply to litigious proceedings; but after the decision in *In re Procter* I feel justified in holding that it does. I cannot do otherwise than hold as I do, but I hope someone will put this matter right. I do not like to criticize the rules, but, according to the decision of Cave, J., in *In re Dowson, Ex parte Jaynes*, if a trustee succeeds in litigious proceedings, he can get full costs; but if it is obvious that he is only entitled to an indemnity, and cannot charge his opponent with more than he would have had to pay himself.

However, as matters stand at present, it appears that when a trustee is successful he can recover the full amount of costs for the estate; while, if he loses, he will only be entitled to charge the estate with the reduced amount. Take also the case of an order for costs against an unsuccessful respondent who cannot pay, and suppose that they are allowed on the higher scale. There, as the loser is insolvent, the solicitor could come on the estate for his costs, and could only get the lower scale, or less than he would have got from a solvent respondent.

The real fact is that it would be as much to the advantage of estates as of everybody that the scale

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

costs should be the same, whether allowed against the estate or against a respondent.

Appeal dismissed.

Solicitor for the appellant, *A. G. Foulkes.*

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

Court of Appeal.

From Adm. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) } Nov. 30; Dec. 18.

SHIP "MECCA."

CORY BROS. & CO. (LIMITED) AND A. LEGEMBRE *v.* OWNERS OF "THE MECCA." (*a.*)

Admiralty — Jurisdiction — Necessaries supplied to foreign ship in foreign port — Action in rem — *Admiralty Court Act,* 1840 (3 & 4 *Vict. c.* 65), *s.* 6—*Admiralty Court Act,* 1861 (24 & 25 *Vict. c.* 10), *s.* 5.

The Admiralty Division of the High Court has jurisdiction over a foreign ship, when in this country, for the price of necessaries supplied to her in a foreign port.

The India, 11 *W. R.* 536, *overruled.*

Appeal from Bruce, J.

The plaintiffs Cory Bros. & Co. (Limited) were coal merchants, carring on business in London, Alexandria, and Port Said. The plaintiff A. Legembre carried on the business of a coal merchant at Algiers. The defendant ship, *The Mecca,* was a foreign ship registered at a Turkish port.

In March, 1894, the plaintiffs Cory Bros. & Co. (Limited) supplied *The Mecca* with coals at Alexandria and Port Said, and in August, 1894, the plaintiff Legembre supplied *The Mecca* with coals at Algiers.

The Mecca having come to this country, the plaintiffs, on the 8th of October, brought an action against her in the Admiralty Division, by which they claimed that the court should pronounce for the sums due in respect of the coals with interest, and that *The Mecca* and her bail should be condemned in the amounts found due.

On the 5th of November the defendants moved before Bruce, J., that the writ and all further proceedings in the action should be set aside.

Bruce, J., feeling himself bound by the decision of Dr. Lushington in *The India,* 11 W. R. 536, made the order asked for by the defendants.

By the Admiralty Court Act, 1840, s. 6, it is enacted that "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received or necessaries furnished in respect of which such claim is made."

The Admiralty Court Act, 1861, s. 5, provides that "the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner, or part owner, of the ship is domiciled in England or Wales. . . ."

The plaintiffs appealed.

Bucknill, Q.C., and *Gerard Ince,* for the appellants.—It was not the intention of the Admiralty Court Act, 1840, to rob the Admiralty Court of its jurisdiction with regard to things done at sea. The intention of the Act, as of the Act of Richard II. (13 Ric. 2, c. 5), was to prevent the Admiralty Court from interfering with contracts made in the realm to be carried out at sea. The ports at which, in the present case, the necessaries were supplied are on the high seas, and the case comes within section 6 of the Act of 1840. Dr. Lushington changed his mind several times with regard to the reasons for the Act of 1840, and finally gave the Act a very restricted meaning: see *The Ocean,* 2 W. Rob. 368; *The Wataga,* 5 W. R. 155, Sw. 165; *The West Friesland,* Sw. 454, 7 W. R. Adm. Dig. 19; *The Flecha,* 1 Spinks, 438. In the latter case Dr. Lushington expressed an opinion on the object of the Act which was expressly dissented from by Lord Watson in *The Heinrich Bjorn,* 11 App. Cas. 270, 34 W. R. Dig. 179. The reasoning in *The Wataga* applies to the present case, and that case was followed in *The Anna,* 1 P. D. 253, 24 W. R. Dig. 279. The Act of 1861 was a remedial Act, passed to increase the admiralty jurisdiction. Under it the court has jurisdiction in the case of a collision between foreign vessels in foreign waters: *The Courier,* Lush. 541; and in the case of a collision between two British ships in foreign inland waters: *The Diana,* 11 W. R. 189, Lush. 539. [Lord HALSBURY.—Dr. Lushington, in *The India,* seems to have introduced the words "British or colonial" into section 5 of the Act.] There is no ground for that. The words are wide: "any ship." There is jurisdiction to entertain this action under section 5 of the Act of 1861, but, inasmuch as in the present case the goods were supplied on the high seas, there is jurisdiction also under section 6 of the Act of 1840: see, as to "high seas," *General Iron Screw Collier Co.* v. *Schurmanns,* 8 W. R. 732, 1 J. & H. 180; *R.* v. *Keyn,* 2 Ex. D. 63, 25 W. R. Dig. 87; *The Mali Ivo,* L. R. 2 A. & E. 356, 17 W. R. Adm. Dig. 23; *R.* v. *Anderson,* 17 W. R. 208, L. R. 1 C. C. R. 161; *The Franconia,* 2 C. P. D. 173, 25 W. R. Dig. 209.

They also referred to *The Neptune,* 3 Knapp, 94, and *The Pacific,* Br. & Lush. 243, 12 W. R. Dig. 31.

Pyke, Q.C., and *A. E. Nelson,* for the defendants.—"Any ship" in section 5 of the Act of 1861 must mean "any British ship." We rely on *The Ella A. Clark,* 11 W. R. 534, Br. & Lush. 32, and *The India.* Though *The Ella A. Clark* was overruled by the House of Lords in *The Sara,* 38 W. R. 129, 14 App. Cas. 209, it was upon another point. Upon this point neither it nor *The India* has ever been challenged. It is too late to do so now. If the argument of the appellant is right, the Court of Admiralty will have an extraordinary jurisdiction. Foreign merchants supplying foreign ships with necessaries will be able to proceed *in rem* in England. The goods were not supplied on the "high seas." Port Said is an artificial harbour which did not exist before the Suez Canal. There are many places where the tide ebbs and flows which are nevertheless not the "high seas."

They referred to the definitions in The Imperial Dictionary and Webster's Dictionary and to the Territorial Waters Jurisdiction Act, 1878.

Bucknill, Q.C., in reply.—Section 688 of the Merchant Shipping Act, 1894, gives power to arrest a

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

foreign ship that has occasioned damage. There is, therefore, no ground for the suggestion that the jurisdiction claimed would be inconvenient.

He also referred to *R.* v. *Carr & Wilson*, 31 W. R. 121, 10 Q. B. D. 76, and *The Saxonia*, 10 W. R. 431, Lush. 410.

Cur. adv. vult.

Dec. 18.—Lord HALSBURY.—The question in this case arises, as to coal supplied in foreign ports to a ship now here, whether the Admiralty Division has jurisdiction to detain the ship for the price of the coals so supplied. Practically the question resolves itself into the question whether Dr. Lushington's decision in the case of *The India* is to be followed in this court. In the view I take of that question I think it unnecessary to enter into the questions which have arisen between the common law courts and the Admiralty, and, indeed, I will assume that up to the year 1861 the Court of Admiralty would have had no jurisdiction in this case, though, as applicable to the supply at Alexandria and Algiers, I am by no means prepared to say that the high seas do not include those places of supply; but, as the Act of 1861 appears to me conclusively to dispose of the question, I would rather rest my judgment upon the language of that statute.

Now the 5th section of that statute provides that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs. Then follow qualifications which are immaterial in respect of this case, and which seem to me to give no materials for qualifying or cutting down the generality of the language I have quoted. The learned judge who decided *The India* held the words I have quoted to apply to a colonial ship in a foreign port, and I search in vain throughout the whole statute for anything which can justify the construction that you must imply the words "British or colonial ship" in the 5th section. The language of the 7th section, "any ship," is admitted to apply to any ship all over the world, and I am wholly unable to see why the same words employed in section 5 ought not to receive an equally extended application. It cannot be alleged that the statute is only intended to apply to British ships, inasmuch as it is admitted that some of its provisions apply to all ships anywhere. Where the Legislature intended to exclude foreign ships and to apply its provisions solely to British ships or ships in British waters it has been careful to say so in terms (see sections 8, 9, and 11), and, upon ordinary principles of construction, where the Legislature has enacted something in respect to any ship and something else as to any British ship it would be improper to assume there was no intentional distinction. Neither is it possible to suggest any reasonable ground for the supposed limitation. Dr. Lushington seems himself to have been unable to suggest any reason for it. The Act itself professes to be an Act for the extending of the jurisdiction of the High Court of Admiralty, and the nature of the thing dealt with seems to me to point in the direction of extension rather than restriction. I am, therefore, of opinion that the decision in the case of *The India* was wrong.

The authority of Dr. Lushington treating of such a subject makes one hesitate to overrule a decision of his, particularly when it has remained unchallenged for so many years; but, on the other hand, the case turns upon a construction of a statute only thirty-three years old. Reluctant as one may be to disturb a decision acquiesced in so long, yet that decision involves principles of construction so serious that I think it is the duty of the court to pronounce its disagreement with them. I am, therefore, of opinion that this appeal should be allowed, and that the respondents should pay the costs.

LINDLEY, L.J.—The question raised by this appeal is whether a foreign steamship supplied with coal in foreign ports, but which ship was in this country when this action was commenced, can be proceeded against in the Admiralty Division of the High Court for the price of such coals. Without investigating the early history of the admiralty jurisdiction in civil cases, it is sufficient to start from the doctrine well settled in the time of Blackstone—viz. (1) That the Court of Admiralty had no jurisdiction to entertain any causes of action arising within the precincts or body of a county; (2) that the court had jurisdiction over some causes of action arising on the high seas (3 Bl. Com. 106). I say "some" because their number was limited to what are commonly called maritime causes. It must also be borne in mind that the Court of Admiralty had no jurisdiction over any causes of action arising in foreign countries beyond the seas, but not on the high seas (Com. Dig. Admiralty, F3). In 1840 an Act was passed to extend the jurisdiction in certain causes of action. The causes of action enumerated are salvage, damage to ships, towage, and necessaries supplied to foreign ships. Necessaries supplied to English ships are not within the section, and the jurisdiction of the court as to them was not extended. In fact, it had none (see *The Two Ellens*, 19 W. R. 983, L. R. 3 A. & E. 345). In *The Robert Pow*, Br. & Lush. 99, 11 W. R. Dig. 24, Dr. Lushington said that the object of this enactment was to give the Court of Admiralty jurisdiction over certain causes of action, although they might arise within the body of a county, and in cases of damage he confined the jurisdiction to collisions between ships. There is no doubt that one of the main objects of the Act was to extend the jurisdiction as above stated. But this was not all, for, as pointed out in *The Heinrich Bjorn*, the jurisdiction to entertain a suit for necessaries supplied to a foreign ship was conferred for the first time, and it was confined to them. The limited construction put by Dr. Lushington on the jurisdiction of the court in cases of damage was not adopted by the House of Lords: see *The Zeta*, [1893] A. C. 468. The statute was held to apply to other cases of damage; and, what is more important on the present occasion, the Act was held to define the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. The expression "high seas," when used with reference to the jurisdiction of the Court of Admiralty, included all oceans, seas, bays, channels, rivers, creeks, and waters below low water-mark and where great ships do go, with the exception only of such parts of such oceans, &c., as were within the body of some county (see as to this 28 Hen. 8, c. 15; 4 Inst. 134; Com. Dig. Admiralty, E7 (1) (7) (14); *R.* v. *Anderson*; *R.* v. *Carr & Wilson*). A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other part of the high seas. The jurisdiction, however, is necessarily limited in its application. It can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow, would not, I apprehend, be in any sense part of the high seas, whether such basin or dock was in this country or in any other. Apart, then, from authority and on general principles of law, I should arrive at the conclusion that in this case the Court of Admiralty had under the Act of 1840 jurisdiction to proceed against *The Mecca* when in this country for the coals supplied to her in Alex-

andria and Algiers, she being supplied on the high seas at those places, although they are also ports. But, the basin at Port Said not being part of the high seas, the Court of Admiralty would have no jurisdiction under the Act of 1840 if it stood alone. The subsequent Act of 1861 has again, however, extended the jurisdiction of the court. This statute was passed expressly for that very purpose. Nothing can be wider than the language of sections 4, 5, 6, 7, and 10. The expression used in them is "any ship," and when this language is contrasted with the language used in sections 8, 9, and 11, in which British ships are expressly mentioned, the inference is very strong that "any ship" means any ship, whether British, colonial, or foreign. Sections 4, 5, 6, 7, and 10 do not refer to the high seas, and I see no justification for limiting the jurisdiction conferred on the court by these sections to ships on the high seas. I read the sections as applying to any ships anywhere, although, until they come to this country, they cannot be proceeded against here. Section 5, which deals with necessaries, runs thus. [His lordship read the section as set out above, and continued:—] I do not read the proviso which follows, as it is not material.

This section, it is true, is only applicable to some ships—viz., to those supplied elsewhere than in the ports to which they belong; but even then they are not excepted if any of their owners or part owners are domiciled in England or Wales when proceedings in the Admiralty are instituted. This limitation, however, points not to the nationality of the ship nor to any distinction between high seas and other places not on the high seas, but to the port of supply. The exception includes English ships supplied at the ports to which they belong, but the larger class of ships from which the exception is taken is not confined to other English ships, but extends to all ships. If the ship, whether English, colonial, or foreign, is supplied with necessaries in her own port the probability is that there are persons there to whom credit is given and who can be sued there. But if, as in the present case, the ship is supplied in some other place, the supplier of necessaries (if he does not obtain cash on delivery, which may be impossible) is very likely never to get paid at all.

There is good reason therefore, both in the interest of the supplier and in the interest of the shipowner, for giving the supplier a remedy against the ship if she comes to this country. If there were no such remedy, supplies would often be refused, however urgently required. Apart, then, from authority, I am of opinion that under this statute of 1861 the court would have jurisdiction to entertain this action for the coals supplied to *The Mecca* in the basin at Port Said as well as for those supplied in the ports of Alexandria and Algiers. Even if these two ports are not parts of the high seas, as I think they are, still the Act of 1861 goes further than the Act of 1840, and is wide enough to give the court jurisdiction to arrest the ship for the price of the coals supplied at all three places.

I turn now to the authorities, and I find that in *The India* Dr. Lushington held that even under the Act of 1861 the Court of Admiralty had no jurisdiction to entertain a suit for necessaries supplied to a foreign ship in a foreign port. The same learned judge had expressed an opinion to the same effect in *The Ocean*, decided in 1845. Dr. Lushington, however, decided in 1856 that the court had jurisdiction under the Act of 1840 to entertain a suit for necessaries supplied to a foreign ship in a colonial port (see *The Wataga*), and this case was approved and followed by this court in *The Anna*. The same point had been decided in the same way in 1854 as regards necessaries supplied to a foreign ship in the Thames (see *The Flecha*). Section 6 of the Act of 1840 and section 5 of the Act of 1861 and these decisions show that it is not the nationality of the ships which is important, but the place of supply. Unless, however, the place of supply is the port to which the ship belongs, the place of supply is not made material. But the authority of Dr. Lushington on all admiralty matters is deservedly so high that I should hesitate long in differing from him on the construction of the statutes in question if the House of Lords had not held that he construed the Acts of 1840 and 1861 erroneously in other cases. It was, however, so held in *The Zeta*, in *The Sara*, and in *The Heinrich Bjorn*. These decisions, it is true, do not overrule *The India*; they relate to other matters—viz., damage and lien for necessaries—but they show that the construction put on the statutes of 1840 and 1861 by Dr. Lushington was in some respects incorrect. Guided by these decisions, and applying my own mind to the statutes in question, I have arrived at the conclusion that the decision in *The India* was erroneous and ought no longer to be followed. The appeal, therefore, must be allowed, and with costs here and below.

A. L. SMITH, L.J.—The point raised in this case is whether the High Court of Admiralty in England, either under the Act of 1840 or under the Act of 1861, has jurisdiction to entertain a claim for necessaries supplied to a foreign ship in a foreign port, the ship having subsequently come to this country, where proceedings against her *in rem* were thereupon taken.

It is not disputed that, if the Admiralty Court has jurisdiction, proceedings *in rem* can be had (see section 35 of the Act of 1861). Bruce, J., followed, as he was bound to do, the decision of Dr. Lushington in the case of *The India* in 1863, in which the learned judge held that the Court of Admiralty had no jurisdiction if the necessaries were supplied to a foreign ship in a foreign port.

The present appeal is in reality brought to review the construction Dr. Lushington has placed upon the statute of 1861, firstly in the case of *The Ella A. Clark*, decided on the 19th of February, 1863, and then in the case of *The India*, on the 16th of March, 1863.

It cannot be denied that judgments so long sanctioned by acquiescence are of great weight, and ought not without good reason to be disturbed, upon the principle that *communis error facit jus*; and James, L.J., went so far in the case of *The Anna* as to say: "It is too late to raise questions of jurisdiction after that lapse of time"—in that case twenty years.

This, however, is the first time in which the construction of these statutes upon the present point has been brought up for consideration in a Court of Appeal, and, in my judgment, it is incumbent upon this court, irrespective of judgments in courts of first instance, to apply itself to the construction of statutes of the present reign and ascertain what they enact, and then look to the judgments which, if not clearly incorrect, ought to be upheld.

The Lord Chancellor (Lord Halsbury) in *The Sara*, in the House of Lords, pointed out what was the duty of a court when construing a comparatively modern statute, and not business documents, even though a prior decision thereon had been practically adopted in actual business; and the House in that case, notwithstanding prior decisions which had been acted upon, placed what it considered to be the true construction upon the Act of 1840 as to the point then raised.

[His lordship then stated the facts of the present case, and proceeded:—]

I will deal with this case as if the supply of coal had all taken place at the inner basin at Port Said;

for, whatever be the correct view of what constitutes the "high seas" in section 6 of the Act of 1840 when applied to Alexandria and Algiers, the supply of coal at the inner basin at Port Said was clearly not a supply upon the high seas, but, on the contrary, was a supply in a foreign port, and this raises the real point the parties desire to have determined.

By section 6 of the Act of 1840 jurisdiction is given to the High Court of Admiralty to decide all claims and demands, amongst others, for necessaries supplied to any foreign ship, whether such ship, when the necessaries were supplied, was within the body of a county or upon the high seas. The construction of the section was fully discussed in this court in the case of the *Heinrich Bjorn*.

It was argued by Mr. Bucknill for the appellants (the plaintiffs) that this section gave the High Court of Admiralty jurisdiction over claims for necessaries supplied to a foreign ship in a foreign port. I cannot so read it.

If a foreign ship is in the body of a county (which, apart from authority, I should have thought meant a county in the United Kingdom) or upon the high seas when the necessaries are supplied, then the Court of Admiralty has jurisdiction over a foreign ship; but I can find no jurisdiction given by this section if the foreign ship be in a foreign port which is not part of the high seas, and I adopt Dr. Lushington's words in *The India*, 32 L. J. Adm., at p. 187: "I think it impossible to maintain that the words 'in the body of a county or upon the high seas' involve necessaries furnished in a foreign port, nor do I see any expression from which I could infer that a foreign port was included." I understand the learned judge to be there dealing with a port that is distinct from the high seas.

After the year 1840, and before the passing of the Act in 1861, Dr. Lushington held, in the case of *The Wataga*, that the 6th section of the Act of 1840 conferred jurisdiction upon the High Court of Admiralty on a claim for necessaries supplied to a foreign vessel in a colonial port, and whether this was correct was not allowed to be argued in this court in *The Anna* upon the ground above mentioned.

In the year 1861 the Admiralty Court Act of that year, which is an Act to extend the jurisdiction of the High Court of Admiralty, was passed.

The question is whether section 5 of this Act, which deals with a claim for necessaries, applies solely to British ships, or to both British and foreign ships; for, if it does, it is clear to me that it applies to a claim for necessaries supplied to a foreign ship in a foreign port, for the sole limitation to the jurisdiction conferred by the section as to place of supply is when the supplies are made "in the place to which the ship belongs."

The initial words of section 5 are "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship"—the largest possible words, wholly irrespective of whether the supplies take place in the body of a county, or in a colonial port, or in any other place; the sole exception being that they must not be supplied at the port to which the ship belongs.

It is impossible, I think, to say that sections 4, 6, 7, 10, and 13 of the Act of 1861 are not applicable to foreign as well as British ships. Take, for instance, section 6, which in some respects is very similar to section 5, upon which this case hinges. In each of these two sections "any ship" is the phrase used, and in each there is the exception from the jurisdiction therein conferred, if it "is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

That jurisdiction is given by section 6 to the High Court of Admiralty over any claim by an owner or consignee of any bill of lading for damage to cargo carried in any ship—*i.e.*, whether British or foreign—into any port of England or Wales, except in the case of any owner or part owner of the ship being domiciled in England or Wales at the time of the institution of the cause, is clear. That the other sections — viz., 4, 7, 10, and 13 — apply to both British and foreign ships appears also clear. That these five sections (4, 6, 7, 10, and 13) apply to any ship, whether British or foreign, is made still more clear, if possible, when sections 8, 9, and 11 are looked at, for in these sections the subject-matters therein dealt with are expressly confined either to "any ship registered at any port in England or Wales" or "to any British ship."

This being so, what is there to lead to the conclusion that section 5, in which the words used are "any ship," as in sections 4, 6, 7, 10, and 13, and without any limitation as to their being British ships, as in sections 8, 9, and 11, is to be held to be confined to British ships, and not to include both British and foreign ships, which clearly are embraced in the term "any ship"? It is said that the two exceptions, the one having reference to there being an owner or part owner domiciled in England or Wales, and the other when the supplies are furnished at the home port of the ship, have this effect. The reason for the exception from the jurisdiction conferred by sections 5 and 6, where there is an owner or part owner domiciled in England or Wales at the institution of the cause, is that if there be an owner or part owner of the ship then "domiciled in England or Wales," there is no necessity to confer jurisdiction upon the Court of Admiralty, inasmuch as the claimant, whether for necessaries supplied or for damage to cargo, has a person he can sue in the ordinary courts of this country, whereas if there be no such owner or part owner in England or Wales, the claimant may well require the aid of the Court of Admiralty *in rem* if the ship afterwards come here, in order to obtain satisfaction of his claim.

I cannot think that the insertion of this exception, which is in sections 5 and 6 alike, is such as to confine the jurisdiction given by these sections to British ships, though Dr. Lushington in the case of the *Ella A. Clark*, Br. & Lush., at p. 37, said, "The words 'owner or part owner domiciled in England or Wales' refer manifestly to ships not foreign owned when the debt was contracted," and in *The India* he says, "I think that this proviso points to the owner of British and colonial ships, and, having regard to the improbability of the British Parliament legislating for the transactions of foreigners in foreign ports, I must hold that the claimant for necessaries cannot maintain his case under the 5th section of the Act." I agree that in the case of a British ship, and, it may be, of colonial ships, this exception is far more likely to come into play than in the case of a foreign ship, but further than this I cannot go.

Moreover, Dr. Lushington in *The St. Cloud*, Br. & Lush. 4, 11 W. R. Dig. 24, expressly stated that section 6 applied to short delivery of goods brought to this country in foreign ships, and gave as the reason for that section becoming law that the aggrieved party might arrest the ship, and it would seem that Dr. Lushington, when he gave this judgment, did not consider that this exception was such as to render section 6 only applicable to British ships, for he expressly stated that it applied to foreign ships, and in this I agree.

Then, why does not section 5 in like manner apply to both foreign and British ships? It is said, because of the additional exception contained in section 5,

which is, "that the necessaries should have been supplied to any ship elsewhere than in the port to which the ship belongs." I agree that this principally refers to British ships, but why does it necessarily exclude foreign ships? I would point out that, if the reason for conferring extended jurisdiction upon the High Court of Admiralty by the Act of 1861 is to give "a remedy *in rem* for a just claim, where no personal action can be brought," which Dr. Lushington in *The Ella A. Clark*, at p. 37, says is the spirit of the Act, I cannot see what good sense there is for excepting foreign ships in respect of the supply of necessaries from section 5 of the Act, unless the section plainly enacts that they are excepted. In my judgment sections 5 and 6 apply both to foreign and British ships.

Dr. Lushington in March, 1864, in the case of *The Pacific*, again gave his view of section 5 of the Act of 1861, which I fully adopt and agree with. This judgment was given a year after those in *The Ella A. Clark* and *The India*, upon which the respondents rely, and would seem to be inconsistent with them, for if section 5 of the Act of 1861 applies to foreign ships, why does it not apply to the supply of necessaries to a foreign ship in a foreign port? No answer was given to this.

I cannot read section 5 of the Act of 1861 as conferring jurisdiction only in cases of British ships. If it had been intended by the Legislature to limit the jurisdiction of the Court of Admiralty to British ships, nothing would have been easier than to have used the words which were used in sections 8, 9, and 11, when it was intended to confer jurisdiction only in cases of British ships, and, in the absence of these words, and reading the Act as a whole, my clear conclusion is that, by section 5 of the Act of 1861, the Admiralty Court has jurisdiction over a foreign ship, and consequently for necessaries supplied to such ship, amongst other places, in a foreign port, when such ship comes within the jurisdiction of the court.

The reasons given by Dr. Lushington in the cases of *The Ella A. Clark* and *The India* for holding that he had no jurisdiction over a foreign ship if the necessaries were supplied in a foreign port are, in my judgment, untenable; and I think that in *The India* he has not placed the true construction upon the statute of 1861. For these reasons the appeal must be allowed.

Appeal allowed.

Solicitors, *Ince, Colt, & Ince; Lowless & Co.*

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) [and Chan. Div.] — May 10; Nov. 5.

KEMP *v.* WRIGHT. (*a.*)

Building society—Instrument of dissolution—Priority of members—Liability of advanced members—Power to vary—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32—*Building Societies Act,* 1894 (57 & 58 *Vict. c.* 47), *s.* 10.

A building society was dissolved by an instrument of dissolution executed in accordance with section 32 (3) *of the Building Societies Act,* 1874. *The instrument provided that withdrawing members should have no preference or priority over members who had not given notice of withdrawal.*

Held, by Kekewich, J., *that all withdrawing members were bound by the instrument of dissolution.*

Some members of the society having received advances from the society repayable by instalments,

Held, by the Court of Appeal (*reversing the decision of* Kekewich, J.), *that such members could not be compelled by the instrument of dissolution to pay up forthwith the balances due from them in respect of their advances.*

Brownlie *v.* Russell, 8 *App. Cas.* 235, 31 *W. R. Dig.* 28, *explained.*

Section 10 *of the Building Societies Act,* 1894, *applies to societies not completely dissolved at the time of the passing of the Act.*

The Charing Cross "Model" Building Society was a terminating society incorporated under the Building Societies Act, 1874, on the 20th of December, 1887.

The rules of the society, so far as material, were as follows:—

Rule 6. "Should it at any time be deemed expedient to make any alteration, addition, or rescission of or to these rules, a special general meeting may be convened, and the course to be adopted . . . shall be determined by a majority of those present."

Rule 25. "After a member has mortgaged property to the society, he shall first pay the premium (if any), then repay the principal by monthly instalments at the rate of £6 per share per annum."

"Rule 30. ". . . Subscriptions shall be returned in full to the withdrawing members in the order in which notice is given, and paid out of the repayments."

Rule 34. "At the termination of the society the members shall have their subscriptions returned in full, together with their share of the net profits."

The Building Societies Act, 1874, s. 32, provides that "a society under this Act may terminate or be dissolved . . . (3) by dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." The section also provides that the instrument of dissolution shall set forth (*inter alia*) "the intended appropriation or division of the funds and property of the society," and shall be binding on all members of the society.

At a meeting of the shareholders, duly convened and held on the 12th of December, 1893, it was resolved that the society should be wound up voluntarily by an instrument of dissolution to be signed by three-fourths of the members, holding not less than two-thirds of the shares in the society.

An instrument of dissolution was signed on the 1st of January, 1894, in accordance with the resolution.

By the instrument of dissolution the plaintiffs were appointed trustees for the purpose of the dissolution, and it was also agreed and declared as follows:—

"Clause 4. After payment of the claims of creditors the funds and property of the society shall be applied as follows—

"(1) In payment of the costs and expenses of and incidental to the dissolution.

"(2) In payment to the members of the amounts standing to their credit in the books of the society, or, in case of deficiency, then in payment to the members rateably in proportion to the amounts standing to their credit as aforesaid.

"(3) In payment of the sum of £10 as compensation to the holder of each share in respect of which no appropriation has been made.

"(4) The surplus (if any) shall be divided among the members rateably in proportion to the amounts standing to the credit of the members respectively in the books of the society.

(*a.*) Reported by ARNOLD GLOVER and C. C. HENSLEY, Esqs., Barristers-at-Law.

"Clause 5. For all the purposes of this instrument the term 'member' shall mean and include all members of the society, whether they shall have given notices of withdrawal or not, and members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice."

The defendant Holyoake was an advanced member, whose mortgage to the society was in the usual form of the society's mortgages, and provided that if the mortgagor "should pay to the society all subscriptions, fines, and other moneys which, according to the rules for the time being of the society, should from time to time become payable in respect of the said shares, and should observe and perform the said rules, and also the covenants hereinafter contained" the society would indorse upon the mortgage a receipt for the mortgage moneys.

The action was brought by the trustees of the instrument of dissolution for the determination of various questions arising out of the instrument.

The first question that was argued was as to whether the priority of withdrawing members was affected by the instrument of dissolution.

W. D. MacConkey, for the trustees.

J. Rutherford, for the defendant Schelefield, an advanced member who had not given notice of withdrawal.—Section 32 of the Building Societies Act, 1874, provides that the instrument of dissolution shall be binding on all members, and that applies to withdrawing members. The provision effected by clause 5 of the instrument of dissolution might have been effected by an alteration in the rules as provided by rule 6, in which case the withdrawing members would certainly have been bound. Clause 5 is an "intended appropriation or division of the funds and property of the society" within the meaning of section 32, sub-section 3 (6), of the Act of 1874.

He referred to *Sibun* v. *Pearce*, 38 W. R. 658, 44 Ch. D. 354; *Barnard* v. *Tomson*, [1894] 1 Ch. 374; *Pépé* v. *City and Suburban Permanent Building Society*, 41 W. R. 548, [1893] 2 Ch. 311.

F. Broadbridge, for the defendant Sarah A. Gamlin, a withdrawing member who had not signed the instrument of dissolution.—It may be that priority among withdrawing members might have been varied by an alteration in the rules, but it cannot be done in any other way.

He referred to *Auld* v. *Glasgow Working Men's Building Society*, 35 W. R. 632, 12 App. Cas. 197.

KEKEWICH, J.—Before the date of the deed of dissolution the defendant Sarah Ann Gamlin had given notice of withdrawal under rule 30. The result is that at that date this defendant was entitled to be paid out of such money as was available for that particular purpose, subject to the claims of those who had given notices of withdrawal of an earlier date than her own, but before all others whose notices were subsequently given. Thereupon she took what may be described as a vested interest in the funds available for repayment of withdrawing members. Before deciding that such an interest is defeated the court must be perfectly clear that the contract permits such a course, or that the Legislature has introduced some paramount provision. The contract is merely that the rules may from time to time be altered.

It has been decided in many cases that a withdrawing member who has not been paid off is still a member for the purpose of the ascertainment and determination of his rights, including the question whether a dissolution shall take place. In the case of *Bradbury* v. *Wild*, 41 W. R. 361, [1893] 1 Ch. 377, which recently came before myself, all the authorities were considered. In that case I merely applied the law to the particular facts before me; but many cases, and amongst others *Rosenberg* v. *Northumberland Building Society*, 37 W. R. 368, 22 Q. B. D. 373, were cited as to the position of a withdrawing member. It is clear that such a member is a member for the purpose of new rules, and if new rules are made within the ambit of the constitution of the society, those rules are binding on the withdrawing member, notwithstanding that they prejudice the vested interest of such member. That seems to me to be now settled. Mr. Broadbridge does not dispute that, but says that there are no new rules, and that he is not bound in that way. It is not necessary to go into that branch of the law, except for one point, which, I think, arises under section 32 of the Building Societies Act, 1874. That section provides that "a society under this Act may terminate or be dissolved upon the happening of any event declared by its rules to be the termination of the society." I wish to point out that, if the existing rules of any given society do not provide for the termination of the society on the happening of any specified event, those rules are capable of alteration; and if the Legislature had intended that the rules, and the rules alone, should govern the contractual relations of members in the event of dissolution, it would have left those relations to be determined by the rules. But the section proceeds, "by dissolution in manner prescribed by its rules," *i.e.*, the rules as they exist or are altered. If the Legislature had intended that everything should be done by the rules, nothing would have been easier or simpler than to have left it for the society to make its rules to meet the occasion. The Legislature further provides for dissolution in an entirely different way—viz., "by dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." That is an addition to dissolution according to the rules. In other words, as it seems to me, the Legislature has said in effect: "And every society shall for this purpose have a rule, incapable of alteration, that if members, not being less than three-fourths of the whole number, and holding not less than two-thirds of the number of shares, shall consent to a dissolution, such consent being testified by their signatures, then the society shall be dissolved, notwithstanding that the rules of the society do not provide for any such event." The terms of the sub-section seem to me added as a necessary adjunct, which is henceforward to be found in every set of rules implied by legislative enactment. It is not denied that, if the variation of the rights of members, which is now objected to, had been effected under the rules, it would have been sound, and no complaint could have been made. Why, then, should it not be capable of being done under legislative enactments, such as I have mentioned? I think that a withdrawing member is as much liable to the parliamentary rule as to the private rules of the society; and, this having been done under the parliamentary rule, I think that the defendant for whom Mr. Broadbridge appears is bound.

The second question was as to whether advanced members could be compelled by the instrument of dissolution to pay up their balances forthwith.

F. Thompson, for the defendant Jessie Wright, a withdrawing member who had signed the instrument of dissolution, referred to *Brownlie* v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28; *Tosh* v. *North British Building Society*, 35 W. R. 413, 11 App. Cas. 489;

London Provident Building Society v. *Morgan*, 42 W. R. 157, [1893] 2 Q. B. 266.

J. Rutherford, for the defendant William Scholefield.

T. R. Hughes, for the defendant William Holyoake, referred to *Scottish Provident Investment Building Society*, 12 Ct. Sess. Cas., 4th ser., 127.

KEKEWICH, J.—*Brownlie* v. *Russell* must, I think, be regarded as an authority of general application, and if that case lays down the law, which I think it does, there is no occasion for me in the present case to go further than that authority. The case of *Tosh* v. *North British Building Society* cannot be said to carry the matter further than *Brownlie* v. *Russell*; but the value of it, as an authority for my guidance, is, that I find there an expression of opinion which has this advantage, that it was given by the Lord Chancellor of the day who took part as counsel in the argument in *Brownlie* v. *Russell*. I do not know where I could look for a better statement as to what was decided in *Brownlie* v. *Russell*. Lord Herschell says this: "In *Brownlie's case* it was held that after a winding up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding up. But it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to pay the amount which was still due upon their advances, but did not substantially alter their position or their rights, or render them at all different from what they would have been if they had been withdrawing under the rules." When you examine that language it is clear that the position of the advanced member is substantially altered to this extent, that the winding up operates to make an immediate withdrawal under the rules. The advanced member still withdraws under the rules, though he does so by reason of the compulsion introduced by the winding up; and here we have an instrument of dissolution which is equivalent to a winding up.

That being so, I do not think it necessary or proper to go into the matter further. The case of *London Provident Building Society* v. *Morgan*, decided in the Divisional Court, is very instructive, because the learned judges went into all the cases which had any bearing upon the point which they intended to decide. In some of the cases, including *In re Britannia Permanent Benefit Building Society*, W. N., 1891, p. 123, 39 W. R. Dig. 34, and *In re Middlesborough, Redcar, and Saltburn Building Society*, 58 L. J. Ch. 771, before Stirling, J., the question was not whether the advanced member was liable to pay up at once, but whether he was liable as a contributory, or merely as a debtor, who, for the purpose of the winding up, was to be treated as a stranger to the society. The question here is whether he is liable to make repayment now. I think that he is so liable.

From the second of the above decisions the defendant Holyoake appealed.

The Building Societies Act, 1894 (57 & 58 Vict. c. 47), was passed on the 25th of August, 1894, subsequent to the decision of Kekewich, J. Section 10 is as follows: "When a society under the Building Societies Acts is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security or under the rules of the society shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time or times and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act."

Cozens-Hardy, Q.C., and *T. K. Nuttall*, for the appellant.—The Act of 1894 is necessarily retrospective, and, therefore, applies to the present case: *Quilter* v. *Mapleson*, 31 W. R. 75, 9 Q. B. D. 672. But, apart from the Act, the decision of the learned judge was wrong. [They were stopped by the court.]

F. Thompson, for the defendant Jessie Wright, a withdrawing member who had signed the instrument of dissolution.—The instrument of dissolution operates under the Act of 1874, and has the same effect as a winding up. [Lord HERSCHELL, L.C.—What is there anywhere to turn a sum due by instalments into a sum due at once?] If I am right as to the effect of the instrument of dissolution, I rely on the judgment of Lord Selborne in *Brownlie* v. *Russell*. [Lord HERSCHELL, L.C.—Lord Selborne is there dealing with winding up, which is *vis major*. It is another thing to say that the unadvanced members, by simply agreeing to a resolution, can make the advanced members pay up their balances at once.] The instrument of dissolution has, at any rate, the same effect as a voluntary winding up, in which case the advanced members could be compelled to pay up forthwith. As regards the Act of 1894, it only applies where the dissolution or winding up takes place, in substance, after the passing of the Act. [Lord HERSCHELL, L.C.—Ought not the Act to apply where the winding up is not complete?] If, after judgment, any advanced member had paid up the balance due from him, he could not have recovered it. The Legislature cannot have intended to overrule an order actually made binding all the mortgagor members.

W. D. MacConkey, for the trustees.

Lord HERSCHELL, L.C.—With all respect to the learned judge in the court below, I am quite unable to agree with the conclusion at which he has arrived. It is not necessary to discuss the question whether the effect of a winding-up order is as extensive as is contended for by the respondents. This is not the case of a winding up, but of an instrument of dissolution. By section 32 of the Building Societies Act of 1874 the dissolution of a society may take place with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society. By such consent a society may be dissolved against the will of the minority. In this case the requisite majority have agreed to the dissolution of the society. That was purely a matter for the shareholders, a matter in which the majority of the members could bind the minority. What they can bind them to is a dissolution. The instrument of dissolution is to set forth certain matters mentioned in section 32, sub-section 3. There is no provision further than that for determining the rights of members on a dissolution, or that they should be other than those provided for by the rules of the society which created the contract between the members. The contention is that, whereas certain members of the society are advanced members—*i.e.*, have obtained advances from the society—and have covenanted to repay those loans according to the rules—that is to say, by instalments—upon a dissolution under an instrument of this character their liabilities are immediately altered, and they become bound to pay up their debts, not by instalments, but all at once. There is nothing in the section to indicate anything of the sort. There is nothing in the deed itself to say that this was to be the effect of the deed of dissolution.

But it is said that this has been held in *Brownlie* v. *Russell* to be the effect when the court makes a winding-up order, and that, therefore, it must also be so when the dissolution is the act of the members.

That is a consequence which I am not able to follow or to see the force of. A winding-up order is the act of the court; it is a *vis major*, however it be procured. All the parties have a right to be heard on it; a minority likely to be affected by the result would be entitled to appeal to this court in opposition to an order which would benefit one class of members at the expense of another. But is it to be said that where a dissolution is agreed upon by the majority the minority are to be at their mercy? According to the contention of the respondents and the judgment of Kekewich, J., a majority who may consist entirely of unadvanced members may dissolve the society and bind the whole of the advanced members to liabilities they have never undertaken. Unless there is distinct authority in favour of that proposition I should decline to assent to it; it is clearly unjust, and I find nothing in the provisions of the Act with respect to the deed of dissolution to support it. The proposed division of the funds and property of the society is to be set out in the deed, and the liabilities and assets of the society are to be stated. Amongst those assets are the liabilities of the members to the society, and the same sums would be included in the funds and property to be divided. But there is nothing to affect the covenants in the mortgages to pay by instalments or to make the loans immediately repayable.

Therefore I think that the instrument of dissolution did not operate in that way to the prejudice of the advanced members. The point raised under the statute of 1894 is also a good one, though it is perhaps unnecessary to go into that after the opinion which I have just expressed. The society is being dissolved, and is not yet completely dissolved. It cannot be disputed that the words "is being dissolved" in section 10 of the Building Societies Act of 1894 in the sense in which they are used in that statute must apply to this society. The Legislature has said that in such a case advanced members are only to pay according to the contract contained in their respective mortgages. The only answer made is that the legislative enactment came into force some months after the commencement of the dissolution, and therefore does not apply.

But inasmuch as these advanced members have not yet completed the payments in accordance with their respective contracts, the Act must have been intended to apply to them. I see no reason why effect should not be given to the obvious intention of the Legislature. The appeal must be allowed.

LINDLEY, L.J.—I am of the same opinion. If a man borrows money and stipulates to repay it by instalments, the majority of the members of his society would obviously have no right, under any intelligible principle of law, to compel him to pay the whole sum straight off. If they have any such right it must be given by statutory enactment. It is said that if this were a winding up under the Companies Act of 1862 the advanced members could be compelled to do so, and that the court did this in *Brownlie* v. *Russell*. I do not think that that case went so far, but if it does the matter has been set right by the recent Building Societies Act of 1894. Section 32 of the Building Societies Act of 1874 draws a distinction between dissolution and winding up. But what we are dealing with is a dissolution, and not a winding up. It appears to me that there was some misapprehension as to the point decided in *Brownlie* v. *Russell*; but, in my opinion, apart from the point under the Building Societies Act of 1894, the decision of Kekewich, J., was wrong.

A. L. SMITH, L.J.—Kekewich, J., arrived at the conclusion on this case by holding that a deed of dissolution was equivalent to a winding-up order of this court. There is no authority to support that view, and, after what has been said, I need add nothing. On the other point, under section 10 of the Building Societies Act of 1894, I read that as meaning that after the 25th of August, 1894, no matter what any court has said about dissolution or winding up, from and after that day when any society is being dissolved or wound up no advanced member shall be called upon to pay his debt otherwise than according to his contract.

Appeal allowed.

Solicitors for the appellant, *Halses & Co.*, for *J. F. Read*, Liverpool.

Solicitors for the respondents, *Alfred Stephenson*, Liverpool; *R. J. Jones & Co.*, Liverpool.

High Court of Justice.

Chan. Div. Stirling, J. — Nov. 13; Dec. 19.

In re BOWLING AND WELBY'S CONTRACT. (*a*.)

Company—Building society unregistered—Winding-up and vesting orders made without jurisdiction—Vendor and purchaser—Sale by liquidator of society—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.

The court has no jurisdiction, under section 199 *of the Companies Act of* 1862, *to make an order for the winding up of a building society, unregistered under the Building Societies Act of* 1874, *where the society does not consist of seven members, and any such order is void.*

A liquidator appointed in pursuance of such an order, cannot make a good title to property of the society, and cannot, therefore, force such a title upon a purchaser.

Summons under the Vendor and Purchaser Act, 1874.

The London and Yorkshire Permanent Benefit Building Society was established in 1851, under the Building Societies Act of 1836, and was never incorporated under the Building Societies Act of 1874.

On the 27th of July, 1893, the judge of the Leeds County Court made an order under the Companies Acts, 1862-1890, for the compulsory winding up of the society, and by another order of the same court, dated the 30th of November, 1893, all the property of the society was vested in the plaintiff as official liquidator.

The defendant, the purchaser, had contracted with the plaintiff, as such official liquidator, to buy certain freehold property of the society, but refused to accept the title offered by the liquidator, on the ground that at the date of the winding-up order there were not seven members of the society, that the said order and the vesting order were consequently void, as being made without jurisdiction, and that the liquidator could not make a good title.

At the date of the winding-up order the register of the society did not contain the names of seven members, but the list of contributories included four living members and the personal representatives of deceased members and the trustee in bankruptcy of a bankrupt member.

This was a summons by the plaintiff, the liquidator,

(*a*.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

to determine the validity of the defendant's objection.

Percy Wheeler, for the plaintiff.—The winding-up order of the county court judge cannot now be appealed from, and hence the objection cannot be sustained. The point as to jurisdiction was raised before the judge and cannot be raised now. Consequently this court cannot interfere by way of prohibition.

Dibdin, for the defendant.

STIRLING, J., delivered judgment on the 19th of December. After stating the facts, his lordship proceeded as follows:—It seems to me very improbable that this transaction will ever be questioned, and if the liquidator were to convey the legal estate to the purchaser, I think the latter would get a good holding title. I suggested at the hearing that this should be done, but I am informed that the parties cannot come to an agreement, and that it is consequently necessary for me to decide the point. The Act itself is plain. [His lordship read that part of section 199 of the Companies Act of 1862 relevant to the point, and continued:—] This seems to apply only to companies consisting of seven or more members, and this was the opinion also of Jessel, M.R., in *In re Bolton Benefit Loan Society*, 28 W. R. 164, 12 Ch. D. 679. Hence it would appear in the present case that if there were not seven members at the date of the winding-up order there was no jurisdiction to make that order, and if there is no jurisdiction to make a winding-up order it is clear that there is none to make a vesting order, and consequently the liquidator could not convey the legal estate, and to such conveyance the purchaser is entitled. Therefore I think the latter is certainly entitled to raise this objection. Now, were there more than seven members? The books and register were irregularly kept, but I do not think that the society can escape from the jurisdiction of the court simply because it has omitted to keep a proper register, and if at the date of the winding-up order there were more than seven members whose names ought to have been on the register, I am of opinion that the court had jurisdiction: *In re South London Fish Market Co.*, 37 W. R. 3, 39 Ch. D. 324. The list of contributories has been settled, and it shows four living members, besides the legal personal representatives of deceased members. These latter are properly on the list of contributories (sections 76, 77, and 200 of the Companies Act of 1862), but it does not follow that they were therefore members. This question depends upon whether they could against their will have been placed on the register of members before the winding up. Now under the rules of this particular society the shareholders have attached to their shares the obligation of paying up their subscriptions, and that rule clearly negatives the idea that a legal personal representative of a deceased investing member could be put on the register. Hence I think these legal personal representatives are not members, and this view is in strict accordance with the judgment of Jessel, M.R., in the *Bolton Benefit Society's case* to which I have referred above. Under these circumstances I think that there was no jurisdiction to make the winding-up order, and the purchaser's objection that the liquidator had no title is well founded.

Summons dismissed.

Solicitors, *A. Scott Lawson*, for *Jones, Son, & Tassett*, Leeds; *Vincent & Vincent*, for *North & Sons*, Leeds.

Chan. Div.
Kekewich, J. } Dec 15.

In re DAVENPORT.
TURNER *v.* KING. (*a.*)

Married woman—Gift for life for separate use and after power of appointment by will, to her executors, administrators, and assigns—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

Where property is held on trust for a woman married since the Married Women's Property Act, 1882, *for life for her separate use, and in default of the exercise by her of a general power of appointment, then for her executors, administrators, or assigns, the married woman, on releasing the power of appointment, becomes entitled absolutely to the property.*

Under the trusts of a will the testator's two daughters were entitled to the income of certain property in equal shares during their lives for their separate use. The capital of each share was, subject to a power of appointment by will given to each daughter respectively, held by the trustees on trust to assign and pay over according to the appointment; and in default thereof to the executors, administrators, or assigns of the ladies respectively. The testator died prior to the Married Women's Property Act, 1882, and both daughters married subsequently to the Act without having released their powers of appointment. This was an application on their behalf, without the concurrence of their husbands, for a declaration that they were absolutely entitled to their respective shares.

Ryland, for the applicants.—The ladies are absolutely entitled by virtue of the Married Women's Property Act, 1882: *Page* v. *Soper*, 11 Hare, 321; *Devall* v. *Dickens*, 9 Jur. 550; *In re Onslow, Plowden* v. *Gayford*, 36 W. R. 883, 39 Ch. D. 622.

Stewart Smith, for the trustees.—All prior applications have been by unmarried women or married women who have power to appoint by will and deed. The only interest taken is under the direction to pay.

KEKEWICH, J.—The main point in this case has lately been of not infrequent occurrence. Apart even from the decision of *In re Onslow, Plowden* v. *Gayford*, which has been cited, the Act itself solves the difficulties. I do not think there is any importance to be attached to the distinction between a direct gift and a direction to pay. It is clear that the ultimate gift is equivalent to a gift to the daughters themselves. [His lordship, after reading the gift in the will, proceeded:—] Before the Act those interests would not coalesce (see *Hanchett* v. *Briscoe*, 22 Beav. 503), but the Married Women's Property Act, 1882, has removed the difficulty, as now by that Act the reversion is hers for her separate use. The policy of the Act is to make the married woman a *feme sole*, and in my opinion the interests do coalesce and she may do as she pleases. It does away to a certain extent with the doctrine of *Whittle* v. *Henning*, 2 Ph. 731, but I should fail to carry out the Act if I did not consider her entitled. I hold that the ladies, on releasing their powers of appointment, are absolutely entitled to the property.

Solicitors, *Huxham & Rawlinson; Austin & Austin.*

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

Q. B. Div.
(Lawrance and Kennedy, JJ.) Jan. 15, 16.

HADLEY & SON v. BEEDOM (LEICESTER AND ANOTHER, *Claimants*). (*a*.)

Bill of sale—Assignment for the benefit of creditors—Registration — Time limit for assenting to deed—Notice—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

A deed of assignment is not prevented from coming within the exception in section 4 of the Bills of Sale Act, 1878, *by reason only that a time limit is imposed within which creditors must assent to it in order to gain the benefit of its provisions, so long as the deed provides for notice to the creditors of the existence of the deed.*

A deed of assignment in favour of the creditors of a debtor provided that any creditor who should not signify his assent to the deed within three months from the date of its registration under the Deeds of Assignment Act, 1887, *he having received actual notice thereof, should be excluded from acquiring any benefit under the deed. It further provided for the exclusion of creditors who, having received notice from the trustees, should not assent within seven days of such notice.*

Held, the deed was valid, notwithstanding it had not been registered under the Bills of Sale Act, 1878.

Appeal from the decision of his Honour Judge Sir Richard Harington, Bart., the county court judge at Worcester.

The defendant, who was insolvent, executed a deed of assignment for the benefit of his creditors, whereby he assigned all his personal property to trustees in trust to pay the costs of the composition and 7s. 6d. in the pound to all his creditors, and to repay the surplus (if any) to the debtor. There was a proviso in the deed that no creditor should be entitled to any benefit under the deed unless he should assent thereto within three months of the registration thereof, he having had actual notice thereof. There was a further proviso which empowered the trustees at any time to call upon any creditor to assent within seven days of notice calling upon him to assent; and (by notice) to exclude such creditors who failed to do so from all benefit under the deed. Within the period of three months from registration the trustees had power to recall any exclusion they had notified; but after that time had elapsed their power of admitting non-assenting creditors ceased.

This deed was registered under the Deeds of Assignment Act, 1887, but not under the Bills of Sale Act.

Messrs. Hadley & Son were creditors of the debtor to the amount of £20, who had before the execution of the deed obtained a judgment for that amount. Declining to assent to the deed of assignment, they proceeded to enforce their judgment by execution upon the debtor's goods. Upon an interpleader, in which the trustees under the deed were the claimants, the question arose whether the deed was a bill of sale and void for want of registration, or whether it came within the exception in section 4 of the Bills of Sale Act, 1878, as being an "assignment for the benefit of the creditors of the person making or giving the same."

The county court judge held that it did not come within that exception, and that the deed was void.

The trustees of the deed appealed.

Corner, for the appellants.—The question here is whether a deed in which there is a condition that any creditor must, in order to benefit by it, come in within seven days after notice, is a deed for the benefit of the creditors. The test is whether every creditor has the right to participate in the deed and the opportunity of doing so: *General Furnishing Co.* v. *Venn*, 11 W. R. 756; *Paine* v. *Matthews*, 53 L. T. N. S. 872, 34 W. R. Dig. 24; *Ashford* v. *Tuite*, 7 Ir. C. L. R. 91. The exclusion in the deed of creditors not assenting within three months is no objection to its validity. It is equivalent to the right of the trustees in bankruptcy to compel creditors to prove their debts within a prescribed time. In this case it cannot be contended that the execution creditor suffered any hardship. He knew of the deed, and it would be highly inconvenient if some limit of time were not allowed to be fixed so as to prevent the possibility of small creditors holding back and thus hindering the operation of the deed.

Cavanagh, for the respondents, the execution creditors.—There are two objections to the deed which prevent it coming within the exception: (1) It provides for the surplus being paid back by the trustees to the debtor, so that if any creditor did not come in within three months his share was to be returned to the debtor. Where nothing is said as to the surplus the rule is that unclaimed dividends should be divided among the assenting creditors, until their demands are satisfied, rather than that they should go to the debtor: *R.* v. *Creese*, 22 W. R. 375, 2 C. C. R. 105; *Wild* v. *Banning*, L. R. 2 Eq. 577, 14 W. R. Ch. Dig. 22. (2) The deed provides that those who do not assent within three months shall be excluded. The deed is, therefore, only for the benefit of those who assent to it within a certain time. It has been held under section 192 of the Bankruptcy Act, 1861, that, if a composition deed is for the benefit of those creditors only who came in within a certain limited time, the deed is bad: *Berridge* v. *Abbott*, 13 C. B. N. S. 507, 11 W. R. C. L. Dig. 14; *Ex parte Morgan*, 11 W. R. 316; *Dewhurst* v. *Kershaw*, 11 W. R. 315; *Giddings* v. *Penning*, 14 W. R. 940, L. R. 1 Ex. 325.

Corner, in reply.—The cases under section 192 of the Bankruptcy Act do not apply here. Under that section if the debtor executed a deed assented to by three-fourths of the creditors the rest were absolutely excluded from proving their debt at all. Therefore the section had to be most strictly construed.

LAWRANCE, J.—It seems to me that the point in this case is a short one, though not without difficulty. I think the county court judge was wrong. The question is whether this deed of assignment comes within the exception of the 4th section, that is to say, whether it is a deed made for the benefit of all the creditors. It is said not to come within the exception and to be invalid for want of registration because it excludes a certain class of creditors, namely, those who do not assent within three months. It is abundantly clear that, if any creditor had desired to be a party to the deed, it was possible for him to be so. The only question is whether the creditors are all equally treated. If every creditor can avail himself of the deed the result of the whole of the cases is that the deed is good without registration. Has there, then, been any exclusion because a time limit of three months was fixed wherein creditors must assent? The Irish case (*Ashford* v. *Tuite*), which I cannot dissent from, is clear on this point. The cases cited to the contrary are cases where some persons have been absolutely excluded.

KENNEDY, J.—I am of the same opinion. The point deserves the full argument that it has received at the hands of counsel, especially as we differ from the opinion of the county court judge. The question

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

in dispute is whether this is a deed within the exception of the Act of 1878. If the deed is not for the benefit of all the creditors it is not within the exception. If the deed excludes any class, then it is not within the exception. But when you use the terms "for the benefit of all the creditors" you must remember that a man cannot have a benefit forced upon him. So if you have a deed which gives the benefit of its provisions to everyone who chooses, and if the deed provides that each creditor shall receive notice of its existence, so that all have an opportunity of coming in, then the deed is for the benefit of all the creditors. This deed, it is true, contains a time limit within which a creditor must assent in order to reap the benefits of the instrument, and if that time limit had not been accompanied by a provision for notice I will not say how I would have decided. That would be quite a different question. But here, "no creditor shall be entitled to any benefit under these presents unless he shall signify his assent to these presents within three months from the date of the registration of these presents, he having had actual notice of these presents." Therefore no one is excluded who does not wish to be excluded. That is the answer to the county court judge's decision. The learned judge, though he realizes that the time limit is accompanied by a provision for notice, nevertheless objects to the time limit altogether. We must assume that where there is a provision for the trustee to call upon a creditor to assent within 7 days, he will act reasonably; and if a creditor only received notice a few hours before the three months were up I doubt whether in such a case he would be excluded. I construe the notice to mean a reasonable notice.

I prefer to decide this case without reference to authority. It is not said that there is a decision on the Bills of Sale Act contrary to this view. *Ashford* v. *Tuite* is in point, in which it was held that a deed was for the benefit of the creditors where the deed was to be for the benefit of those who should execute within one month. It did not even provide for notice, but it was nevertheless held to be a good deed. In that case Monahan, C.J., said, "But it may be asked, does not the provision that this deed was to be executed within a certain number of days show that it was not to have been for the benefit of all the creditors? We are of opinion that it does not, and that the instrument may have been prepared and executed in such a way as that all the creditors might have taken advantage of it if they chose to do so; that it came within the exception in the 7th section (17 & 18 Vict. c. 55), and therefore that the verdict for the defendant should be changed into a verdict for the plaintiff." It is suggested that the *General Furnishing Co.* v. *Vean* is contrary to *Ashford* v. *Tuite*. I have read that judgment carefully, and I can see in it nothing contrary to the principle I have laid down, for in the Irish case there was no provision for notice. I am therefore of opinion that I cannot agree with the learned county court judge. As I understand that this was the only point dealt with in the judgment, it must be reversed.

Judgment reversed.

Solicitors for the appellants, *Prior, Church, & Adams*, for *Matthews & Campbell*, Worcester.

Solicitor for the respondents, *Thomas G. Dobbs*.

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 13.

GREAT CLACTON LOCAL BOARD (*Appellants*) *v.* YOUNG & SONS (*Respondents*). (*a.*)

Local government—Private street works—New street—Houses on one side only—Footpath on that side—Cost of footpath—Apportionment—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 10.

Where proposed works under the Private Street Works Act, 1892, *consist of a roadway in a new street having houses on one side only, and a footpath on the side where the houses are, the expenses of this footpath, as well as the expenses of the roadway, are to be apportioned, under section* 10 *of the Act, amongst the owners of premises abutting on both sides of the street.*

Case stated by justices of the peace for the county of Essex, sitting at a special session holden at Thorpe, on the 26th of April, 1894, for the purpose of hearing and determining certain objections made by the respondents, Young & Sons, under section 7 of the Private Street Works Act, 1892.

The Great Clacton Local Board (the appellants) passed a resolution in January, 1894, that under section 6 of the Private Street Works Act, 1892, the "Marine Parade" be sewered, levelled, paved, metalled, flagged, and made good, and their surveyor duly prepared a specification of the proposed works, with plans and sections, and an estimate of the probable expenses, and a provisional apportionment of the estimated expenses among the premises fronting, adjoining, or abutting on the Marine Parade, and these were all submitted to, and approved of by, the local board, who duly published the same.

It appeared from the plans and estimates that it was proposed to make up the said street with a thirty-six feet roadway and a twelve feet footpath on the north side only; and as to the footpath only, the surveyor had apportioned the expenses of paving and kerbing it among the owners of premises fronting, adjoining, or abutting on the north side of the street only.

The Marine Parade had buildings on the north side only; on the south side it was bounded for the most part by land which extended to the edge of the cliff, and was the property of the Great Clacton Local Board. The expenses of making up the whole of the thirty-six feet roadway (as distinguished from the footpath) and all the other expenses of the proposed works were apportioned among the owners of the properties abutting upon both sides of the said street, including the local board as owners of the adjoining land.

It was contended before the justices by the respondents, as the owners of premises abutting on the Marine Parade on the north side, that the provisional apportionment was incorrect and made on a wrong principle; and that the whole of the expenses of the works—the footpath as well as the roadway—should have been added together and apportioned among all the owners of premises on both sides of the street according to the frontage of their respective premises, and that it was wrong to separate the expenses of the footpath, and to apportion such expenses upon the owners of premises on the north side only.

It was contended for the appellants, upon the authority of *The Wakefield Sanitary Authority* v. *Mander*, 28 W. R. 922, 5 C. P. D. 248, and other cases, that under the Private Street Works Act, 1892,

(*a.*) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

if an urban authority paved a footpath on one side of a street only, whether they made up the rest of the street at the same time or not, the cost of such footpath must be apportioned among the owners of that side only, and that the provisional apportionment was made on a correct principle.

The justices found that the provisional apportionment was incorrect, and that the expenses of the footpath on the north side ought not to have been separately apportioned among the owners of the premises fronting or abutting on the north side only, and they ordered the apportionment to be amended so that the sums apportioned upon the objectors be altered to the amounts which would have been payable by them if the total expenses of the proposed works were apportioned among all the owners of the premises fronting, adjoining, or abutting on the Marine Parade.

The question now was whether the order of the justices was correct in point of law.

The Private Street Works Act, 1892 (55 & 56 Vict. c. 57), provides: section 6, "Where any street, or part of a street, is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may resolve . . . to sewer, level, pave, &c., such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned . . . on the premises fronting, adjoining, or abutting on such street or part of a street"; section 10, "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises," &c.

Lawson Walton, Q.C. (*A. Macmorran* with him), for the appellants.—The provisional apportionment made by the surveyor was right. The question is whether, under section 10 of the Act, the cost of the construction of the footpath can be separated from the cost of the roadway. We submit that it can and ought to be separated, and that the cost of the footpath ought to be thrown entirely on the premises on the north side only, as it was made on the north side only and for the sole benefit of the owners on that side. The case of *Wakefield Sanitary Authority* v. *Mander* is an authority for this contention, as it was there held that where a footpath was made upon one side of a street, the owners on that side had to bear the whole cost.

Fleetwood Pritchard, for the respondents.—The justices were correct in apportioning the cost of the footpath on both sides of the street. The Wakefield case was decided on a section of the Public Health Act, 1875, which is different from the section of the present Act. The case of *The Vestry of Paddington* v. *The North Metropolitan Railway and Canal Co.*, 42 W. R. 223, [1894] 1 Q. B. 633, is similar to the present case, and there it was decided that the cost of flagging a footway, under the Metropolis Management Acts, ought to be borne by the owners on both sides of the street.

Lawson Walton, Q.C., replied.

POLLOCK, B.—This was a new place, and new roads and paths were required; and in apportioning the cost of the roadway and the cost of the footpath in respect of the street in question the local authority treated the cost of the footpath separately from the cost of the roadway, and they apportioned the cost of the footpath on the owners of the one side only, but this was set aside by the justices.

The question whether the justices were right in their decision depends on the true construction of section 10 of the Private Street Works Act, 1892. Reading that section, we see that the apportionment is to be against the "premises fronting, adjoining, or abutting on the street or part of a street," &c. Now this was a new street, footpath, and road equally, and it seems to me that the matter ought to be dealt with as a whole, and that all the owners whose premises abut on the street are liable to their share of the whole expenses. With regard to the *Wakefield case*, the decision there was upon different words from those used in the present Act, and therefore that decision does not govern the present case. I think, therefore, that this appeal must be dismissed with costs.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Chamberlayne & Short.*

Solicitors for the respondents, *Young & Sons.*

Q. B. Div.
(Mathew and Charles, JJ.) Nov. 5.

REG. v. LIVERPOOL REVISING BARRISTER AND CHADWICK. (*a*.)

Election law — Parliamentary franchise — Borough — Duplicate entries—Voter's notice of selection—Form of notice—Validity—Appeal from decision of revising barrister—Parliamentary Registration Act, 1843 (6 & 7 *Vict. c.* 18), *ss.* 17, 18, 39, 42—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 14—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 5—*Registration Order*, 1889, *Schedule* 3, *Form* (*P*)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 44.

There is no appeal from the decision of a revising barrister upon the validity of a notice given by a voter under the Parliamentary and Municipal Registration Act, 1878, *s.* 28, *sub-section* 14, *selecting which of two duplicate entries of his name upon the lists of voters for the borough he will retain for voting, at a parliamentary election.*

Rule *nisi* calling upon the revising barrister for the parliamentary and municipal borough of Liverpool and the respondent, Charles Chadwick, to show cause why an appeal should not be entertained, and a case stated, in the matter of an objection taken to the name of Chadwick being expunged from or starred on the lists of electors for the Kirkdale parliamentary division of the said borough.

The facts upon which the application for a rule nisi was granted were as follows:—

The name of the respondent, Charles Chadwick, was entered more than once on the lists of parliamentary voters for the borough—namely, in respect of his occupation of a house, No. 38, Walton-road, upon the list for the Kirkdale division, and in respect of his occupation of a house, No. 6, Temple-lane, upon the list for the Abercromby division.

Chadwick desired to have his name retained in the list for the Abercromby division, for the purpose of voting at parliamentary elections; and that as regards the entry in the list for the Kirkdale division his name should be marked by the revising barrister for

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

other purposes only, in accordance with section 44, sub-section 6, of the Local Government Act, 1894. He accordingly filled up and signed the following notice, and caused the same to be handed to the revising barrister at the opening of the first court for the revision of the lists of electors for the borough: "To the revising barrister of the parliamentary borough of Liverpool. I, the undersigned, being on the list of voters for two or more divisions of the parliamentary borough of Liverpool do hereby select the following: viz.—for parliamentary voting—Abercromby parliamentary division No. 7, polling district No. 29, No. on list 1,724. (Signed) CHARLES CHADWICK. Place of abode, 38, Walton-road, polling district No. 3, No. on list, 1,906." This notice, together with other notices of selection, was permitted by the revising barrister to be inspected by the agent or solicitor of the opposing party at the time such notice was handed in, but no objection was made to it upon that occasion. At a subsequent sitting of the court application was made to the revising barrister by the agent of the respondent Chadwick that the entry of his name in the list for the Abercromby Division might be retained for parliamentary purposes, and that the entry in the list for the Kirkdale Division might be marked for other purposes only. This application was opposed by another voter in the borough on the ground that the notice of selection was insufficient and was not in the form prescribed by the Registration Acts and the Registration Order, 1889, and that, therefore, the revising barrister was bound to retain for parliamentary purposes the entry in respect of the voter's place of abode (viz., the entry in the Kirkdale division) and to star the entry in the Abercromby division.

The revising barrister held that the notice of selection was sufficient, and he marked the duplicate entries in the manner requested by the application. The objector thereupon gave written notice to the barrister of his desire to appeal, but the barrister refused to state a case upon the point for the opinion of the High Court. This rule *nisi* for a *mandamus* was then obtained on behalf of the objector.

The following form is contained in Schedule 3 of the Registration Order, 1889 (made under the Local Government Act, 1888, s. 76, sub-section 7):—

"FORM (P).—Form of elector's notice of selection in the case of duplicate entries.

"To the revising barrister for the parliamentary borough of . I hereby elect to vote in respect of the following entry in division of the list of parliamentary electors [*or* burgesses or county electors] for the parish [*or* township] of . . ."

Name of elector in full, surname being first.	Place of abode.	Nature of qualification.	Description of qualifying property.

(Signed) A. B.

"Note.—The foregoing form should be filled up with a copy of the entry in the list of electors which the elector wishes to have retained for voting. The notice should specify the list, and, if the list is made out in divisions, the division in which the entry referred to appears."

Sir H. James, Q.C., and *W. F. Taylor*, for the respondent Chadwick, shewed cause.—There is no appeal from the decision of the revising barrister that the notice was sufficient. The voter has a right to make a selection of the entry to be retained for parliamentary voting, and if he does not make such a selection the barrister must retain the entry in respect of his place of abode. Here the voter has given his notice of selection; it is substantially in agreement with Form (P) of the Registration Order, and gives more information than that form, and the barrister has held it to be sufficient. The only appeal from the decision of a revising barrister is that given by section 42 of the Parliamentary Registration Act, 1843: The objector in the present case is not within that section, which relates to appeals by persons who have given notice of objection according to the provisions of that Act. There was no objection to the voter's name being retained in some list, and the voter has selected the entry to be retained by giving a notice which the barrister has considered sufficient, and which no other person has a right even to see.

He referred to *Arnold* v. *Clerk of the Peace for Kesteven*, 65 L. T. 618.

Joseph Walton, Q.C., and *W. N. Butler*, for the objector in support of the rule.—The objector had a right to oppose the retention of the voter's name in one list rather than in the other, and reading the Act of 1843 with the later Registration Acts there is a right of appeal against the decision of the barrister on the notice of selection. That notice was in substance a claim by the voter to have his name entered as an effective voter on the Abercromby list, and this can be objected to, and if a point of law material to the objection arises, there is a right to appeal.

MATHEW, J.—This a case of importance, because the object of the application is to limit the right of a voter to elect for which of two or more qualifications he will choose to vote. I think it is clear that no such right of appeal as that contended for by the objector, is given by the 42nd section of the Registration Act, 1843. That section provides: "That it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case," to appeal in the manner specified by the section. What are "the provisions hereinbefore contained"? So far as the making of objections is concerned, we find them in the 17th and 18th, and also in the 39th sections of the Act. The 17th section provides that every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person, as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for the same city or borough; and every person so objecting shall give, or cause to be given, a notice to the overseers who shall have made out the list in which the name of the person so objected to shall have been inserted; and every person so objecting shall also give or cause to be left at the place of abode of the person objected to a notice; and every notice of objection shall be signed by the person objecting. Then the 18th section provides that the overseers shall include the names of all persons so objected to in a list, and shall sign the list and cause copies thereof to be written or printed, and shall publish the list of all persons objected to.

The 39th section permits a voter to oppose the claim of a person whose name has been omitted from a list to have it inserted in it. These are the provisions referred to in the 42nd section, so far as objections are concerned, and there is nothing in the section to give an appeal from a decision of a revising barrister upon a point of law in the case of any objection made otherwise than under those provisions.

It was said, however, that subsequent legislation has imposed upon this court the duty and the obligation of hearing appeals in a number of other cases. The first statute referred to is the Parliamentary and Municipal Registration Act, 1878, section 28, sub-section 14, of which gives a voter whose name appears more than once on the lists the right to select the entry to be retained for voting. I can see nothing in that provision as to any appeal from the determination of the revising barrister.

It was also said that in some way under the 5th section of the Registration Act, 1885, a right of appeal arose; but I am unable to see anything in that section as to appeals, and in my judgment that section has no application here.

The circumstances of this case are that an objection was made before the revising barrister to the right of a voter to select the entry of his name in respect of his place of business to be retained for voting, instead of the entry in respect of his place of abode. The voter had delivered a notice of selection to the revising barrister, and the revising barrister considered the notice, and, in my judgment, rightly, acted upon it, and allowed the voter to elect. It is said that the revising barrister ought not to have done so, but ought to have treated the notice given by the voter as insufficient. In my opinion, this was a matter entirely between the revising barrister and the voter. The revising barrister was not bound to hand the notice given by the voter to any other person, and no other person had any right to see it. It was a matter solely for the decision of the revising barrister, and I find nothing in any statute to give an appeal from his decision.

CHARLES, J.—I am of the same opinion. I think that there is no appeal in cases of this description. The right of appeal from a revising barrister is still governed by the 42nd section of the Parliamentary Registration Act, 1843, and exists only with reference to the voters there mentioned. A voter on the list of voters may, under section 17 of that Act, object to the name of another person already on the list being inserted in the list, and if he does he must give notice to the overseers and to the person objected to, and a list of the persons objected to must be published.

By the 39th section, again, a voter is entitled to oppose the claim of any person whose name has been omitted from the list to have it inserted. There, in the case of a person not on the list, the machinery for taking objection is quite different, and the person claiming to have his name inserted is not entitled, as a person is whose name is on the list, to notice of objection before the sitting of the court; but the person intending to oppose the claim may give notice in writing in the court to the revising barrister of his intention to oppose the claim, and is thereupon entitled to do so. In such a case there would be an appeal under the 42nd section. I fail, however, to see how the voter in the present case can be considered as a person making a claim to have his name inserted in the list. He was a person whose name was already inserted in the list, and who therefore had a right, in the absence of any notice of objection being served upon him, to assume that his name was duly on the list, and yet it is suggested that he should be placed in the disadvantageous position of a person whose name is not upon the list at all.

By the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-section 14, where the name of a person appears more than once upon a list, the revising barrister has to inquire whether the entries relate to the same person; and if they prove to relate to the same person he retains one of the entries for voting, and places against the other or others a note to the effect that the person is not entitled to a vote in respect to the qualification there referred to. Then the section goes on to empower the person to select the entry to be retained for voting by notice in writing delivered to the revising barrister. This was done in the present case. The voter delivered a notice to the revising barrister that he wished to vote for his place of business, and not for his place of abode. It thereupon became the duty of the revising barrister to mark the list accordingly. Yet it is said that the Act of 1843 empowers a properly-qualified person to object and to appeal under the 42nd section of the Act against the decision of the revising barrister. I see no section in the Act which gives any such right. The objector cannot rely upon the 39th section, because the person objected to was already on the list, and I do not think that he can in any sense be deemed to be a claimant. It follows that the objector cannot avail himself of the 42nd section, and the rule must therefore be discharged.

Solicitors for the objector, *Crowders & Vizard*, for *George J. Lynskey*, Liverpool.

Solicitors for the respondent Chadwick, *Pritchard, Englefield, & Co.*, for *Barrell, Rodway, & Co.*, Liverpool.

C. C. R.
(Lord Russell of Killowen, C.J., Hawkins, Charles, Wright, and Collins, JJ.) — Nov. 10, 17.

REG. v. BROWN. (a.)

Gaming—Betting Act, 1853 (16 & 17 *Vict. c.* 119), s. 1, 3—*Using a house for betting with persons "resorting thereto"—Bets made by letter or telegram—Summary Jurisdiction Acts—Practice—Election to be tried by jury—Indictment for offences not included in summons before justices—Indictable Offences Act*, 18[illegible] (11 & 12 *Vict. c.* 42), *s.* 25—*Summary Jurisdiction Acts*, 1848 (11 & 12 *Vict. c.* 43) *and* 1879 (42 & [illegible] *Vict. c.* 49)—*Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35), *s.* 1.

A defendant was charged before a court of summary jurisdiction, under section 1 *of the Betting Act*, 18[illegible] *with having used rooms in a certain house for the purpose of betting with persons resorting thereto. He elected to be tried by a jury, and the magistrates, after hearing evidence, committed him for trial.*

The first count of the indictment charged that the defendant, being occupier of the rooms in question, used them for the purpose of betting with persons resorting thereto. The second count was framed under the latter part of the section, and charged him with having used the rooms for the purpose of money being received by him and on his behalf upon an understanding, promise, and agreement to pay thereafter money on a contingency of and relating to horse-races. It

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

proved that persons had gone to the house for the purpose of paying money to the defendant under the circumstances alleged in the second count. It was also proved that the defendant kept the house for the purpose of betting with persons who wrote or telegraphed to him, asking him to make bets with them. The recorder directed the jury upon the first count that if persons were in the habit of sending letters and telegrams to the house asking the defendant to make bets with them, such persons resorted to the house within the meaning of section 1 *of the Betting Act,* 1853, *and the jury might find the defendant guilty of using the house for betting with persons resorting thereto. The jury convicted the defendant on the first and second counts.*

Held, that, even if the indictment contained charges differing from those upon which the defendant was summoned before the magistrates (which the court did not decide), the indictment was not thereby invalidated, it being lawful, after the accused had elected to be tried by a jury, to indict him for any indictable offence disclosed by the depositions, and that the conviction on the second count was good.

Held, also, that the word "resorting" must be construed in its ordinary sense, and that the sending of letters and telegrams to the house asking the defendant to make bets was not a resorting to the house within the meaning of the section, and that, the recorder having misdirected the jury on this point, the conviction on the first count was bad.

Quære, *whether section* 1 *of the Betting Act,* 1853, *creates two distinct offences, and whether separate penalties can be imposed for acts done upon the same day in violation of the provisions of the earlier and the latter parts of that section.*

Case stated by the Recorder of Plymouth. The facts were as follows:—

The defendant Charles Thomas Brown was summoned before a court of summary jurisdiction in the borough of Plymouth to answer an information, under section 1 of the Betting Act, 1853, that he, on the 17th and 18th days of April, 1894, being then occupier of a certain house situate at 11, Alfred-street, "there unlawfully did use the said house for the purpose of betting with persons resorting thereto upon certain events or contingencies of or relating to certain horse-races, contrary to the form of the statute," &c.

On appearing before the court of summary jurisdiction the defendant elected to be tried by a jury. The magistrates heard evidence and committed him for trial.

The defendant was accordingly indicted at the Midsummer Quarter Sessions for the Borough of Plymouth, and a true bill was found by the grand jury. The indictment recited that the defendant had been charged before the magistrates "with offences, to wit, the offences hereinafter in several counts charged and stated," and had claimed to be tried by a jury.

The first count alleged that the defendant was the occupier of a house and rooms numbered 11, Alfred-street, and that the defendant, "being such occupier as aforesaid, on the 17th and 18th days of April, 1894, did open, keep, and use the said rooms in the said house for the purpose of betting with persons resorting thereto, to the great damage and common nuisance of all the liege subjects of our lady the Queen . . . against the form of the statute, &c."

The second count alleged that the defendant, being the occupier of the house and rooms mentioned in the first count, on the days therein mentioned "unlawfully did open, keep, and use the said rooms in the said house for the purpose of money being received by and on behalf of him, the said defendant, then being the said person occupying the said house as aforesaid, as and for the consideration for, an undertaking, promise, and agreement to pay thereafter money on the contingency of and relating to horse-races, to the great damage," &c.

The third and fourth counts were similar to the first and second counts, but alleged that the defendant "used" the rooms in question.

Before the defendant pleaded, it was objected that the indictment was bad, because each count alleged a different offence from that with which the defendant was charged before the magistrates, or because it contained counts for other offences than that for which the defendant was so charged.

The evidence taken before the magistrates was, in the opinion of the recorder, sufficient to support all the four counts in the indictments, and the recorder held that the indictment was good, but agreed to state a case for the opinion of this court.

The defendant then pleaded not guilty, and was tried.

It was proved that the defendant was occupier of the house in question, and that he used the house for the purpose of betting with any persons who wrote or telegraphed to him asking him to bet with them. It was also proved that he used the house for the purpose of money being received on his behalf as and for the consideration for an agreement to pay thereafter money on the event of a horse-race. There was no evidence that any person had actually gone to the house for the purpose of betting with the defendant other than those who had gone to pay money under the circumstances described in the second count of the indictment.

It was objected that there was no evidence of the defendant having betted with persons resorting to the house.

The recorder directed the jury that it was not necessary for a conviction under the first count of this indictment that the defendant's house should have been used for the purpose of betting with persons who physically came to the house, but that if the house was used by the defendant as an office to which any person who wished to bet with him were to send their communications, and if persons were in the habit of sending letters and telegrams to him there, directing him to make bets with them, such persons resorted to the house within the meaning of the Act; and the jury might find the defendant guilty of using the house for betting with persons resorting thereto; and he directed the jury to give their verdict separately upon the first and second counts.

The jury found the defendant guilty upon the first count and also upon the second count, and the recorder sentenced him to a fine of £300 on the first count and to a fine of £100 on the second count.

It was objected on behalf of the defendant that the recorder had no jurisdiction to sentence the defendant to a greater fine than £100, or to more than one penalty.

The questions for the court were:—

1. Whether the indictment was bad for not alleging the same offence as that in respect of which the defendant had claimed to be tried by a jury, or for containing more than one count, or for containing a count differing from the charge upon which the defendant had been brought before the magistrates?

2. Whether the defendant could be guilty of using his house for betting with persons resorting thereto, although such persons only sent letters and telegrams to the house, and did not personally come there?

3. Whether the recorder had jurisdiction to fine the defendant more than one penalty of £100?

If the court should answer the first question in the

affirmative, the judgment was to be reversed and the defendant acquitted.

If the court should answer the first question in the negative, and either the second or third question also in the negative, the defendant was to be acquitted on the first count, and judgment was to stand upon the second count, that the defendant be fined £100.

The Betting Act, 1853, s. 1, provides that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, &c., as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, &c., or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Section 2 declares that any such house, room, &c., so used is to be deemed a common gaming-house within the Gaming Act, 1845 (8 & 9 Vict. c. 109).

Section 3 provides that any owner or occupier of, or person using, a house, room, &c., "for the purposes hereinbefore mentioned, or either of them, . . . shall, on summary conviction thereof before any two justices of the peace, be liable" to pay a penalty not exceeding £100, and to pay costs, and in default of such payment, or, in the first instance, may be imprisoned for not more than six months, with or without hard labour.

Charles Gill (*Duke* with him), for the defendant.—The first count is bad. The recorder misdirected the jury by telling them that a physical resorting to the house need not be proved in order to establish an offence under the first part of the section. The word "resorting" must be used in its ordinary sense, there being nothing in the context to require any other meaning to be put upon it: *Hornsey Local Board* v. *Monarch Investment Building Society*, 38 W. R. 85, 24 Q. B. D. 1. The ordinary meaning of "resort" is "to go to," "to repair to," and it is used here in its ordinary physical sense. Both the first and second counts are bad, because the defendant was not indicted for the same offence for which he was summoned before the magistrates, and this invalidates the indictment. An information can relate to one offence only: 11 & 12 Vict. c. 43, s. 10; and the one offence to which this information related was that of using the house for the purpose of betting with persons resorting thereto. On the accused electing to be tried by a jury that offence, and that offence only, became indictable. The offence alleged in the second count is a different offence, and is within the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17), and those provisions ought to have been complied with before the bill was sent before the grand jury. [The COURT held that the point on the Vexatious Indictments Act was not reserved by the recorder, and was therefore not before them.]

Poland, Q.C. (*Thorne* and *Bodilly* with him), for the prosecution.—The conviction was right. Upon the defendant's electing to be tried by a jury the offence becomes an indictable offence: section 17 of the Summary Jurisdiction Act, 1879. The consequence is that the indictment may be drawn so as to cover any offence disclosed by the depositions, and the depositions here, as the recorder has stated, disclose the offence of using the rooms for the purpose of receiving money under the second part of the section. It was, therefore, regular to charge that offence in the indictment. Using a house in the manner described by section 1 of the Betting Act is declared to be a common nuisance, and this is indictable apart from the Vexatious Indictments Act. [He was stopped on this point.] As to the direction of the recorder upon the meaning of the word "resort," it must be remembered that the object of the Act is to make punishable persons who keep a house for betting purposes. If the house is kept for that purpose it is an offence, whether any persons resort to it or not. Further, the word "resort" may be taken here in the figurative sense of "have recourse to." It cannot be intended that the object of the section should be defeated if persons make their bets by means of letters, telegrams, or telephones, or by sending messengers to the house.

Cur. adv. vult.

NOV. 17.—Lord RUSSELL OF KILLOWEN, C.J.—This matter comes before this court upon a case stated by the learned recorder of Plymouth, and the facts are these. [His lordship then stated the facts as to the summons before the magistrates and the indictment at the quarter sessions, and proceeded:—] Upon the commencement of the trial, and before evidence was gone into, objection was taken that the indictment was bad, because it contained charges other than and different from the charge upon which the defendant had been brought before the magistrates, and upon which he had elected to be tried, and one of the questions we are here to try is whether or not that objection was a good one.

The case then proceeded, and evidence was given which, in the opinion of the recorder (by which we are bound), was sufficient to support the charge under each of these counts. In the course of summing up the case to the jury, however, the recorder directed them that it was not necessary for a conviction under the first count that the defendant's house should have been used for the purpose of betting with persons who physically came to the house, but that it was enough to prove that he, having opened the house, had received letters and telegrams there relating to betting; and the second question raised by the case is whether that direction was right or wrong. If wrong, then the question arises whether the conviction on the first count can stand.

It was further contended, and the point is raised, that under the circumstances there was no power in the learned recorder to impose what is erroneously called more than one "penalty" in respect of one and the same occasion. The term "penalty" has really no application to the punishment imposed, where the matter is treated as an indictable offence, and there has been a conviction after trial by jury. In each case the jurisdiction of the court is to award such fine or imprisonment as it thinks fit, whereas "penalty" is a term applicable to the punishment fixed by the statute in the absence of defendant electing to be tried before a jury.

Now I will take the questions raised in the order in which I have stated them. The first is that charges other than and different from those charged in the summons were included in the indictment. I do not stop to consider whether in fact, the indictment did include other and different charges. It is quite clear that the charges which are contained in the indictment are cognate with those in respect of which the defendant was brought before the magistrates. It seems to me that

when the case arises the question may require to be very seriously considered whether, when the whole of the section is looked at, more than one offence is enacted by it. But that question does not arise here, and we think there is no necessary objection to the inclusion in an indictment of charges other than and different from those in respect of which the defendant was brought before the justices.

There seems to me to have been a confusion made between the course of proceeding enjoined by the statute when a matter is being dealt with summarily, and when the magistrates are not exercising their summary jurisdiction, but are merely exercising jurisdiction with a view to sending the case to trial before another jurisdiction. It is clear that under 11 & 12 Vict. c. 43, which relates to summary proceedings only, a person can only be dealt with on the charge covered by the summons. The magistrates can only authorize the issue of a fresh summons when it is desired to charge another offence, or if the evidence discloses fresh offences. In the latter case the magistrates can give time by adjournment to enable the defendant to meet the fresh charges. But where the magistrates are not dealing summarily with the case, but are merely putting it in train to be dealt with elsewhere, the Indictable Offences Act, 1848, has made a different set of provisions; for instance, by section 25 it is provided that when all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justices are of opinion that such evidence is not sufficient to put the accused party upon his trial for any indictable offence they shall forthwith order his discharge, but if, in their opinion, the evidence is sufficient to put him on his trial for an indictable offence they shall commit him for trial. The difference between the two cases is obvious. In the one the magistrates are called on to deal with the case forthwith in the exercise of their summary jurisdiction, and consider the punishment to be inflicted if necessary. In the other case, where the defendant is sent for trial before another tribunal, he will have ample notice of the offence or offences with which he is to be charged; and therefore it is that in cases in which the magistrates send the case for trial before a jury the real question is whether the evidence given before the magistrates in support of the summons covers the particular charges which are made by the indictment. It is, in fact, a common practice for judges at assizes and chairmen at quarter sessions to send up to the grand jury fresh counts which have been founded upon the evidence contained in the depositions.

It is further to be observed that were it not for the provisions of section 1 of the Vexatious Indictments Act (22 & 23 Vict. c. 17) the offence or offences for which the defendant was indicted, being a common nuisance, could have been charged against him without any preliminary charge at all by the mere act of sending up an indictment to the grand jury. That Act, however, includes amongst the offences for which no indictment may be sent up to the grand jury as of right the offence of keeping a gambling house, and a house kept contrary to section 1 of the Betting Act, 1853, is a common gaming-house (see section 2 of the Act); it is therefore within the Vexatious Indictments Act. The prohibition contained in that Act was, however, to a certain extent abrogated by 30 & 31 Vict. c. 35, section 1 of which seems absolutely to preclude this question from arising; for the last-mentioned Act, after reciting that "it is found that delay and inconvenience are frequently caused by the provisions contained in the 1st section of the Act 22 & 23 Vict. c. 17 in cases not within the mischief for remedy whereof the same was made and passed," enacts that "the said provisions of the said 1st section of the said Act shall not prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act if such count or counts be founded, in the opinion of the court in or before which the same bill of indictment be preferred, upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace in the presence of the person accused or proposed to be accused by such bill of indictment." It seems, therefore, clear that it was perfectly legal and regular, even assuming that here the counts of the indictment did contain charges differing from those in respect of which the defendant was summoned (which, however, I do not say the indictment in this case did), to include those counts in the indictment. The first objection therefore fails.

The second objection was that the learned recorder directed the jury that the offence charged in the first count—namely, that the house was kept open and used for purposes of betting with persons resorting thereto—could be established by evidence of letters or telegrams being sent to the house, although the persons who sent them did not actually or physically resort to the house themselves to bet. I cannot but think that on this part of the case the learned recorder was guilty of some misconception of the real intention of the Act. The gist of the offence is the keeping open a house for the purpose of betting with persons resorting thereto. It is the purpose for which the place is opened and kept that has to be looked to; and if, for instance, a person opens a place, and publishes, by means of advertisements, that he is ready to bet with persons resorting thereto, that would be ample evidence of the place being kept open for purposes prohibited by the statute, even though no evidence was forthcoming of any person having in fact resorted to the place. But that is not all, and here again I say, with deference to the learned recorder, that he has been under a misapprehension as to the nature of the offence, for he says: "There was no evidence that any person had actually gone to the house for the purpose of betting with the defendant other than those who had gone to pay money under the circumstances described in the second count of the indictment"—that is to say, other than those who went to pay money in doing that which is briefly described as "ready-money betting." The whole of the court are most clearly of opinion that there could be no stronger evidence of a resorting to the place for the purpose of betting than evidence of that kind. However, what we have to consider is, Was the evidence left to the jury? It is clear, to my mind, that the jury was not asked to pass any judgment at all on the important body of evidence contained in the words to which I have just referred.

I think that is clear, for as I read the case further I find that on objection being taken that there was no evidence of the defendant having betted with persons resorting to the house, the recorder directed the jury "that it was not necessary for a conviction under the first count of this indictment that the defendant's house should have been used for the purpose of betting with persons who physically came to the house." If the direction had stopped there it would have been perfectly sound, because the fact that the house had been kept open for the purpose of betting with persons resorting thereto might be proved in many other ways than by evidence of persons physically resorting thereto, as I have pointed out. But that was not the view which was left to the jury, for the learned recorder went on to say that "if a house was used by the defendant as an office to which any persons who wished to bet with him were to send their

communications, and if persons were in the habit of sending letters and telegrams to him there, directing him to make bets with them, such persons resorted to the house within the meaning of the Act." That, therefore, is a direction to the jury that you may prove that a place has been kept open for the purpose of betting with persons resorting thereto, by proof merely that persons who desired to bet with the defendant sent letters to him at such a place. It therefore follows, if I am right in saying, as I think I clearly am, that the jury were not asked to give their verdict on this count upon any other evidence than that referred to in the direction of the learned recorder, that if that direction was right the conviction on the first count ought to stand, while if it was wrong it ought not to stand. Now, is that direction right? In my judgment it is clearly wrong; the word used in the Act is "resort," which we must assume, —the Legislature not having put any special meaning upon the word—was intended to be used in the ordinary and usual sense of "to go," "to frequent," "to go in and out." I put a case in the course of the argument which illustrates the view that it must be a physical resorting. I put the case of a man in Paris writing three letters making bets, one to a house in Birmingham, one to a house in London, and one to a house elsewhere, at the same time. Could it be said that that person was resorting at one and the same time to each of those places, although he had never, and might never, in the course of his life, set foot in any of them.

It is suggested that to place a narrow construction on the enactment would to a great extent defeat the object of the Act. But even if that would be the effect we ought to construe the Act as we think it ought to be construed. An illustration has been put of persons sending messengers to places to make bets for them instead of going themselves. And I should be sorry to have it thought that I am of opinion that that would not be within the mischief of the 1st section of the Act. The second portion of the section deals with the case of places being kept open for ready-money betting, and I should be sorry to think, and I do not think, that anything I have said in any way renders nugatory the provisions of the Act. But it is to be borne in mind that, while the law does not sanction and refuses its aid in the carrying out of any transactions of a gambling description, the law has nowhere made all betting criminal, but merely makes it criminal when it is carried on under the conditions mentioned in the section. The result is that, so far as the conviction on the first count of the indictment is concerned, the conviction cannot stand, because the jury were directed to find a verdict of guilty upon that which, as I have pointed out, was a clear misdirection on the part of the learned recorder. The conviction on the first count of the indictment must, therefore, be quashed, and the punishment and fine awarded by the learned recorder in respect of that conviction must necessarily drop with the conviction. The jury having found separate verdicts, however, upon the first and second counts, as they were very properly asked to do by the learned recorder, and there having been ample evidence to support the charge contained in the second count, it follows that that conviction upon that count will stand.

The third point was that there was no power on the part of the court to inflict a double fine. As the case now stands, however, the question does not arise, the fine under the first count falling with the quashing of the count, and there being, therefore, only one fine imposed. I have already said that upon that question much may be said when the time comes for it to be argued. But it is not necessary to consider it in the present case.

The result is that the conviction on the first count of the indictment must be quashed, while the conviction on the second count will stand. I have only to add that my learned brother Charles, J., concurs with me in the judgment which I have delivered.

HAWKINS, J.—I so entirely concur in everything that my lord has said in his judgment in this case that I propose only to add one or two words. The statute itself is somewhat inartistically drawn. The 1st section makes it a common nuisance for any house to be kept open or used for the purpose of the occupier betting with persons resorting thereto, or of receiving money as the consideration for thereafter paying money upon certain contingencies. In my judgment an indictment might have been framed upon that by a count simply alleging that the defendant had kept a house and used a house within the meaning of the section so as to amount to a common nuisance, and in support of that indictment it would have been competent for the prosecution to have offered all the evidence that has been offered in support of the present indictment. [His lordship read the first and second counts, and continued:—] Now those two counts together, to my mind, make but one offence - that is, assuming that the things alleged to have been done were done upon the same day. It seems to me that to fine a man upon the first count, and also upon the second, was an improper thing to do, because there was but one offence, and it cannot be said, I think, that it was ever intended by the Legislature that every single act which was done, whether keeping the house open for the purpose of betting with persons resorting thereto, or keeping it open for receiving money on the contingency of horse-races, should be a separate offence. The language of the statute seems to me to show that a house kept open for any of the purposes mentioned in the section is a common nuisance. I am therefore inclined to think that two penalties could not have been inflicted, it being admitted that those two alleged offences were committed upon one day.

In order to avoid an indictment being drawn in this form again, I would point out that it seems to me to be irregular to join two offences in the same count, as I see has been done here; for instance. to allege that an offence was committed on the 17th and also on the 18th.

Now, with regard to the first count, I have come to the conclusion that the direction of the learned recorder to the jury was wrong. I confess I was a little struck with the argument of Mr. Poland, and for a moment thought that it was just barely possible that the word might be satisfied by persons having recourse to the house; but upon consideration I have come to the conclusion that the words "resorting thereto" cannot be satisfied except by persons having physical resort to the house. I think, therefore, that upon the first count judgment ought to be given for the defendant, on the ground that the learned recorder was wrong in telling the jury that it was not necessary that the house should have been used for betting with persons who physically came to it, and that they could convict on that count if persons were in the habit of sending letters or telegrams directing the defendant to make bets with them.

I now come to the second count, and that, and the third and fourth counts seem to me merely to be ringing the changes upon the evidence which was before the magistrates when the charge was made. It is said that those counts are bad because they allege offences other than those with which the defendant was charged when before the magistrates. Now, upon the face of it the indictment is perfectly good, and no objection is made to it before us, the ques-

tion raised being whether any of those counts were legally joined. It seems to me that we must treat this as if it was originally an indictable offence, and then it is clear that the Vexatious Indictments Act applies. But no mention of this point is made by the recorder; and, besides, section 17 of 30 & 31 Vict. c. 35 gives power to add a count if founded upon the evidence in the depositions.

In the present case the learned recorder has stated as a matter of fact that the evidence was sufficient to authorize those counts. Therefore the objection fails. The first count, however, fails by reason of the misdirection of the learned recorder, and must be set aside; the second count seems to me in itself to be unobjectionable. I therefore agree with my lord that the conviction upon the first count must be quashed, while the conviction on the second count must be affirmed.

WRIGHT, J.—I agree with the judgment of my lord. I confess I do not share in the opinion that has been expressed by my brother Hawkins that there could not be two offences under this section on the same day; for, in my opinion, the acts mentioned in the first and in the second portions of section 1 are made two separate and distinct offences.

COLLINS, J.—I agree with my lord. I express no opinion on the other point.

Conviction on the first count quashed; conviction on the second count affirmed.

Solicitors for the prosecution, *Church, Rendell, Todd, & Co.*, for *Trehane*, Plymouth.

Solicitors for the defendant, *Law & Worssam*, for *Rundle & Martyn*, Devonport.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) Jan. 22.

BAXTER *v.* FRANCE. (*a.*)

Practice — Parties — Third-party procedure — Notice served by one defendant on another—Mode of objection —Application to set aside notice—Summons for directions—R. S. C., 1883, *ord.* 16, *rr.* 52, 55.

Where a third-party notice is served by one defendant on another under ord. 16, *r.* 55, *and the defendant served objects to the question between himself and his co-defendant being tried in the action, his proper course is not to apply to have the notice set aside, but to take his objection on the summons for directions under rule* 52.

Appeal from an order of Day, J., reversing an order of a master setting aside a third-party notice.

The action was brought against several defendants to recover possession of land and mesne profits. The defendant France had executed a conveyance of the premises to his co-defendants. After all the defendants had appeared, a third-party notice was served on France by his co-defendants, under ord. 16, r. 55, by which they claimed to be entitled to contribution or indemnity against him. On the application of France a master made an order setting aside the third-party notice. Day, J., reversed the master's order.

France appealed.

Spearman, for the defendant France.—The third-party notice ought to be set aside. The plaintiff claims as heir-at-law, and the conveyance by France to the other defendants does not contain a covenant to indemnify them against a claim by title paramount. Therefore, they have no right of indemnity against him, though they may have a right of action for damages. [Lord ESHER, M.R.—There is no order here to be set aside. How can we set aside a mere notice?] Where one defendant claims contribution or indemnity against another, he may serve a third-party notice on him under ord. 16, r. 55, without obtaining any order of the court for that purpose. That was the course adopted in this case. But when the defendant who is so served has appeared to the notice, he is in the same position as a third-party who has been served by the leave of the court under rule 48. If he objects to the question between himself and his co-defendant being tried in the action, his proper course is to apply to have the notice set aside: *Towse* v. *Loveridge*, 32 W. R. 151, 25 Ch. D. 76. The case of *Barton* v. *London and North-Western Railway Co.*, 36 W. R. 452, 38 Ch. D. 144, shows that if the party served does not take the proper steps for getting rid of the notice, he cannot object to it on the summons for directions under rule 52.

J. E. Bankes, for the other defendants.

Lord ESHER, M.R.—This action was brought against several defendants, all of whom appeared. A third-party notice was then served upon one of the defendants by his co-defendants, who claimed to be entitled to contribution or indemnity against him. To that notice he appeared. He then applied to have the notice set aside. But no order had been made, nothing had been done by the court with regard to the notice which could be set aside. There was nothing but the notice itself, and we are asked to hear an appeal from the judge's refusal to set that aside. In truth, the parties ought not to be here at all; we cannot hear an appeal on a matter as to which there is no order.

We have been referred to the rules of order 16. None of the rules of that order which deal with giving leave to serve a third-party notice are applicable to this case. No leave to serve this notice was necessary, nor was any given. If leave had been given, there would have been an order, as to which an application might have been made to set it aside. But the rules say nothing about setting aside a notice. The only rule which seems to me to be applicable to this case is rule 52. That rule says that if a third party appears to a notice, the defendant giving the notice may apply to the court for directions. That is the course of procedure laid down in the rule. When the summons for directions comes on to be heard, that is the time for the judge to consider whether there is a question proper to be tried as to the liability of the third-party to make the contribution or indemnity claimed. If the judge thinks that there cannot be any question as to contribution or indemnity, then he is to direct that there shall be no such issue tried. The meaning of the rule seems to me to be that in such a case as this there must be a summons for directions, and that the question whether an issue is to be tried as to any liability to contribute or indemnify must be determined on that summons.

There is no authority against that view. The case of *Barton* v. *London and North-Western Railway Co.* was cited, but there an order had been made giving leave to serve the notice. The court, after expressing their opinion that that order might have been appealed against, proceeded to consider the proper way of dealing with the case on the summons for directions. I am of opinion that this appeal must be dismissed.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the defendant France, *Black & Fisher*, for *Nutsey & Payne*, Shrewsbury.

Solicitors for the other defendants, *Patersons, Snow, Bloxam, & Kinder*, for *Salt & Sons*, Shrewsbury.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 13, 20.

SIDEBOTHAM *v.* HOLLAND. (*a.*)

Landlord and tenant—Yearly tenancy—Notice to quit on anniversary of commencement of term—Validity.

A notice to determine a yearly tenancy ought to expire on the last day of the current year; nevertheless, a half year's notice to quit on the anniversary of the day on which the tenancy commenced, is a valid notice.

In determining tenancies commencing at a particular time, the expressions "at," "on," "from," or "on and from" are equivalent expressions.

H. became yearly tenant of S. under an agreement dated the 19th of May, 1890, such yearly tenancy "commencing on the 19th day of May instant." On the 17th of November, 1893, S. gave written notice to H. to quit and deliver up "possession to him on the 19th of May next" of the premises.

Held, that such notice to quit was a valid notice; the tenancy commenced on the 19th of May, and would be determined at midnight of the 18th of May. A notice to quit on the 18th of May would equally have been a good notice.

This was an appeal from a decision of Bruce, J., given at the trial without a jury at the Liverpool Assizes.

By an agreement dated the 19th of May, 1890, between the plaintiff of the one part and the defendant of the other part, the plaintiff agreed to let to the defendant, who agreed to take, a certain beerhouse known as the Grapes Inn, Weaste, Salford, "as yearly tenant commencing on the 19th day of May instant at the clear yearly rent of £45, the sum of £4 7s. 6d. as the apportioned part up to the 24th day of June next being paid on the signing hereof, and the future rent to be paid by equal quarterly payments in advance if demanded on the usual quarter-days of payment, the first payment being considered as due in advance if demanded on the 24th day of June next, and each succeeding quarterly payment to become payable in advance if required upon the first day of such quarter."

On the 17th of November, 1893, the plaintiff's solicitor gave to the defendant a notice to quit in the following terms:—

"Madam,—As solicitor for and on behalf of Mr. Thomas Sidebotham, your landlord, I hereby give you notice to quit and deliver up the peaceable and quiet possession to him on the 19th of May next of the Grapes Inn and premises in your occupation, situate 320, Eccles-road, New-road, Weaste, Salford, and which you now hold of him as tenant under agreement dated the 19th of May, 1890.—Yours, &c., "ROBERT INNES."

The defendant having refused to quit, the plaintiff brought his action to recover possession.

The defence set up was that the notice to quit was invalid; and alternatively, that the defendant was induced to lend to the plaintiff various sums of money on the plaintiff's assurance that he would permit her to continue in possession of the premises until the 9th of November, 1895.

Bruce, J., decided that the notice to quit was invalid, because, looking at the whole agreement, it was the intention of the parties, as expressed by the agreement, that the tenancy should be a tenancy as from the 24th of June, and the notice did not in fact terminate the tenancy on one of the usual quarter-days. His lordship considered that even if that were not so, supposing the 19th of May were the first day of the tenancy, then the tenancy would terminate on the 18th of May, and the notice to quit, in order to be valid, should have been given for that day. As to the alternative defence, his lordship held that the agreement that the tenancy should continue until the year 1895, being a parol agreement, was void under the Statute of Frauds.

The plaintiff appealed on the first two points, and the defendant gave cross-notice of appeal on the third point.

McCall, Q.C., and *Roskill*, for the appellant.—If the tenancy commenced on the 19th of May the plaintiff's notice to quit would have been good. The learned judge was clearly wrong in holding that the tenancy commenced on the 24th of June. There is no case where the statement that the term shall commence on a fixed day is nullified by the payment of rent on another day. The rent would be apportioned by the Apportionment Act: *Hartcup & Co.* v. *Bell*, Cab. & Ell. 519. All the text-books give the notices to quit for the quarter-day where the tenancy commences on the quarter-day: See notes on *Clayton* v. *Blakey*, 8 T. R. 3, in Smith's Leading Cases, vol. 2, p. 122. There is no authority for the statement that a half-year's notice to quit must include 183 clear days. In *Morgan* v. *Davies*, 26 W. R. 816, 3 C. P. D. 260, it was contended that the notice was bad, though given from feast-day to feast-day, because fewer than 182 days were included. In *Doe d. Cornwall* v. *Matthews*, 11 C. B. 675, notice to quit on the anniversary of the commencement of the term was held to be good notice. See also *Doe d. Spicer* v. *Lea*, 11 East, 312; *Cutting* v. *Derby*, 2 W. Bl. 1075. On parol agreements they cited *Kemp* v. *Derrett*, 3 Camp. 510; *Doe d. Holcomb* v. *Johnson*, 6 Esp. 10; *Doe d. Savage* v. *Stapelton*, 3 Car. & P. 275.

The Hon. J. W. Mansfield and *E. F. Spence* (*Shee Q.C.*, with them), for the respondent.—We admit that the tenancy commenced on the 19th of May. In the case of parol agreements a tenancy may commence during a broken quarter, rent be paid for the broken quarter and afterwards on the usual quarter-days, then *primâ facie* the tenancy is a yearly tenancy from the usual quarter-day, as in *Doe d. King* v. *Grafton*, 18 Q. B. 496, and the tenancy would expire on the 24th of June. In an ordinary case a tenancy commences from a quarter-day, and therefore the tenant has to go out on that day. Here the tenancy is expressed to commence on the 19th of May. therefore that day is included in the term, and it must determine on the 18th of May. [A. L. SMITH, L.J.—If I am a tenant from Michaelmas Day, can I not go in on that day?] We submit not, because the previous tenant is entitled to be in for the whole of Michaelmas Day: *Page* v. *More*, 15 Q. B. 684; *Ackland* v. *Lutley*, 9 Ad. & Ell. 879. Terms for years cover the whole anniversary from which the tenancy commences. A tenancy from Lady Day should expire on Lady Day, and not on the 26th: Woodfall's Landlord and Tenant. The same author says that a lease from the 25th of March commences on the 26th, and expires on the 25th. We cannot contend that there must be 183 clear days, but here, in

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the true way of counting, there are only 181, which is not a half-year. Where a lease is executed on the 20th, you must not count the 20th as a day of the term: *Clayton's case*, 5 Co. 1. [A. L. SMITH, L.J., referred to *Pugh* v. *Duke of Leeds*, 2 Cowp. 714.] All the text-books say that "on" must presumably be an inclusive word.

The following cases were also cited:—*Miles* v. *New Zealand Alford Estate Co.*, 34 W. R. 669, 32 Ch. D. 266; *Wood* v. *Beard*, 2 Ex. D. 30, 25 W. R. Dig. 134; *Doe d. Phillip* v. *Benjamin*, 9 A. & E. 644; *James* v. *Smith*, [1891] 1 Ch. 384, 40 W. R. Dig. 198; *Marshall* v. *Berridge*, 30 W. R. 93, 19 Ch. D. 233; *Lester* v. *Garland*, 15 Ves. 248; *Right* v. *Darby*, 1 T. R. 159, and Dyer, 345. [THE COURT referred to *Queen* v. *Humphery*, 10 A. & E. 335; *Buddle* v. *Lines*, 11 Q. B. 402.]

McCall, Q.C., in reply.—A notice to quit is a notice to the tenant to give up vacant possession on a particular date. Here vacant possession must be given up on the 19th.

Cur. adv. vult.

Dec. 20.—Lord HALSBURY expressed his concurrence in the written judgment of Lindley, L.J.

LINDLEY, L.J.—The express statement in this agreement, that the tenancy is to commence on the 19th of May is too clear and unambiguous to warrant any inference which might otherwise have been drawn from the stipulation that the rent is to be paid by equal quarterly payments in advance, if demanded, on the usual quarter-days. In the absence of any express statement as to the commencement of the tenancy, it might have been held to commence on the 24th of June: see *Holcomb* v. *Johnson*; *Sanddill* v. *Franklin*, 23 W. R. 473, L. R. 10 C. P. 377. It is true that if the tenancy commences on the 19th of May the last quarterly payment to be made in advance on the previous Lady Day will not be a full quarter's rent, but only a proportionate part of it—viz., an apportioned part of it for the time which will intervene between Lady Day and the 19th of May. But this circumstance only shows that the agreement is not very accurately drawn. The inaccuracy does not justify the conclusion that the tenancy did not commence on the day expressly mentioned for its commencement—viz., on the 19th of May, 1890—and that the time which intervened between that day and the 24th of June was not part of the tenancy. Treating the tenancy, then, as commencing on the 19th of May, 1890, the question is whether a notice to quit on the 19th of May, 1894, given by the landlord on the 17th of November, 1893, is a good notice. It is a six calendar months' notice to quit on the anniversary of the day on which the tenancy commenced. Why, then, is it bad? The notice is said to be bad because it expires one day too late. The contention is that, as the tenancy commenced on the 19th, and not from the 19th, the notice should have been to quit on the 18th, and not on the 19th. Having regard to the decision in *Clayton's case*, I think that, although the agreement was signed on the 19th, and the tenant can hardly, in fact, have been in possession the whole of that day, yet, in point of law, that day must be treated as the first day of the tenancy and as part of the term for which the house was agreed to be let. The tenancy cannot, therefore, be treated as commencing on the 20th to the exclusion of the 19th. One year from that day would expire at midnight of the 18th of the next May: *Reg.* v. *St. Mary, Warwick*, 1 W. R. 307, 1 E. & B. 816; *Ackland* v. *Lutley*. If, therefore, notice to quit on the 18th were given, it would no doubt be good. Indeed, it is well settled that a notice ought to expire on the last day of the current year: see *Right* v. *Darby*; *Doe d. Robinson* v. *Dobell*, 1 Q. B. 806, 1 Wms. Saund. 276c. But although a half-year's notice to quit on the 18th would be correct, it does not follow that a notice to quit on the 19th, which is the anniversary of the day on which the tenancy commenced, is bad, and I am clearly of opinion that it is not. I have looked at all the decisions which were referred to in the argument, and at many more, and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case. The validity of a notice to quit ought not to turn on the splitting of a straw. Moreover, if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be, and are, disregarded as out of place.

There are several decisions in which notices like the present have been held sufficient. In *Kemp* v. *Derrett*, a yearly tenancy began on the 29th of October; it was determinable at any time on a three months' notice to quit. Lord Ellenborough said: "I am quite clear that the notice should have expired on January 29, April 29, July 29, or October 29." Again, in *Doe d. Cornwall* v. *Matthews* a yearly tenancy commenced on the 7th of May, 1850; a six months' notice to quit on the 7th of May, 1851, was held good; the rent was payable quarterly, but none was ever paid. *Roe* v. *Doe*, 6 Bing. 574, and *Papillon* v. *Brunton*, 5 H. & N. 518, 8 W. R. C. L. Dig. 37, are, again, cases in which the tenancy began on (or perhaps from) a usual quarter-day; the notice was to quit on the anniversary of that day, and the notice was held good. In those cases a notice to quit on the day before the anniversary would be bad: see *Page* v. *More*. In *Right* v. *Darby* and *Morgan* v. *Davies* notices were too short, and were bad on that ground, but no one suggested that they were bad because they were notices to quit on the anniversary of the day on which the tenancy commenced. In *Page* v. *More* a notice to quit on the right day was bad; but it was given by the landlord, and it was to quit at noon, which was too soon. In the last edition of Bythewood and Jarman, vol. 3, p. 276, the rule is thus laid down: "It—*i.e.*, the notice to quit—must generally be a half-year's notice, and must expire at the period of the year at which the tenancy commenced; and it is immaterial whether the letting was from one of the general quarter-days or from any other day." For these propositions several authorities are cited, the more important of which I have noticed when considering the validity of a notice to quit given in time and expiring on the anniversary of the commencement of a tenancy. I can find no distinction ever drawn between tenancies commencing at a particular time or on a particular day or from the same day. "At," "on," "from," or "on and from," are, for this purpose, equivalent expressions. Any distinction between them for such a purpose as this is far too subtle for practical use: see *Doe* v. *Spence*, 6 East, 120. In an action for double rent it is, however, necessary to be more particular: *Page* v. *More*. So it is when the number of days has to be counted. In the absence of authority compelling me to decide differently, I hold the objection, that the notice was bad because it was a notice to quit on the 19th instead of the 18th of May, untenable.

Then it was said that where the tenancy is not from one of the usual quarter-days there must be 183 clear days between the day on which the tenancy begins and the day on which the notice expires. There were, however, 183 days in this case if the

time is reckoned in the usual way—that is, counting in one of the extremes and excluding the other, and I can find no case which decides that both extremes must be excluded. In 1 Wms. Saund. 276c it is said that a half-year's notice must consist of 182 days except when the rent is payable on the usual quarter feast-days, when notice on one feast-day to quit on the next but one is sufficient. If 182 days' notice is enough, it is plain that this notice was long enough.

Lastly, it was urged that the notice was bad because the lessor had promised for valuable consideration not to turn the tenant out before 1895. This is the defendant's real defence to this action. Unfortunately, however, the promise was a verbal one; it was not to be performed within a year, and the Statute of Frauds precludes the defendant from enforcing it. Under these circumstances it is impossible to hold the notice bad on this ground. An argument was advanced that this verbal agreement created a new lease until May, 1895, and that the term created by the written agreement of 1890 was impliedly surrendered. But it is familiar law that whether an agreement operates as a demise or as an agreement only, depends on the intention of the parties. Now in this case it is plain that no new lease was ever thought of or intended by either party, and it would not be right to invent one in order to get the defendant out of the difficulty in which the absence of a written agreement places her. In my opinion, therefore, the appeal ought to be allowed, and judgment be entered for the plaintiff, with costs here and below.

A. L. SMITH, L.J., stated the facts shortly, and continued:—Upon the tenant refusing to go out the present action was brought, which the defendant resisted, upon the grounds, first, that in consideration of her advancing £100 to the plaintiff in the month of September, 1892, he promised that, although she was but a yearly tenant, she should remain in possession until 1895; secondly, that by the agreement the tenancy commenced upon the 24th of June, and that the six months' notice served upon the 17th of November, 1893, to quit upon the 19th of May, 1894, was more than a month prior to the 24th of June, and, therefore, bad; and lastly, said the learned counsel for the defendant, who argued their case admirably, that if the tenancy commenced on the 19th of May, as the plaintiff alleged, then the notice to quit was equally invalid, because it was not a notice to quit expiring upon the last day of some year of the tenancy.

As to the first defence the plaintiff, though denying the promise, also set up the Statute of Frauds, and if sections 1, 2, and 4 of that statute had been pleaded in the reply instead of only section 4—though from the course this case took at the trial it must, I think, be treated as if all three sections had been pleaded—the point upon the statute would have been a good one, and Bruce, J., was right in deciding against the defendant upon this defence.

As to the second ground of defence, I am of opinion that Bruce, J., was mistaken in holding that the tenancy commenced on the 24th of June, 1890. He appears to have arrived at this conclusion notwithstanding the express terms of the agreement that the defendant shall become tenant "as yearly tenant commencing on the 19th day of May instant" because he thought that if he held otherwise, the tenant being under obligation to pay rent in advance, she might have to pay rent for between the 19th of May and the 24th of June, when she had been turned out upon the 19th of May; but this was fully answered by Mr. McCall for the plaintiff, who pointed out that the Apportionment Act would apply, and even if not, as a six months' notice, if given, must be running when the quarterly rent payable in advance became due, the tenant would obviously refuse to pay rent for the period during which the notice to quit would prevent her occupying the premises—viz., between the 19th of May and the 24th of June. I cannot doubt that under the agreement by its express terms the tenancy commenced on the 19th of May, 1890. I cannot bring myself to hold, as I was invited to do by the plaintiff, that when a written agreement states that a person shall become a yearly tenant "commencing on the 19th of May," that it means that he shall become such tenant "commencing on the day after the 19th of May," or, in other words, as the plaintiff contends, "commencing from the 19th of May."

This being so, the third defence arises, which is certainly technical and without merit, that although a full six months' notice to quit has been given for the 19th of May, which was the anniversary of the day upon which the tenancy commenced, it is, nevertheless, a bad notice to quit, because it is not a notice expiring upon the last day of the year of the tenancy, but upon the day after. It appears upon looking into the old authorities that at one time what was to be considered a reasonable notice to quit was not ascertained, but subsequently it became settled law that in cases of yearly tenancies half a year's notice expiring at that period of the year at which the tenancy commenced was the reasonable notice to be given, and in the case of *Doe d. Shore* v. *Porter*, 3 T. R. 13, Lord Kenyon, over 100 years ago, laid it down that a tenant from year to year cannot be dispossessed without a six months' notice ending at the expiration of a year, and indeed I take this to be familiar knowledge. It has also been settled that the notice to quit must be given half a year before the expiration of the then current year of the tenancy excepting when the rent is payable on one of the usual feast-days, in which case what Tindal, C.J., in *Roe d. Durant* v. *Doe*, 6 Bing. 575, calls "a customary half-year's notice" will suffice if given on or before one of the feast-days in the earlier half of the tenancy to quit on the feast-day at the conclusion of the tenancy, though there may be fewer than 182 days between the two feast-days. No point was taken in *Durant's case* nor as far as I have been able to discover in any of the cases upon feast-day tenancies that the notice was bad because it terminated upon the anniversary of the commencement of the tenancy, but the point taken was that the tenant had not had a full six months' notice. The recent case of *Morgan* v. *Davies* deals with these feast-day tenancies, and is to the like effect. The complaint in the present case is, not that too few days have been allowed to elapse between the giving of the notice upon the 17th of November, 1893, for the 19th of May, 1894, for that is not the fact, but it is said that as the tenancy commenced on the 19th of May, the notice does not expire upon the last day of the year of the tenancy, for as it commenced upon the 19th of May it expired at midnight upon the 18th of May.

It has been held that where a notice to quit at New Michaelmas would be good because the tenancy had then commenced, it was bad if given for Old Michaelmas, which was twelve days later than New Michaelmas, though it had been given in ample time for New Michaelmas, Lord Ellenborough observing that if it might be given for Old Michaelmas instead of for New Michaelmas it might as well be given for any other time: *Doe d. Spicer* v. *Lea*. In *Doe d. King* v. *Grafton*, 18 Q. B. 496, Lord Campbell, at p. 501, in giving judgment, stated that "on an ordinary yearly letting the six months' notice must expire at the end of the year," and Erle, J., said, "The authorities

determine that where premises are taken on a yearly tenancy the term must expire with the year." This case does not necessarily determine the question whether a notice for the anniversary of the day upon which the tenancy commenced is or is not a good notice to quit. I can find no case, nor has any been cited, in which a full six months' notice to quit given for the anniversary of the day upon which the tenancy commenced has been held to be invalid; and, indeed, the cases of *Kemp* v. *Derrett* and *Doe d. Cornwall* v. *Matthews* are to the contrary effect so far as they go. In the first case Lord Ellenborough held that where a person became tenant on the 29th of October, 1810, a notice to quit upon the 29th of October was good, and in *Matthews' case* it was held that the tenancy commenced from Christmas, and the notice to quit was good. But I must point out that in neither of these cases was there a written agreement stating when the tenancies commenced, the only statement being that they commenced on the respective days, and the inference drawn was that the tenancies commenced from those days. There is no place for any such inference in the present case, for the agreement is express upon the point. It cannot be denied that the law upon notices to quit is highly technical, but the technicalities are too deeply rooted in our law to be now got rid of, and if any case had been found showing that a full six months' notice to quit, given, as in the present case, for the anniversary of the day of the commencement of the tenancy, was bad, I must have given effect to it, but as no such case has been found I do not desire to add one more technicality to a notice to quit unless compelled to do so.

I would point out that the plaintiff has only himself to blame for the difficulties he is in in this case. Had he added the words which are very ordinarily inserted in a notice to quit, "or at the expiration of the year of your tenancy which shall expire next after the end of one half-year from the service of this notice," and which are inserted to avoid such a point as that now taken, all would have been in order; but the words are not there. If the notice to quit in this case had been for the 20th or 21st of of May or any later day, I should have had no doubt but that it was a bad notice; and I own that the inclination of my opinion is that the present notice is bad because it does not expire upon the last day of some year of the tenancy; but, as Lord Halsbury and Lindley, L.J., are of opinion that, inasmuch as this was a full six months' notice given to quit upon the anniversary of the day upon which the tenancy commenced, it is good, though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from them by holding that this unmeritorious technicality must prevail. I content myself with expressing my opinion in this way. This appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Emmett, Son, Stubbs, & Mellish*, for *Robert Innes*, Manchester.

Solicitors for the respondent, *Smiles & Co.*, for *J. H. Cooper*, Manchester.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 7.

PRESTON BANKING CO. (LIMITED) v. ALLSUPP & SONS (LIMITED). (*a*.)

Practice—Amendment—Jurisdiction—Order made on misrepresentation of facts—Right to rehear—R. S. C., 1883, *ord.* 28, *r.* 11.

Where an order which represents the decision of the judge has been finally drawn up, there is no jurisdiction to reconsider it, though it may have been made on a misrepresentation of fact.

Staniar v. Evans, 35 *W. R.* 286, 34 *Ch. D.* 470, *questioned.*

Appeal from the Vice-Chancellor of the County Palatine of Lancaster.

This was a debenture-holders' action. By an order made in the action on the 17th of February, 1894, D. W. Allsupp and F. L. Lindsey were appointed receivers and managers of the real and personal property of the defendant company comprised in three series of debentures.

By an order dated the 4th of June, 1894, the said receivers were authorized, with the consent of the plaintiff company, to sell out of court, either by public auction or private treaty, the property of the defendant company.

Subsequently to this order F. J. Lindsay, who was a holder of a debenture of the third series for £1,000, applied to the Vice-Chancellor that the sale might be carried out under the directions of the court. By an order dated the 11th of July, 1894, made upon this application, it was ordered that, upon the applicant paying £250 into court within a week as security for the costs of the application, it should be referred to the registrar to appoint some fit and proper person to conduct the sale out of court, the application to be dismissed with costs upon default being made in payment of the £250.

Subsequently to this order the property was sold at a price which left £600 for distribution among holders of the third series of debentures.

On the 7th of August, 1894, Lindsay, having made default in payment of the £250, took out a summons asking that, notwithstanding the order of the 11th of July, 1894, the costs of all parties thereby directed to be paid by the applicant and the costs of the applicant might be costs in the action, and that in the meantime all further proceedings under the said order might be stayed, and that the costs of that application might be also costs in the action.

The ground of this application was that the order of the 11th of July had been obtained upon a misrepresentation of the value of the assets of the company. The application was made after the order of the 11th of July had been passed and entered.

On the 26th of November the Vice-Chancellor decided that he had no jurisdiction to entertain the application. Lindsay appealed from this decision.

Hopkinson, Q.C., and *T. E. Mansfield*, for the appellant.—When a wrong order has been made by reason of misrepresentation or mistake there is jurisdiction to correct it: *Staniar* v. *Evans*, 35 W. R. 286, 34 Ch. D. 470; *In re Swire, Mellor* v. *Swire*, 33 W. R. 785, 30 Ch. D. 239. See also the judgment of the majority of the Court of Appeal in *In re Roper, Taylor* v. *Bland*, 39 W. R. 101, 45 Ch. D. 126; *Nicholson* v. *Norton*, 7 Beav. 67; *Blakey* v. *Hall*, 35

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

W. R. 592. [A. L. SMITH, L.J., referred to *In re Suffield & Watts*, 36 W. R. 584, 20 Q. B. D. 693.]

Astbury, for the defendant company and W. Allsupp, a holder of debentures of the second series, was not called upon.

Humber, for the plaintiff company.

Lord HALSBURY.—I am of opinion that this appeal must be dismissed. If by mistake or error, or in any other way, an order is drawn up which does not express the meaning of the judge, there is jurisdiction to correct it. But the present application is, in substance, for the reconsideration of an order which was intended to be made. There is, in my opinion, no jurisdiction to do that, even in a case of fraud. If such jurisdiction existed, it would be most mischievous. The fact that, in the present case, it is the judge who made the order that is asked to rehear the case is immaterial, for if one judge can reopen an order, another can. Any application which may be made to the Vice-Chancellor in the nature of a supplemental order is, of course, within his jurisdiction. I have, and desire to have, no knowledge or interest in the facts of the case. I think there is no jurisdiction to alter this order.

LINDLEY, L.J.—I am of the same opinion. The case is one of some importance in the practice of the court. The application is not based on the fact of there being some slip or oversight in the order, or of the order not having been drawn up. The order represents the real decision of the judge, and has been finally drawn up. That being so, I think there is no jurisdiction to reconsider it. If the summons of the appellants had proceeded on the idea that the order of the 11th of July was right, but that circumstances subsequently discovered had rendered a supplemental order necessary, the application might have been entertained, but this summons proceeds on the theory that the order was wrong and ought not to have been made. It is of the utmost importance that a rigorous end should be put to litigation when once the order has been completed, and I think the appeal must be dismissed. It will be dismissed, however, without prejudice to any application which may be made based upon the view that the order of the 11th of July was right.

A. L. SMITH, L.J.—I think the Vice-Chancellor was right. This is not the case of an order not having been drawn up, or not expressing the view of the judge. It was said that in *Staniar* v. *Evans*, North, J., had decided to the contrary, but at the time of that decision, the case of *In re Suffield & Watts* had not been decided, and *In re St. Nazaire Co.*, 27 W. R. 854, 12 Ch. D. 88, which was decided by Sir G. Jessel, M.R., and upon which Fry, L.J., relied, was not cited to the learned judge. Speaking for myself, I think *Staniar* v. *Evans* may, at some future time, require consideration. I think the law was put upon the right foundation by Fry, L.J., in *In re Suffield & Watts*.

Solicitors for the appellant, *T. H. & T. Dodd*, Preston.

Solicitor for the defendant company, *W. Bramwell*, Preston.

Solicitor for W. Allsupp, *T. Whitehead*, Preston.

Solicitors for the plaintiff company, *Finch & Johnson*, Preston.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 18, 19.

In re O'SHEA.
COURAGE *v.* O'SHEA. (*a.*)

Bankruptcy—Charging order on fund in court—Protected transaction—"Dealing or transaction" with bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 49(d).

A charging order on a fund belonging to a person against whom a bankruptcy petition had previously been presented, on which an adjudication was made subsequently to the charging order, is not a protected execution within the meaning of section 45 *of the Bankruptcy Act*, 1883; *nor is it a "contract dealing or transaction" with the bankrupt within the protection of section* 49 *of the same Act.*

Appeal from North, J.

In the course of 1892 one Hannington obtained final judgment against Captain O'Shea, the defendant in the above administration action, and presented a bankruptcy petition against him on the 12th of November, 1892. This petition was dismissed on the 21st of April, 1893, on the understanding that other petitions then pending against the defendant (including several which had been presented at the Brighton County Court) should be also dismissed, and the judgment debt be paid in two instalments. Hannington, not being able to get payment of his debt, obtained a charging order *nisi* on a fund in court (in the above administration action) belonging to the debtor. This order was made absolute by North, J., on the 17th of July, 1893. On further consideration in the same action an inquiry was directed by North, J., as to what was due to various incumbrancers on the fund in court (including Hannington), and as to their priority.

When the charging order was obtained neither Hannington nor his solicitors were aware that a petition in bankruptcy had been presented against the defendant, though in fact one had been presented on the 30th of May, 1893, a few days before the charging order *nisi* was granted; and a receiving order was made on that petition on the 13th of December, 1893.

The chief clerk certified that the charging order of Hannington was a valid incumbrance on the fund in court, and North, J., on a summons taken out by the official receiver to vary the certificate, affirmed the chief clerk's decision.

Section 45 (1) of the Bankruptcy Act, 1883, enacts that, "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act an execution against goods is completed by seizure and sale, and an attachment of a debt is completed by receipt of the debt, and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver." And section 49 provides as follows:—"Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy, (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely—(1) The . . . contract, dealing, or transaction takes place before the date of the receiving order; and (2) The person (other than the debtor) . . . by or with whom the . . . . contract, dealing, or transaction was . . . . entered into has not at the time of the . . . . contract, dealing, or transaction notice of any available act of bankruptcy committed by the bankrupt before that time."

The official receiver appealed, and on the appeal was represented by a solicitor and counsel different from those representing him in the court below.

Muir Mackenzie and *Greig*, for the appellant.—The *onus* of shewing no notice of the London petitions and the Brighton petitions has not been discharged by the execution creditor. It must be taken he had notice of those petitions, and, consequently, had constructive notice of the acts of bankruptcy on which they were founded; he was put upon inquiry, and ought to have prosecuted it. In any event, the charging order is not protected by either section 45 or section 49, and is therefore bad as against the trustee in bankruptcy. *In re Hutchinson, Ex parte Hutchinson*, 34 W. R. 475, 16 Q. B. D. 515, shows that the charging order *nisi* is not an execution within section 45 of the Bankruptcy Act, 1883, and under 1 & 2 Vict. c. 110 the charging order is merely a statutory security. Nor can it be said to be a protected transaction within the meaning of section 49 (*d*) of the Bankruptcy Act, 1883.

Samuel Hall, Q.C., and *Carrington*, for the execution creditor, the respondent.—We cannot say that the charging order is within section 45, but we do urge that it is a protected transaction within the meaning of section 49. The execution creditor was only bound to search the file during 1892, and not indefinitely. The case falls within the principle of *Ex parte Pillers, In re Curtoys*, 29 W. R. 575, 17 Ch. D. 653, and *Krehl* v. *The Great Central Gas Consumers' Co.*, 18 W. R. 1035, L. R. 5 Ex. 275; *In re Leavesley*, 39 W. R. 276, [1891] 2 Ch. 1. The consent of the chargee to the charging order is immaterial. [The COURT referred to *Haly* v. *Barry*, 16 W. R. 654, L. R. 3 Ch. 452; *In re Wright, Ex parte Arnold*, 24 W. R. 977, 3 Ch. D. 70.] A "transaction" may consist of several steps, and the court will look at the whole, and not at the last step only.

Muir Mackenzie, in reply.—The Bankruptcy Act of 1849 was so far different from the other two Acts that the words "*bonâ fide*" occur in it, instead of "for valuable consideration," as in the others. The proceeding here being a garnishee process, is *in invitum*, and *Ex parte Pillers* shows that it is not a dealing or transaction.

A. à Beckett Terrell, for the debtor.

Lord HALSBURY.—I think we are all agreed with the appellant as to the construction of the 49th section of the Bankruptcy Act, 1883; and that this proceeding is really more in the nature of an execution, and therefore not within section 49; and the respondent's counsel admits it is not within section 45; therefore I think the argument on behalf of the appellant is right. Looking at the words, it is impossible to my mind to give any other interpretation to the word "transaction." I agree with Mellish, L.J. It seems to me that a "dealing" is very much the same thing when you look at the words with which the word "transaction" is accompanied. I cannot get rid of the general intention of the Legislature to protect by that clause *bonâ fide* dealings with the bankrupt as a trader, which, having been completed before notice of the act of bankruptcy, ought to be protected. That being the condition of things, I think Mr. Mackenzie's point is a good one, and the answer to it is insufficient.

It becomes unnecessary, therefore, to enter into the other question at all, because that depends upon a comparison of all the affidavits, and I am not prepared to say that my mind is fully made up what decision I should arrive at if that were the question I had to determine. We are now in this position, that we really have not before us the same question which was before North, J. We are sitting in appeal on North, J., on a totally different point from that which was raised before him. Furthermore, it is to be observed that every part of this transaction seems to be tainted with irregularity or error. This is not a point arising on a motion to vary the chief clerk's certificate at all. The chief clerk's certificate is perfectly right. It seems to me this point ought to have been made on an application to make an order, notwithstanding the chief clerk's certificate.

The result is that, although the appellant succeeds, he must, I think, be satisfied to pay his own costs. We will not give any costs of this appeal.

LINDLEY, L.J.—I am of the same opinion. The substantial question is whether a charging order obtained against some stock or shares under 1 & 2 Vict. c. 110, s. 14, falls either within section 45 or section 49 of the Bankruptcy Act, 1883, and is valid as against the trustee in bankruptcy of the judgment debtor, whose title relates back to the time anterior to the charging order. Unless the charging order is protected under one or other of those two sections, it is not protected at all as against the trustee, whose title relates back to a time anterior to it. Therefore the question we have to consider is whether it is either a protected execution within section 45, or a protected transaction within section 49. Section 45 is so worded as to exclude the possibility of holding that this is a protected execution within that section. Mr. Hall felt that, and has very properly not argued it; therefore we may dismiss section 45, but, although we may dismiss section 45, it will not do to throw out of view the real nature of a charging order. The real nature of a charging order is much more akin to an execution than what is commonly called a dealing or transaction. It must not be forgotten that a charging order may be obtained in the first instance *ex parte*. That being the nature of the step taken, I cannot think that it is fairly construing the expression "contract, dealing, or transaction" to hold that a step taken in this way behind the back of a man and without his sanction, in which he has no part whatever, is a contract, dealing, or transaction with or by him. I think that would be stretching the words too far. I do not think this is a novel decision at all, having regard to the decision in *Ex parte Pillers*, in which it was held that a charging order was not a dealing under the previous Bankruptcy Act of 1869, because it was a step *in invitum* and not in any fair sense a contract or dealing. In substance and in point of fact that covers this case. The Act of 1883 refers back to the language of the prior Act of 1869, and has put in the word "transaction" after "dealing." I, for one, very much doubt whether it has gained by it. "Contract, dealing, or transaction with the bankrupt" means something done, something in which the bankrupt would not be put in the same position as

he is in the case of a charging order. I think it would be straining the language of section 14 of 1 & 2 Vict. c. 110, which says that a man who has a charging order is to have the like remedies as a person would have if he had an agreement of charge, if we were to say that he was to be deemed a person in whose favour such an agreement had been made; and not being within section 49, the respondent's case fails.

Now as regards the question of notice we need not go into it. I am not at all satisfied that the doctrine of *Lucas* v. *Dicker*, 29 W. R. 115, 6 Q. B. D. 84, could be stretched so far as Mr. Mackenzie is asking us to stretch it here, for these reasons, amongst others, that all the petitions were dismissed; and I doubt very much whether the cases of *Lucas* v. *Dicker* and *In re Sedgwick, Ex parte Hobbs*, 9 Morr. 217, can be pressed so far as to say that a man who has notice of the dismissal of a petition has notice of the act of bankruptcy on which the petition was founded. I say no more about that.

As regards the costs, the original summons was all wrong. The certificate was quite right when it was made. Here is an incumbrancer who has a charge on this £45,000, and his priority is quite right, but by reason of the bankruptcy his charge is invalid as against the trustee in bankruptcy; and the proper form of the application would have been an application to the court that, notwithstanding the certificate, the money should not be paid out to Mr. Hannington, but should be paid out to the trustee in bankruptcy. That would have been the right form. Having regard to the fact that the proceedings taken by the official receiver in the court below were wrong in form, and that this point was never taken before North, J., and that affidavits have been filed on the subject, I do not think it would be right to give the trustee, the official receiver, costs. I think the case must be fought out on the merits, and there ought to be an expression of opinion of this court that the charging order is invalid as against the trustee in bankruptcy. That would put the matter right, but I do not think there should be costs.

A. L. SMITH, L.J.—This case comes before this court in a peculiar way. The point argued before North, J., on which he gave judgment, was practically abandoned. North, J., gave judgment on the hypothesis that the only evidence and knowledge of an act of bankruptcy was the knowledge of the petition, which itself would contain a statement of the act of bankruptcy, which was subsequently dismissed. The learned judge said, "I am not at all satisfied that any act of bankruptcy has ever been committed at all." Therefore he gave judgment against the official receiver, whereupon the official receiver appeals; but the first thing he does is not to controvert the judgment of my brother North, but he starts another point, and he begins with another affidavit of Captain O'Shea for the purpose of showing what he had not deposed in his former affidavit, that there was an act of bankruptcy *de facto* on the 7th of April, 1893. So he begins with a new statement of fact in this court. And then, further, the official receiver takes a point of law which nobody took on behalf of the official receiver before North, J.,—viz., that the charging order is not protected within either section 45 or section 49 of the Act of 1883. Section 45 of the Act of 1883 is abandoned by the respondent. It is not within that; but it is said on behalf of the appellant that neither is it a transaction protected within section 49. Upon that point of law, for the reasons which have been given by Lord Halsbury and Lindley, L.J., I concur in holding that the official receiver succeeds. Having brought up an entirely new case, which I do not think North, J., would have recognized if he had been sitting here, the official receiver succeeds. But what is right to be done as to costs? I think the proper course is not to let him have his costs, and, therefore, he gets judgment, but without costs.

Appeal allowed, without costs.

Solicitor for the official receiver, *Graham Gordon.*

Solicitors for the execution creditor, *Nye & Moreton*, for *Nye & Treacher*, Brighton.

Solicitors for the debtor, *Leman, Groves, & Leman.*

High Court of Justice.

Chan. Div.
Kekewich, J. } Dec. 19.

In re GILCHRIST'S TRUSTS. (*a.*)

Charity — Endowment — Charity Commissioners — Accounts — Charitable Trusts Acts, 1853 *and* 1855 (16 & 17 *Vict. c.* 137 *and* 18 & 19 *Vict. c.* 124).

Where a testator bequeathed funds to trustees upon trust to apply and appropriate the same as they in their uncontrolled discretion should think proper for the advancement of education and learning,

Held, that the charity was subject to the general jurisdiction of the Charity Commissioners, and that the trustees must furnish accounts to the commissioners.

Motion.

This was an application by the Charity Commissioners under the Charitable Trusts Act, 1853, s. 14, for an order to commit the trustees of the charity for refusing to render accounts to the commissioners pursuant to section 10 of that Act.

One Gilchrist, who died in 1841, by a codicil to his will provided that his trustees should stand possessed of certain funds on trust to apply and appropriate the same in such manner as they should in their absolute discretion think proper and expedient for the benefit, advancement, and propagation of education and learning in every part of the world so far as circumstances would permit.

The motion was made to determine whether the charity was subject to the general jurisdiction of the Charity Commissioners or fell within the exemptions in section 62 of the Charitable Trusts Act, 1853. The charity was not supported by voluntary subscriptions.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the motion.—The case is governed by *In re Sir Robert Peel's School at Tamworth*, 16 W. R. 773, L. R. 3 Ch. App. 543.

Warmington, Q.C., and *Church*, for the trustees.

KEKEWICH, J.—To resist this application successfully the trustees of the charity must show that their charity falls within one of the exceptions of the Charitable Trusts Act, 1853, s. 62. It is said there are provisions within which this charity must upon a benevolent construction of the section be held to fall. I do not take that view. Where an Act such as this confers general jurisdiction, and then contains specific exceptions, any charity within the general jurisdiction must come precisely within the limits of an exception in order to be exempt. That the general jurisdiction is applicable if the exception is

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

not to be found there can be no doubt. It is an endowed charity, and as such within the Act. Though in one sense not of a permanent character, it is likely to last a long time. The trustees can in their uncontrolled discretion so deal with the endowment hat it may cease to be the endowment of this particular charity. I am not called upon to say that the court will at any time direct a scheme or allow the Charity Commissioners to lay their hands on any part of the money or control the discretion of the trustees. This is not before me.

The question now is whether the trustees are bound to render their accounts of this charity, as being a charity, within the meaning of the Act. As regards their power to divert the charity funds so as to interfere with the permanency of the charity, the case of *Sir Robert Peel's School at Tamworth* is in point, though there the trust was to apply the income, and here the power extends to the *corpus*. But there was a power of revocation which might be exercised at any moment, and the Lord Justices distinctly held that that fact did not prevent the interference of the Charity Commissioners to the extent of demanding accounts, and did not prevent it being the duty of the court to insist on that being done. The only other question is, Do they come within section 62, the exempting clause? I think not. There will be an order similar to the one in *Sir Robert Peel's School at Tamworth*.

Solicitors, *Clabon; F. J. & G. J. Braikenridge.*

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 17.

MOORE *v.* HAWKINS AND OTHERS.
MOORE, *Claimant.* (*a.*)

Practice—Interpleader—Sheriff—Goods seized under fi. fa.—*Title of claimant admitted by execution creditor—Delivery of goods by sheriff to claimant*—1 & 2 *Will.* 4, *c.* 58, *s.* 6—*Common Law Procedure Act*, 1860—*Ord.* 57, *r.* 1 (b); *rr.* 16, 17.

A sheriff, having elected to deliver over goods taken in execution to a claimant whose title to them was properly admitted by the execution creditor, sought the protection of the court by means of an interpleader summons.

Held, that, the sheriff, having thought proper to withdraw from possession, had, by so doing, excluded himself from the interference and protection of the court.

Kirk *v.* Almond, 2 *L. J. N. S. Ex.* 13, *followed.*

Appeal from a judge in chambers dismissing sheriff's interpleader summons.

On the 31st of July a writ of *fi. fa.* was issued directing the Sheriff of the County of London to recover the sum of £5 13s. 4d. and costs, and on the 1st of August the sheriff's officer seized certain goods and chattels believed to be the property of the judgment debtor. On the same day a notice was sent to the sheriff that the goods were the property of the claimant (a brother of the judgment debtor), and the sheriff forthwith gave notice to the judgment creditor and to the claimant as required under ord. 57, r. 16.

On the 4th of August the judgment creditor gave notice in writing to the sheriff that he admitted the claimant's title to the goods seized, and the sheriff thereupon withdrew from possession.

The claimant threatened an action for damages, on the ground that the fact having become known that an execution had been put into his premises by the sheriff had seriously affected his business as a butcher; and on the 8th of August the sheriff took out an interpleader summons.

On the 11th of August Wright, J., sitting in chambers, dismissed the sheriff's application for relief, holding that the sheriff, having elected to give up possession of the goods to the claimant, had by so doing precluded himself from obtaining the protection he sought.

From his decision the sheriff appealed.

Cock, Q.C., for the sheriff.—Ord. 57, r. 1 (*b*), directs that relief may be granted by way of interpleader where the applicant is a sheriff, and claim is made to goods or chattels taken or intended to be taken in execution under any process, by any person other than the person against whom the process is issued. The sheriff under that order is entitled to relief by way of interpleader. If the sheriff had remained in possession of the goods he certainly would have been entitled to the protection asked for. It was inequitable that because the sheriff, by doing that which would save the parties expense—by taking his officer out when the claimant's title was properly admitted—should thereby place himself in a worse position. Under the old practice the sheriff, it is true, had to be in possession of the goods at the time that he took out an interpleader summons. By the new rules his duties are altered and his rights enlarged. They provide that a definite notice shall now be given by the execution creditor, whether he intends to admit or dispute the claim. If he admits the claim the sheriff need not continue in possession.

C. C. Scott, for the claimant.—The sheriff, having withdrawn, is not entitled to relief by way of interpleader. Under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, and under the Common Law Procedure Act, 1860, it was made a condition for granting such relief that the sheriff must satisfy the court that he was ready to bring the goods into court or was able to deal with them as they should direct. [He then cited *Braine* v. *Hunt*, 2 Dowl. 391, where the sheriff handed over part of the goods seized; *Kirk* v. *Almond*, 2 L. J. N. S. Ex. 13, where the sheriff delivered up all the goods seized to the claimant. He also referred to *Inland* v. *Bushell*, 5 Dowl. 147, where the sheriff, having paid over the proceeds of the levy to the execution creditor, the court also refused relief by way of interpleader, although the sheriff was willing to bring a similar amount into court.] The conditions upon which the court could grant relief by way of interpleader were not altered by the new rules which affected the sheriff's rights to costs only. Under the old practice, a sheriff was not entitled to any costs, as against the plaintiff, except on the return of the interpleader summons: *Searle* v. *Matthews*, W. N., 1883, p. 176, and note on page 77, 19 Q. B. D.

Cock, Q.C., in reply.—Ord. 57, rr. 16 and 17, expressly provide that a definite notice shall be given whether the execution creditor intends to admit or dispute the claim. Rule (1) (*b*) sets out that relief by way of interpleader may be granted where the claim is in respect of goods or chattels taken or intended to be taken in execution. Goods intended to be taken by a sheriff cannot be in his possession at the time he makes the application for relief. It is therefore no longer a *sine quâ non* that the goods must be in his control. Although the sheriff has withdrawn from possession, the writ is still in his hands. The court, as formerly, is able to make such order for the protection of the sheriff as may be just and reasonable,

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

and I submit that the relief sought should be granted.

POLLOCK, B.—I think this application must be dismissed with costs. I am not surprised that the sheriff in this case should make all reasonable efforts to secure protection, for his conduct has not been such that he should suffer for it. It would be certainly fair, under the circumstances, that he should be protected, and relief would have been granted by this court had it been in our power to make the order asked for. The cases that have been cited show that under the Interpleader Act (1 & 2 Will. 4, c. 58) and also under the Common Law Procedure Act, 1860, a sheriff who had elected to deliver over the goods and chattels taken in execution to a claimant was not entitled to relief by way of interpleader.

Order 57, which now regulates all interpleader proceedings, has not altered the rights which the sheriffs formerly enjoyed under those Acts. Rules 16 and 17 of that order were never intended in any way either to enlarge or diminish this right of the sheriff to protection, but were passed solely to enable the question of costs to be dealt with more easily, and therefore they afford no ground for relief being granted, as has been contended, by way of interpleader in the present case. The sheriff having elected to withdraw his execution, the whole thing is at an end. Not only does his right to levy execution cease, but also the right to take any further steps for his own protection that he might have had if he had remained in possession. Under these circumstances the court has no power to make the order asked for, and the rule must be discharged.

GRANTHAM, J.—I am of the same opinion. I am sorry that it is so, and that we must come to the conclusion that we have no power to grant the application. It certainly seems inequitable that where an opportunity is expressly given of limiting the expenses to which the parties are put by directing that the execution creditor may give notice to the sheriff that he admits the claim, and the sheriff should then withdraw, that the sheriff doing so should afterwards find himself in a worse position than if he had continued in possession. That, however, is the case, and I would suggest that when the Rules of the Supreme Court are next revised this fact should be noted. Rules 16 and 17 of order 57 were passed for the benefit of the execution creditor, and not for the benefit of the sheriff.

Appeal dismissed with costs.

Solicitor for the sheriff, *W. Burchell.*

Solicitor for the claimant, *Godfrey Webb.*

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 11, 13.

HAMMOND (*Appellant*) v. PULSFORD (*Respondent*). (*a.*)

Master and servant—Shop assistant—"Young person" employed in shop—Neglect of employer to exhibit notice as to provisions of Act and number of working hours — Liability of employer to penalties — Shop Hours Act, 1892 (55 *&* 56 *Vict. c.* 62), *ss.* 3, 4, 5.

An employer who neglects to exhibit in his shop the notices as to the provisions of the Act required by section 4 *of the Shop Hours Act,* 1892, *which imposes no penalty for such neglect, does not thereby render himself liable to the penalties imposed in section* 5 *for employing a young person in his shop "contrary to the provisions of the Act."*

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Case stated by justices for the county of Warwick, sitting at a petty sessions holden at Aston on the 21st of September, 1894.

An information was preferred by the appellant against the respondent, charging him with having, on the 13th of September, 1894, employed a young person within the meaning of the Shop Hours Act, 1892, in or about his shop contrary to the provisions of the Act, to wit, that he had employed a young person in or about a shop in which shop a notice referring to the provisions of the said Act, and stating the number of hours in the week during which a young person may lawfully be employed in that shop, was not kept exhibited by the respondent, the employer of such young person, in a conspicuous place.

The information was dismissed by the justices, and this case stated.

It was proved that the respondent did employ a young person within the meaning of the Shop Hours Act, 1892, and that the notice required to be exhibited by section 4 of the Act was not exhibited in the shop of the respondent.

It was contended on behalf of the appellant that sections 4 and 5 should be read together, and that, although no penalty is specifically provided in case default is made in not exhibiting the notice under section 4, still the penalty enacted in section 5 was to be read and made applicable to neglect of the provisions of section 4 where a young person is employed.

The justices were of opinion that the information charged the respondent with committing an offence under section 4 of the Act, and that, no penalty being provided for the contravention of this section, they could not convict the respondent, and they dismissed the information.

The questions for the court were: (1) Whether any penalty is provided by the Shop Hours Act, 1892, for the employment of a young person within the meaning of the Act in a shop where no notice is exhibited by the employer in a conspicuous place referring to the provisions of the Act, and stating the number of hours in the week during which a young person may lawfully be employed in that shop? (2) Whether the penalty specified in section 5 can be inflicted in respect of such offence as is alleged in the information to have been committed, and deemed by the justices to have been proved in fact?

The Shop Hours Act, 1892 (55 & 56 Vict. c. 62), provides, section 3: "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week," &c.; section 4: "In every shop in which a young person is employed, a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop"; section 5: "Where any young person is employed in or about a shop contrary to the provisions of the Act, the employer shall be liable to a fine not exceeding one pound for each person so employed"; section 9: "A 'young person' means a person under the age of eighteen years."

Pritchett and *Evans Austin*, for the appellant.

The respondent did not appear.

Cur. adv. vult.

Dec. 13.—POLLOCK, B.—The justices here came to the conclusion that, though beyond all doubt section 4 does require the notice to be exhibited in the shop, the section does not impose upon the

employer a penalty for not exhibiting it. [His lordship then read the material sections of the Act.] It was contended on behalf of the prosecutor that a penalty had been incurred because a young person had been employed in a shop where the notice required by section 4 had not been exhibited, and it was argued that that was employing a young person in that shop "contrary to the provisions of the Act," which rendered the employer liable to the penalty imposed in section 5. But it certainly would be a forced construction of the Act to hold that a young person was employed "contrary to the provisions of the Act" merely because such young person was employed in a shop where the requisite notice was not exhibited. If that construction were correct, it would lead to the extremely harsh result that the employer would be liable, not to a simple specified fine, but to a fine not exceeding £1 for every young person so employed, and there might be one person, fifty persons, or a hundred persons so employed in the shop at any one time. That in itself would be a strong reason for showing that the Legislature could not have contemplated such a result. It is impossible to say that, although section 4 imposes no fine, yet that the case is covered by section 5.

I think, therefore, that the justices came to a right conclusion, and that this appeal must be dismissed.

GRANTHAM, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Field, Roscoe, & Co.*, for *Field & Sons*, Leamington.

Q. B. Div. (Wills and Wright, JJ.) — Dec. 11.

EVANS, *Appellant.*
OWEN, *Respondent.* (a.)

Fishery—Salmon fisheries—Salmon Fishing Act, 1865 (28 & 29 *Vict.* c. 65), *s.* 3—*Fishery district—Definition of limits—Meaning of tributary.*

A fishery district was defined as including "the river S. and all its tributaries." A streamlet ran into a brook C., which ran into a river V. The river V. ran into the river S.

Held, that the streamlet was a tributary of the river S.

Special case stated by justices of the borough of Llanfyllin.

The respondent was charged under section 22 of the Salmon Fisheries Act, 1873, as amended by section 7 of the Freshwater Fisheries Act, 1878, with taking trout by means other than a properly licensed instrument at a place within the Severn Fishery District.

The justices found as a fact that the respondent did unlawfully take trout in a streamlet which had no name, but which ran into a brook called the Cain, which ran into the river Vyrnwy. The river Vyrnwy flowed directly into the river Severn.

The Severn Fishery District was, by a certificate of a Secretary of State, defined as including so much of the river Severn and of all its tributaries as was situate within the counties named, including the county of Montgomery.

The justices were of opinion that the streamlet in question, not being a direct tributary of the river Severn, did not come within the Severn Fishery District. They therefore dismissed the information, subject to this case.

Willis Bund, for the appellant, contended that the streamlet was a tributary of the river Severn and within the fishery district.

He referred to *Hall* v. *Reid*, 10 Q. B. D. 134n; *Merricks* v. *Cadwallader*, 51 L. J. M. C. 20, 30 W. R. Dig. 87.

No counsel appeared for the respondent.

WILLS, J.—I think this is a clear case. By the order of the Secretary of State all tributaries of the river Severn came within the Severn Fishery District. A tributary is a thing which contributes, and this streamlet is none the less a tributary of the river Severn because, before reaching the Severn, it flows through another stream with another name. The object of this legislation was to protect the fish, and names are mere arbitrary distinctions as to which the fish are quite ignorant. This case is distinguishable from *Merricks* v. *Cadwallader*, because the language of the definition clause in this case is wider, and was probably made wider on account of that decision. The appeal must be allowed.

WRIGHT, J.—I agree.

Appeal allowed; case remitted to justices to convict.

Solicitors for the appellant, *Stallard & Turner*, for *John Stallard, jun.*, Worcester.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) — Dec. 21.

In re HEWITT.
Ex parte LEVENE. (a.)

Bankruptcy—Bankruptcy notice issued against a widow upon a judgment obtained against her separate property during coverture—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Rules*, 1886, *r.* 136—*Appendix, Form No.* 6.

When a judgment has been obtained against the separate property of a married woman in the form prescribed in Scott *v.* Morley, 36 *W. R.* 67, 20 Q. B. D. 120, *no bankruptcy notice can be issued against her personally upon such judgment after she has become a widow and her separate property has ceased to exist as such.*

Appeal against the refusal of the registrar of the county court of Portsmouth to make a receiving order.

In 1888 the petitioning creditor, Solomon Levene, obtained a judgment against Mr. and Mrs. James Hewitt, the judgment against Mrs. Hewitt being in the form prescribed in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D., at p. 132. "It is adjudged that the plaintiff do recover £ and costs (to be taxed) against the defendant (the married woman), such sum and costs to be payable out of her separate property as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman) not subject to any restriction against anticipation, unless, by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to execution notwithstanding such restriction."

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

In April, 1894, Mr. James Hewitt died.

Upon the 15th of May the petitioning creditor issued a bankruptcy notice founded upon the above judgment, and subsequently presented a petition thereon.

The registrar refused to make a receiving order.

The petitioning creditor appealed.

Muir Mackenzie, for the appellant. — Although this bankruptcy notice could not have been issued against Mrs. Hewitt while her husband was alive, his death has altered her position in that respect. Execution against her was only limited during her coverture. At her husband's death the restraint on anticipation was removed, and her separate property ceased to exist as such. *Holtby* v. *Hodgson*, 38 W. R. 68, 24 Q. B. D. 103, decides that upon the death of the husband personal judgment may go against the wife, and the inference is that bankruptcy proceedings may be taken as well.

He also cited *Pelton* v. *Harrison* (*No.* 2), [1892] 1 Q. B. 118, 40 W. R. Dig. 181. [The COURT referred to *In re Lynes, Ex parte Lester & Co.*, 41 W. R. 488, [1893] 2 Q. B. 113, and to *Beckett* v. *Tasker*, 36 W. R. 158, 19 Q. B. D. 7.]

Carrington, for the respondent.—If the appellant's argument is right, *In re Lynes, Ex parte Lester & Co.* was wrongly decided. A bankruptcy notice must call upon the debtor to pay "in accordance with the terms of the judgment," and must also be in the prescribed form. The judgment in this case is against the separate property, and the form of the notice (Appendix, Form No. 6) is not in accordance with the terms of the judgment, so that it would seem to be impossible to issue a bankruptcy notice upon a judgment in this form. [VAUGHAN WILLIAMS, J.—A creditor cannot issue a bankruptcy notice unless he is in a position to issue execution, which he cannot do upon the judgment in this case, unless the position of a widow is different.] The first case of *Pelton* v. *Harrison*, 39 W. R. 689, [1891] 2 Q. B. 422, decides that the removal of restraint by the death of the husband does not make the property liable.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—I am of opinion that a bankruptcy notice could not properly be issued upon the judgment in this case. It is conceded that if Mrs. Hewitt were not a widow the notice could not be issued, but it is contended that the death of her husband has altered her position in that respect. That depends upon whether you can issue execution against the widow upon this judgment as it stands, and it seems to me that the cases of *Beckett* v. *Tasker* and the first case of *Pelton* v. *Harrison* show that a judgment in this form is limited to separate property, and that the husband's death makes no difference to it. It is plain law that a creditor cannot issue a good bankruptcy notice unless he is in a position to issue execution, and in this case he is not. Here the judgment only gives him a right to issue execution against certain property, and not against Mrs. Hewitt personally.

KENNEDY, J., concurred.

Appeal dismissed.

Solicitor for the appellant, *Maurice Moseley*.

Solicitors for the respondent, *Prior, Church, & Adams*, for *Goble & Warner*, Fareham.

Court of Appeal.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Nov. 23, 26; Dec. 18.

SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING CO. MEUX'S BREWERY (LIMITED) *v.* SAME. (*a.*)

Injunction or damages—Lord Cairns' Act (21 & 22 *Vict. c.* 27)—*Nuisance—Right of reversioner to an injunction—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 10, 17, 32.

Lord Cairns' Act does not alter the principles upon which courts of equity granted injunctions to restrain the infringement of a legal right; and, therefore, where a legal right and also its substantial infringement in the past and further infringement in the future is established, the person so injured is entitled to an injunction restraining such infringement, unless his conduct has been such as in any way to prevent him from obtaining an injunction.

The defendants, an electric lighting company, having, by the vibration caused by their engines, substantially damaged the fabric of a house of which the plaintiff S. in the first action was lessee and the plaintiff M. in the second action was the freeholder, and it being established that such injury would continue and increase,

Held, (1) *that, upon the construction of the defendants' statutory powers, they were not justified in committing a nuisance; and* (2) *that each of the plaintiffs was entitled to an injunction restraining the defendants from so injuring the house, and also to damages for past injuries.*

Appeal from the judgment of Kekewich, J. (42 W. R. 644).

The plaintiff in the first action was the lessee for a term of twenty-one years from Lady Day, 1893, at a yearly rent of £70 per annum, and the plaintiffs in the second action were the freeholders and also mortgagees by sub-demise of a public-house called the Waterman's Arms, being No. 60, Bankside, in the county of Surrey.

The defendants were a company incorporated on the 11th of July, 1891, under the Companies Acts, their objects being (*inter alia*) to take over the benefit of certain contracts and provisional orders for the electric lighting of the City of London and to generate, accumulate, distribute, and supply electricity and to light streets, buildings, and other places, both public and private.

In pursuance of such objects the defendants acquired and held the benefit of and were subject to the provisions of certain provisional orders granted by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and respectively confirmed by Acts of Parliament. Each of such provisional orders contained a clause to the effect following—namely, that "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

At the end of the year 1891 the defendants, having acquired land adjacent to premises immediately adjoining the plaintiff's premises, erected thereon sheds, engine-houses, and all the buildings and machinery requisite for supplying electricity over a considerable area of the metropolis. The foundations for these works were sunk 25 or 30 ft. below the surface of the land, and in the autumn of the year 1893 several large engines of about 1,000 and 5

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

horse power each, commenced working. The plaintiffs alleged that, in consequence of the user by the defendants of their engines the plaintiffs' house had sustained serious damage; and the plaintiff Shelfer alleged that the comfortable enjoyment of his occupation of the house had been in consequence much prejudiced.

By the writ in the first action the plaintiff claimed (1) an injunction to restrain the defendants from using or working, or causing or permitting to be used or worked in or upon the defendants' premises, any dynamos or other engine or machinery in such a manner as, by reason of vibration or otherwise, to injure the structure, fixture, or fittings of the leasehold tenement and premises called the Waterman's Arms, held and occupied by the plaintiff, or to interfere with the enjoyment by the plaintiff of the said premises, or of his use thereof for the purposes of his business as a licensed victualler and innkeeper or otherwise, or in any way so as to cause a nuisance to the plaintiff or injury to his said leasehold premises or his said business; and (2) damages.

By the writ in the second action the plaintiffs claimed (1) an injunction restraining the defendants from so working their engines, and so carrying on their works, as, by reason of vibration or otherwise, to cause damage to any part of the said premises known as the Waterman's Arms, or the structure, fixtures, or fittings thereof, or to interfere with the enjoyment of the said premises by the occupier thereof, or his use thereof, for the purposes of his business as a licensed victualler and innkeeper or otherwise, or so as in any way to cause annoyance or nuisance or danger to such occupier or the persons inhabiting or frequenting the said premises, or as to cause any injury to the said premises or the business carried on upon the same; and (2) damages.

Kekewich, J., by his judgment in both actions delivered on the 19th of April, held that, upon the construction of the Electric Lighting Act, 1882, the defendants had entirely failed to exempt themselves from an action for nuisance in working their engines and electrical appliances for the supply of electricity within their defined area; and further found as a fact that there had been an interference with the ordinary comfort of the occupation of the house, and also that there had been an interference with the structure of the house, for which the defendants were responsible. His lordship, however, refused to grant an injunction in either action, but granted inquiries as to damages.

The judgment in Shelfer's action was entered on the 11th of May, 1894, and in Meux's action on the 9th of August, 1894. Against this judgment the plaintiffs respectively appealed, and by their notices of appeal respectively claimed injunctions as claimed by their writs.

Shelfer's notice of appeal was given on the 11th of August, 1894, and Meux's was given on the 23rd of October, 1894.

The appeal in Shelfer's action was first heard.

Warmington, Q.C. (*Budcock* and *Waggett* with him), for the appellant.—There is no cross appeal; substantial damage is now admitted. In all cases in which an injunction has been refused and damages in lieu thereof been forced on a plaintiff the injunction asked for was a mandatory injunction: *Isenberg* v. *East India House Estate Co.* (*Limited*), 12 W. R. 450, 3 De G. J. & S. 263; *Durell* v. *Pritchard*, 14 W. R. 212, L. R. 1 Ch. App. 244. [He was stopped by the court.]

Renshaw, Q.C. (*Moulton, Q.C.*, and *Braithwaite* with him), for the respondents.—All the cases cited are cases of rights to light: *Gorst* v. *Clark*, 16 W. R. 569; *Holland* v. *Worley*, 32 W. R. 749, 26 Ch. D. 578. [LINDLEY, L.J., referred to *Stokes* v. *City Offices*, 13 L. T. N. S. 81]; *Sayers* v. *Collyer*, 33 W. R. 91, 28 Ch. D. 103. The defendants under their statutory powers are authorized to commit this nuisance. The defendants are not acting negligently; they are bound to supply electricity to the public.

The appeal in Meux & Co.'s action was then heard.

Warmington, Q.C. (*Budcock* and *Waggett* with him), for the appellants.—The appellants ask for an injunction; they have no remedy in respect of the diminution in the value of our property. The learned judge has found as a fact that the injury will continue: *Bell* v. *Midland Railway Co.*, 9 W. R. 612, 10 C. B. N. S. 287.

Renshaw, Q.C. (*Moulton, Q.C.*, and *Braithwaite* with him), for the respondents.—Under the lease of the premises the tenant is bound to repair [Lord HALSBURY.—The tenant may become insolvent]: *Rust* v. *Victoria Dock*, 35 W. R. 673, 36 Ch. D. 113. The injury is not necessarily permanent. Better machinery may be invented: *Mott* v. *Shoolbred*, 23 W. R. 545, L. R. 20 Eq. 22; *Jones* v. *Chappell*, L. R. 20 Eq. 539, 24 W. R. Dig. 306; *Simpson* v. *Savage*, 5 W. R. 147, 1 C. B. N. S. 347 [Lord HALSBURY.—Here the walls of the house are actually shaken]; *Mumford* v. *Worcestershire Railway Co.*, 4 W. R. 457, 1 H. & N. 34; *Cooper* v. *Crabtree*, 30 W. R. 649, 20 Ch. D. 589.

Lord HALSBURY.—The two plaintiffs in this case complain of a nuisance created by the defendants by the vibration of their engines, and the annoyance caused by the carrying on of their undertaking.

Of the reality and gravity of the nuisance no serious denial has been made before us.

The two plaintiffs are respectively the lessee and reversioner of the house known as the Waterman's Arms. The considerations which arise are applicable to both plaintiffs, except in so far as one is lessee and other reversioner. I will deal with that question separately.

The nuisance being established, it is said, first, that the defendant company are authorized by law to carry on the said business, and that as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature.

If the analogy were a correct one, I should think the defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and if it does all that can be done to prevent a nuisance, the thing having to be done in that place, and by locomotive engines, with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned this proceeding. No such considerations apply here, quite apart from the difference in the legislative sanction, with which I will deal presently. It is not, however, necessary to deal with this part of the case, and I only mention it in order to disclaim the notion that I acquiesce in the allegation that it has been proved that it is essential to the carrying on of the electric lighting business in the district in question that there should be a nuisance created.

The main question turns on the construction of the Electric Lighting Act, 1882, and the provisional order which has become an Act of Parliament.

It was boldly contended by Mr. Moulton that the provisional order protected the undertaking, and that

if a nuisance were necessarily created by the carrying on of the company's undertaking such nuisance was authorized, and even imposed as a duty on the undertaking. I think it is only necessary to read the section of the provisional order in connection with the 10th section of the Electric Lighting Act, 1882, to dispose of the argument.

The Electric Lighting Act, 1882, s. 10, is in these words, so far as they relate to power under provisional orders: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act and of . . . any order or special Act authorizing or affecting their undertaking"—and it goes on to give authority to carry on the undertaking—and then in the order relied on for the authority to create the nuisance come the words, "nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

The general Act only gives them power subject to the restriction of the particular order, and the particular order makes them liable for nuisance.

I have also come to the conclusion that the powers given in the 17th section when read together with the 32nd section refer and are applicable to the execution of the works, and when we consider how frequently the distinction between the execution of the works and the use of them when executed has been the subject of comment and decision I think it must be taken that the language used has been deliberately chosen by the Legislature as pointing to the distinction now well recognized between the construction of the works and the user of them when constructed.

But, assuming that there is a nuisance, and that there is no authority justifying it, the question still remains, What is the relief to which the plaintiffs are entitled.

But for the provisions of Lord Cairns' Act I suppose no one would have doubted that in the state of facts which I have now assumed to exist the plaintiff Shelfer would have been entitled to an injunction to prevent the continuance of the nuisance. Lord Kingsdown in the House of Lords has laid down the principle in words which comprehend such a case as this: "The rule I take to be clearly this. If the plaintiff applies for an injunction to restrain the violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law" (and its violation). "I apprehend unless there be something special in the case he is entitled as of course to an injunction to prevent the recurrence of that violation": *Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 612.

But it is said, and truly said, that the law has been altered by Lord Cairns' Act, and the question is, What construction is to be placed upon that enactment? Undoubtedly it conferred upon courts of equity the jurisdiction to award damages, which did not exist before, but the question is, Did it mean to interfere with the well-settled principles upon which courts of equity were in the habit of interfering in such cases as the present? It seems to me that the defective powers of the equity courts, which were sought to be supplied by that statute, give ample grounds for the provisions of the statute without supposing that it meant to revolutionize the principles upon which equitable jurisdiction had been administered up to that time. The language, of course, is general, the discretion given is necessarily wide enough in terms to authorize a judge to award damages where formerly it would have given an injunction; but there is nothing in this case which, to my mind, can justify the court in refusing to aid legal rights established, by an injunction preventing the continuance of the nuisance. On the contrary, the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it, to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance.

But while I can neither agree with Mr. Warmington or Mr. Moulton upon the alternative restrictions which each respectively seeks to place upon the statute, I see no trace of any such intended alteration of the principles upon which equity should interfere by injunction as would be involved in a refusal of an injunction here. But, further, I think that the question is here covered by authority, of which *Martin* v. *Price*, 42 W. R. 262, [1894] 1 Ch. 276, in this court is the last example.

For these reasons I think that the judgment of Kekewich, J., should be reversed so far as the refusal of an injunction is concerned, and that an injunction should be granted.

The point which I have reserved for treatment in respect of Meuxs depends on their interest in the property affected by the nuisance. They are reversioners, and the action by the reversioners can only be justified if the reversion is affected. But is it possible in this case to contend that the reversion is not affected if the walls of the house are so shaken by the nuisance in question that cracks are developed in the building, which experts consider will increase with the continuance of the vibration, and, indeed, with the increase of the sources of vibration by the erection of larger and more powerful engines? I think there is ample evidence here of serious and permanent injury to the reversion by the continuance of the nuisance, and that, therefore, the same judgment ought to be given in respect of the reversion. As the reversioner with the leaseholder represent the entire interest, it will be proper, in respect of the inquiries of damages for past injuries, to see that the defendants are not made liable for the same damages twice over.

The result will be that the appeals succeed so far as the injunction is concerned, and that, therefore, the judgment of Kekewich, J., should be reversed in that respect, and the defendants should pay the costs.

LINDLEY, L.J.—The nuisance complained of in these actions is clearly proved as a fact. It is also proved that the nuisance is of a very serious character, and will continue, and will increase, if the defendants are allowed to enlarge their machinery and to extend their operations, as they proposed to do.

The persons who complain of this nuisance are (1) Shelfer, who is a lessee for twenty-one years and the occupier of a public-house near the defendants' works, and (2) Meux's Brewery Co., who are his lessors. Both ask for an injunction, and for damages for the injury already done. They have not joined in one action, as they might have done, but they have brought separate actions, which, however, came on for trial together.

The learned judge has refused an injunction in both actions, and has simply directed an inquiry as to damages. From this decision the plaintiffs in both actions have appealed, and they ask for an injunction.

The defendants have not appealed. They do not, they say, object to pay damages or compensation, but they strongly object to an injunction; and in opposing an injunction their counsel have contended

that the defendants have done no actionable wrong, and that the statute which applies to them authorizes —and, indeed, requires—them to supply electricity, and that the nuisance complained of is authorized by statute, and must therefore be submitted to by those who unfortunately suffer from it. It was contended by the plaintiffs that it was not open to the defendants to take this course without themselves appealing against the judgment for damages; but this contention cannot be supported. The defendants are entitled, if they choose, to waive their own right, if any, to appeal, and yet to resist the further relief which the plaintiffs seek to obtain against them.

The defendants' contention that the nuisance is authorized by Act of Parliament cannot be supported. This question turns on the Electric Lighting Act, 1882, ss. 10 and 17, and on the Provisional Orders of 1890 and 1891, made under its authority. These orders prescribe the conditions on which the defendants are entitled to exercise their statutory powers, and these orders expressly say that nothing in them shall justify a nuisance. Mr. Moulton's argument that the defendants can justify what they are doing under the Act of Parliament, although not under the orders, is, in my opinion, displaced by the wording of the Act and orders, which must be read together. When so read they do not legalize any nuisance. Part of the price paid for the right to exercise the statutory powers is that those who exercise them shall not create a nuisance.

Another answer to the defendants' contention on this head is that sections 10 and 17 of the statute only relate to damage done in the execution of the company's works, and not to damage done afterwards by the use of engines, the erection of which is completely finished.

I will add, further, that it is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence as it stands does not satisfy me that this is really true. The defendants have not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station. It is not shown that they cannot in this way avoid creating a nuisance at any of their stations.

The nuisance not being legalized, the question arises whether the plaintiffs are not entitled to an injunction. I will take the tenant's case (Shelfer's) first.

Before Lord Cairns' Act Shelfer, as tenant, certainly would have been entitled to an injunction to protect him during his tenancy. Nothing can be more explicit on this point than the judgment of the House of Lords in *Imperial Gas Co.* v. *Broadbent*, 7 H. L. Cas. 600, where a market gardener obtained an injunction against a gas company who injured his crops: see pp. 610, 612; see also the judgment of Lord Cranworth in the same case in the court below (7 De G. M. & G. 462). This case is an authority to show that an injunction would not be refused, on the ground that the public might be inconvenienced if an injunction were granted. But then it is urged that, although this was the law before Lord Cairns' Act, that Act has given the court a discretion to award damages, even in the case of a clear continuing nuisance of a serious character.

It is very true that Lord Cairns' Act (21 & 22 Vict. c. 27, s. 2), conferred upon the Court of Chancery jurisdiction (which it had not before) to award damages in lieu of an injunction. [His lordship read the section.] The jurisdiction to give damages instead of an injunction is in words given in all cases, but the use of the word damages has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well-settled principles, and ever since Lord Cairns' Act was passed the Court of Chancery had repudiated the notion that the Legislature intended to turn that court into a tribunal for legalizing wrongful acts, or, in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor—*e.g.*, a gas or water company or a sewer authority—ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriating even for a money consideration is only justifiable where Parliament has sanctioned it. Courts of justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation and the deprivation of people of their rights with or without compensation. Lord Cairns' Act was not passed in order to supersede special legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act. That this is the view which has always been taken of the Act is plain from *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. App. 349; *Clowes* v. *Staffordshire Potteries Waterworks Co.*, 21 W. R. 32, L. R. 8 Ch. App. 125; *Krehl* v. *Burrell*, 27 W. R. 805, 7 Ch. D. 551, 11 Ch. D. 146; and *Martin* v. *Price*. In *Martin* v. *Price* the principle on which the court ought to act was quite recently enunciated and enforced. The court there said in a carefully-considered judgment: "The plaintiff's legal right and its infringement already, and threatened further infringement to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of the *primâ facie* right, but we can discover none in this case." In that case, accordingly, the Court of Appeal granted an injunction which had been refused by the court below, being of opinion that the discretion given to the court by Lord Cairns' Act had been wrongfully exercised. So here, guided by the same principle, I come to the same conclusion.

Without denying the jurisdiction to award damages instead of an injunction even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them or lay down rules for the exercise of judicial discretion. It is sufficient to refer by way of example to trivial and occasional nuisances; cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused. There are no circumstances in the present case which, according to recognized principles, justify the refusal of an injunction, and in my opinion, therefore, an injunction ought to have been granted in the action brought by the tenant.

I pass now to the action brought by Meux & Co., the landlords. They sue in respect of actual and prospective injury to their reversion. Actual injury

is proved, for their house is structurally injured by the defendants' operations, and further prospective injury from continued and increased vibration is also proved. This is not the case of a temporary nuisance which is likely to cease before the existing tenancy expires, and which nuisance, therefore, although it may affect the present value of the reversion, will not affect its value when it falls into possession. The nuisance is of a totally different character, and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. The cases on this subject—from *Baxter* v. *Taylor*, 4 B. & Ad. 72, downwards—will be found collected in North, J.'s judgment in *Mayfair Property Co.* v. *Johnson*, [1894] 1 Ch. 516, and I do not, therefore, refer to them here.

It is true that in *Jones* v. *Chappell* an injunction sought by a reversioner to restrain noise and vibration was refused; but it was refused because they might cease before the reversion came into possession. But in this case it is idle to suppose that the vibration which is the real cause of the continuing injury will cease. It must be borne in mind that the defendants are a corporation created for the express purpose of supplying electricity for a time to which no limit can be assigned, and they have gone to great expense in making foundations and erecting permanent works on a large scale. *Jones* v. *Chappell* may be compared with *Clowes* v. *Staffordshire Potteries Waterworks Co.* There a reversioner applied for an injunction to restrain the defendants from fouling a stream. Malins, V.C., refused the injunction, on the ground that the reversion was not materially or permanently injured, and that, if it was, the plaintiff's remedy was for compensation under the defendants' special Acts. But on appeal this decision was reversed, and an injunction was granted, James, L.J., saying that the injunction was really a matter of course. That case arose after Lord Cairns' Act had come into operation. The common law decisions show that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or, as some express it, an injury of such permanent nature as to be necessarily injurious to his reversion. Where this is proved, as it is in the present case, a reversioner is, in my opinion, entitled to an injunction upon the principles which I have already explained. In Meux's action also, therefore, I think an injunction ought to have been granted.

There ought to be one order on both appeals varying the judgments appealed from by granting an injunction restraining the defendants from carrying on their works so as to occasion a nuisance to the plaintiffs in either action. The form ought to be that adopted when landlord and tenant join in one action to have their respective interests protected. The defendants must pay the costs of the action brought by Meux's Brewery Co. and also the costs of these appeals.

The damages in Meux Brewery Co.'s action ought to be referred to the same referee to whom the damages in Shelfer's action have been referred. This will protect the defendants from the risk of having to pay more than they ought in the aggregate.

A. L. SMITH, L.J.—I will first give judgment in the case of *Shelfer* v. *City of London Electric Lighting Co.*

I cannot agree with the proposition put forward by Mr. Warmington for the appellants, that under Lord Cairns' Act (21 & 22 Vict. c. 27) jurisdiction is only given to the Court of Chancery to award damages in lieu of an injunction in those cases in which application is made for a mandatory injunction; and that there is no jurisdiction to do so if the object of the injunction is to prevent a continuing nuisance. It may well be, as stated by him, that only fourteen cases are to be found in the books in which damages in lieu of an injunction have been awarded by the Court of Chancery, and that all these are cases in which mandatory injunctions were sought, but this constitutes no canon of construction whereby to interpret section 2 of Lord Cairns' Act. [His lordship read the section, and proceeded:—] The section is in the widest possible terms, and I can find no limitation as to it applying only where the injunction sought is mandatory, as distinguished from an injunction to prevent a continuing nuisance; and as regards jurisdiction, construing the section according to its plain English, I cannot doubt that the Court of Chancery has the power in the one case as in the other to award damages in substitution for an injunction. The only binding authority that has placed a restricted construction upon the section is *Dreyfus* v. *The Peruvian Guano Co.* in this court (43 Ch. D. 316, 38 W. R. Dig. 63), in which it was held that for an injury not yet committed but only threatened the Court of Chancery has no power to award damages. The present case is not for a threatened injury, but for a continuing nuisance existing at the date of the writ, whereby damages have been and still are being sustained. That jurisdiction to award damages exists in the present case I cannot doubt; but whether it should be exercised in such a case is quite another question, which I will deal with hereafter.

It was argued on behalf of the defendants that, even if they were committing the nuisance to the plaintiff Shelfer and his family, as found by Kekewich, J., no injunction could be granted against them, for that the combined effect of sections 10 and 17 of the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), was to authorize their doing what they were doing upon making full compensation to the plaintiff for all damages sustained by him thereby. In my judgment this is not the true reading of these sections. Section 10, read in conjunction with the interpretation section (32), is confined to construction of the works required to supply electricity, and does not apply to their subsequent user; and section 17 is confined to payment of damages caused by the execution of such works, and does not apply to damages caused by their user; and, further, whatever be the true construction of these sections, the defendants were only authorized by the Act of 1882 to set up works and supply electricity subject to and in accordance with the provisions and restrictions of the order or special Act authorizing or affecting their undertaking, and by the provisional order, confirmed by Act of Parliament, under which the defendants were authorized to erect works and supply electricity, it is expressly provided that nothing therein contained should exonerate the defendants from any indictment, action, and other proceedings for nuisance in the event of any nuisance being caused by them. This argument, therefore, of the defendants appears to me to be wholly untenable, and I agree in the conclusion Kekewich, J., arrived at thereon; and if authorities were wanted, though I think they are not, I refer to the cases cited at the bar of *Attorney-General* v. *Gas Light and Coke Co.*, 2[illegible] W. R. 125, 7 Ch. D. 217, and *Attorney-General* v. *Leeds Corporation*, 19 W. R. 19, L. R. 5 Ch. A[illegible] 583.

I now come to the question whether, in a case like the present, to award damages in substitution for an injunction is or is not an altogether erroneous exercise of the jurisdiction given by the section of Lord Cairns' Act. Kekewich, J., has found, and his findings are unappealed against, that the defendants w[illegible]

at the date of action brought, creating a continuing nuisance by means of vibration, noise, and steam, which were produced by the working of their plant and machinery, whereby, not only annoyance, inconvenience, and personal discomfort were occasioned to the plaintiff Shelfer, his wife and daughter, in the occupancy of their house, but that the two latter had been by the nuisance made actually ill. There was also evidence that the defendants, by the erection of their works, had let down the buildings of the plaintiffs, which consequently cracked, and that the continuous vibration which subsequently arose from the user of their plant and machinery was constantly increasing and aggravating these cracks. It was proved that the defendants were producing electricity by means of engines of from 4,000 to 5,000 horse-power, and that, unless stopped by injunction, they were about to increase their engine-power to not less than at least 20,000 horse-power. It appears to me, to use the words in the judgment in *Martin* v. *Price*, [1894] 1 Ch. 276, to which I was a party, that the plaintiffs' legal right, and its infringement already, and threatened further infringement to a material extent, has been established, and that the plaintiff is entitled to an injunction according to the ordinary principles upon which the court is in the habit of acting in these cases.

Then what is there in this case to take it out of the ordinary rules.

There is no suggestion of any conduct on the plaintiff's part depriving him of his *primâ facie* right to an injunction.

Then why is it that Kekewich, J., awarded damages in the place of an injunction? The learned judge appears to have thought that because the defendants at the trial had consented to abate the nuisance caused by steam, though not that caused by vibration and noise, damages were the proper remedy and adequate to compensate the plaintiff. But I would point out that the learned judge himself stated in his judgment that he was unable to allot to the different matters complained of the part each took in creating the undoubted nuisance proved to exist; and the reasons he gives for awarding damages are as follows: "Having regard to the occupation not having been as a matter of money interfered with, having regard also to this, that the inconvenience is felt very much more at one part of the house than the other—almost exclusively, as regards a great part of the complaint, in the upper floors—and having regard, at any rate, to the possibility of some inconvenience, and probably some loss of accommodation, of making sleeping arrangements elsewhere, which, I suppose, is possible, having regard also to the large inconvenience—to say no more—of stopping a business such as is carried on by the defendants, I think this is a case in which damages are a very fair compensation."

It is true that I cannot agree with the learned judge. Because the plaintiff does not suffer a money loss, and is only driven out of his upper floors, and has only to make arrangements for sleeping elsewhere, he, according to the judge, is not entitled to stop the continuance of the nuisance, but damages are a very fair compensation.

Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so if he purchases his neighbour's rights by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application of the wrongdoer, but to grant the injunction sought against the wrongdoer; for the plaintiff's legal right has been invaded, and he is *primâ facie* entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages as authorized by the section may be awarded.

In any case in which a case for an injunction has been made out, if the plaintiff by his acts or *laches* has disentitled himself to an injunction, the court may award damages in its place. So, again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion it may be stated as a good working rule that (1) if the injury to the plaintiff's legal right is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, damages in lieu of an injunction may be awarded.

If these four requirements are found in combination in a case, then damages in substitution for an injunction may be given.

There may also be cases in which, although the four above-mentioned requirements exist, the defendant by his conduct—as, for instance, hurrying up his buildings so as, if possible, to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights—has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either small injury, or what can be estimated in money, or what is a small money payment or an adequate compensation, or what would be oppressive to the defendants. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small, but considerable, whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable.

Each case must be decided upon its own facts, but to escape the rule it must be brought within the exception.

In the present case it appears to me that the injury to the plaintiff is certainly not small, nor is it, in my judgment, capable of being estimated in money and of being adequately compensated by a small money payment. For nineteen years the plaintiff is saddled with his lease, and for that period, upon the hypothesis of the nuisance continuing, he is to suffer whatever annoyance, inconvenience, and personal discomfort may be created by the user of the works of the defendants other than by steam, and the cracks in the walls of the house already made by the defendants' works are to be increased, and it may be that his wife and daughter throughout that period are to continue to be made ill as heretofore. Can anyone truly say that this is a small injury to the plaintiff's legal rights? Moreover, how are these injuries to be put into moneys awarded, and upon what principle are those damages to be assessed so as to represent the continuing injury to the plaintiff?

To guess at them is not assessing them at all. In order to constitute a real assessment it appears to me that the principle of purchasing the plaintiff's interest in his lease for the unexpired term will have to be adopted as the basis upon which the assessment is to be made, and, as I have before stated, this is never sanctioned by the court at the instance of a

tortfeasor. The assessment, upon the facts proved, will manifestly not result in a small money payment.

In my judgment, for the reasons above, this is clearly not a case in which damages should be granted to the plaintiff in substitution for the injunction which he asks for, which is an injunction to restrain the continuance of the existing nuisance.

If the remedies the defendants are about to apply to the steam will abate the nuisance, well and good, and the injunction will not injure them; but if, on the other hand, a nuisance still continues, in my judgment the case is by no means brought within the exception to the ordinary rule which I have endeavoured to express; and I am of opinion that Kekewich, J.'s judgment, wherein he awarded damages in substitution for an injunction, must be reversed, and an injunction as prayed for granted.

As regards the case of the reversioners, Messrs. Meux & Co., this appears to me to give rise to a discussion of somewhat an academic description so far as the defendants are concerned, assuming that an injunction is granted against them in the case of the tenant Shelfer. It may, however, be of moment to the plaintiff reversioners, for the reasons pointed out by Mr. Warmington, and more especially as the works of the defendants, as regards engine power, are about to be enormously enlarged, which obviously will increase the present continuing injury to the fabric of the house.

There is evidence that the defendants are committing, and are proposing to continue to commit, acts that are injurious to the fabric of plaintiff's house of a permanent character, and from which a jury would be well warranted in finding an injury to the reversion.

I agree with what Lord Halsbury and Lindley, L.J., have said upon the matter, and that an injunction should go as in the case of the tenant.

These appeals, for the reasons above, must be allowed.

Appeal allowed.

Solicitors, *Hunters & Haynes; Ashurst Morris, Crisp, & Co.*

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Jan. 15.

In re GODFREY.
THORNE-GEORGE *v.* GODFREY. (*a.*)

Married woman — Separate property — Restraint on anticipation — Costs of action — Married Women's Property Act, 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2.

Section 2 *of the Married Women's Property Act,* 1893, *applies to an action commenced prior to, and pending at, the* 5*th of December,* 1893, *the date of the passing of that statute.*

Appeal from Romer, J.

This action was instituted by a married woman, before, and was pending at, the 5th of December, 1893, the date of the passing of the Married Women's Property Act, 1893. The plaintiff charged the defendants, who were her trustees, with a breach of trust. The action was tried before Romer, J. By the judgment it was ordered that, notwithstanding the restraint against anticipation imposed by a will and settlement, under which the plaintiff was entitled to a life estate for her separate use, the plaintiff should be at liberty to charge such life estate for the purpose of raising the costs of the action, which she was ordered to pay to the defendants, the trustees of the instruments in question. Liberty was reserved to the defendants to apply in case the costs should not be paid to them within one month after the date of the taxing master's certificate. The plaintiff having failed to raise the costs, which had been taxed at £208, an application was made on behalf of the defendants, under section 2 of the Married Women's Property Act, 1893, that their costs might be paid out of the income, notwithstanding the restraint on anticipation. The settled income amounted to £160 per annum.

By section 2 of the Married Women's Property Act, 1893, "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Romer, J., made an order to the effect that, the court being of opinion that section 2 of the Act was applicable, and that the case was one in which the powers of that statute were properly exercisable, the defendants should be at liberty, notwithstanding the restraint, to retain £80 each year out of the income as it accrued due until the costs of the action and of this application should have been satisfied.

The plaintiff appealed.

The appellant appeared in person and contended that the court had no jurisdiction to make the order as to the costs of the action, inasmuch as section 2 of the Married Women's Property Act, 1893, was not retrospective in its operation, and had no application to actions commenced before the Act came into force.

J. F. Popham, for the respondents, was not called on.

Lord HERSCHELL, L.C., said that in his opinion section 2 did apply to an action which was commenced prior to and was pending at the date of the passing of the statute, for otherwise no meaning could be attached to the word "now" in the section. The appeal must therefore be dismissed, with costs.

LINDLEY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitor for the respondents, *O. Vernède.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Nov. 16; Dec. 7.

In re THE MIDLAND COAL, COKE, AND IRON CO. (LIMITED). (*a.*)

Company — Winding up — Scheme of arrangement — Transfer to new company — Creditor — Contingent liability — Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 158 — *Joint-Stock Companies Arrangement Act,* 1870 (33 *&* 34 *Vict. c.* 104), *s.* 2.

The lessee of a colliery assigned his lease to a limited company, who covenanted with him to pay the rent and royalties reserved by the lease, and to perform the lessee

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

covenants and to indemnify the lessee therefrom. A resolution to wind up the company voluntarily was passed, and subsequently an order was made to continue the winding up under the supervision of the court.

By a scheme of arrangement sanctioned by the court it was provided that a new company was to be formed to take over the assets and liabilities of the old company, and to pay or satisfy, within three months of the approval of the scheme by the court, the debentures and unsecured creditors of the company and the costs of winding up; that the new company should allot to each shareholder of the old company one share in the new company, credited with £4 paid, for each share held by him in the old company; and that, upon payment or satisfaction of the debentures, debts, and expenses the old company should be wound up and dissolved.

A new company was formed as proposed, and under an agreement made between the liquidators of the old company and the new company the assets of the old company were taken over by the new company. The lessee knew of the proposed scheme, but did not oppose its approval by the court or take any steps to prevent its being carried out. He subsequently, however, applied by summons that a claim by him might be admitted against the old company based on the covenant by the company to indemnify him from the rent, royalties, and covenants of the lease.

Held, (1) *that the applicant was a "creditor" within the meaning of section* 2 *of the Joint-Stock Companies Arrangement Act,* 1870, *and was, therefore, bound by the scheme of arrangement;* (2) *that, even if that were not so, the applicant was too late in making his application.*

Quære, *as to the effect of the decision in* Hardy *v.* Fothergill, 37 *W. R.* 177, 13 *App. Cas.* 351, *upon the right of a lessor to have the assets of a limited company which is being wound up impounded.*

Appeal from the decision of Wright, J.

The appellant, W. Y. Craig, was, in 1890, the lessee of a colliery, and, by a deed dated in June, 1890, he assigned his lease to the above-named company, and the company covenanted with him to pay the rent and royalties reserved by the lease, to perform the lessee's covenants contained in it and to indemnify Craig therefrom. This covenant covered the whole period of the lease, and there was no provision relieving the company from it in the event of the company assigning the lease to any other person. The company took possession and worked the colliery.

In May, 1893, a resolution was passed to wind up the company voluntarily, and on the 21st of July, 1893, an order was made to continue the winding up subject to the supervision of the court.

On the 13th of September, 1893, a scheme of arrangement was adopted at meetings of creditors, debenture-holders, and contributories of the company for forming a new company, which was to take over the assets and liabilities of the old company and to pay or satisfy within three months of the approval of the scheme by the court the debentures and unsecured creditors of the old company and the costs of winding up. It was further provided by the scheme that the new company should allot, upon the nomination of the liquidators of the old company, to each shareholder of the old company one share in the new company, credited with £4 paid, for each share held by him in the old company. It was further provided that upon payment or satisfaction of the debentures, debts, and expenses the old company should be wound up and dissolved.

On the 12th of October, 1893, this scheme was approved by the court. A new company was formed as proposed, and registered on the 30th of November, 1893.

An agreement for taking over the assets and business of the old company was shortly afterwards entered into between the liquidators of the old company and the new company, and those assets were in fact taken over pursuant to this agreement. The appellant knew of the proposed scheme, but did not oppose its approval by the court nor take any steps to obtain an injunction to prevent its being carried out. But on the 9th of December, 1893, he applied, by summons, that a claim by him for £45,787 might be admitted against the old company. Part of this claim consisted of a debt or liability for £336, which was not disputed. The rest of the claim was based on the covenant by the old company to pay and indemnify him against the future rent and royalties to become due under the lease. The allowance of this claim was resisted by the liquidators of the old company. The new company were not served with the summons.

On the 5th of July, 1894, Wright, J., made an order allowing the proof of the £336, but disallowing the rest of the claim.

From this order Craig appealed.

The Joint-Stock Companies Arrangement Act, 1870, s. 2, provides that "where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the court, under the Companies Acts, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the court shall direct, and if a majority in number representing three-fourths in value of such creditors or class of creditors present either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

Buckley, Q.C., and *Kenyon Parker,* for the appellant.—The appellant is entitled to prove in respect of this liability: *Close* v. *Wilberforce,* 1 Beav. 112; *Moore* v. *Grey,* 2 Ph. 717; *Elphinstone* v. *Monkland Iron and Coal Co.* (*Limited*), 11 App. Cas. 332, 34 W. R. Dig. 54; *In re The Telegraph Construction Co.,* 18 W. R. 729, L. R. 10 Eq. 384; *Oppenheimer* v. *British and Foreign Exchange and Investment Bank,* 26 W. R. 391, 6 Ch. D. 744. The new company did not within the time limited by the scheme satisfy the appellant's claim. To satisfy the claim the new company should have given the appellant the same rights as he had against the old company: *Gooch* v. *London Banking Association,* 32 Ch. D. 41, 34 W. R. Dig. 38. If the old company had gone on to liquidation, the appellant might have proved for rent due and claimed in respect of future rent. The creditors might have had priority, but he would have been able to compel the liquidators to keep from the shareholders a sufficient sum to answer the claim. He is now entitled to have the sum impounded and an injunction against the dissolution of the old company. If the liquidators have distributed all the assets, so much the worse for them. [LINDLEY, L.J., referred to *Hardy* v. *Fothergill,* 37 W. R. 177, 13 App. Cas. 351.]

Kirby, for the liquidators.—The appellant is not in the same position as a lessor. His rights are under the scheme, which is binding on him. All the

assets have been handed over under an order of the court, and any person unsatisfied must go against the new company. This is not a case of the return to the shareholders of the capital of the old company: *In re Cardiff Coal and Coke Co.* (*Limited*), 11 W. R. 1007, 9 L. T. N. S. 186.

He also referred to *Moule* v. *Garrett*, 18 W. R. 697, 20 *Ib.* 416, L. R. 5 Ex. 132, 7 *Ib.* 101.

Buckley, Q.C., in reply, referred to *In re City and County Investment Co.*, 28 W. R. 933, 13 Ch. D. 475.

Cur. adv. vult.

The judgment of the COURT was read by

LINDLEY, L.J.—In order to dispose of the various questions raised by the appeal it will be convenient to consider (1) Mr. Craig's rights against the old company apart from the scheme of arrangement; (2) the effect of that scheme upon his rights; and (3) the consequences which follow from the fact that the liquidators of the old company have handed over to the new company all the assets of the old company, and have distributed amongst the shareholders of the old company the shares received from the new company as provided by the scheme.

First, as regards Mr. Craig's rights against the old company, apart from the scheme. With respect to that, section 158 of the Companies Act, 1862, provides: "In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company—present or future, certain or contingent, ascertained or sounding only in damages—shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Notwithstanding the very comprehensive language of this section, Giffard, L.J., when Vice-Chancellor, decided in *In re London and Colonial Co., Ex parte Horsey*, 16 W. R. 577, L. R. 5 Eq. 561, that, as it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant, he was not entitled to prove against a limited company being wound up and to receive a dividend on his proof, and this view prevailed until a comparatively recent date. But after the decision of the House of Lords in the case of *Hardy* v. *Fothergill*, which must be considered in connection with section 10 of the Judicature Act, 1875, it is difficult, if not impossible, to say that Mr. Craig could not have had his claim valued and have proved for its value against the old company.

Mr. Craig, however, does not really want to do this. What he wants is to enter a claim with a view to have assets of the old company set apart for his indemnity before they are divided amongst the shareholders; or, if he is not in time for that, he asks that the old company may not be formally dissolved so long as he is exposed to liability under his covenants. He bases his claim in this respect on certain decisions in which a lessor of a limited company being wound up or applying for leave to reduce its capital has been held entitled to enter a claim for the amount of rent and royalties which may become due to him in future, and to an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment. The cases in which orders to this effect have been made are *In re the Telegraph Construction Co., Oppenheimer* v. *British and Foreign Exchange and Investment Bank, Gooch* v. *London Banking Co.*, and *Elphinstone* v. *Monkland Iron and Coal Co.* The last of these cases was in the House of Lords, and the House made an order in favour of the lessor of a limited company, which was being wound up voluntarily, and declared that the lessee company was bound to fulfil its future obligations under its lease, and that the liquidators were bound to make due provision for fulfilling such obligations, and to set aside assets of the company in their hands, for that purpose. It is true that this was a Scotch case, and a case between lessor and lessee; but I see no reason to suppose that there is any difference between English and Scotch law in this respect. The effect, however, of the decision in *Hardy* v. *Fothergill* on the right of a lessor to have the assets of a limited company which is being wound up, impounded has not yet been judicially determined. The English decisions in favour of his right to enter a claim and have assets impounded to meet it, have all proceeded upon the view that the lessor could not prove for any ascertainable sum and be paid a dividend upon it, and on some future occasion those decisions will have to be reconsidered. In the present case it is not necessary to solve this new problem, and I say no more about it. I will assume that, apart from the scheme, Mr. Craig would have been entitled to enter a claim for indemnity, and to have assets in the hands of the liquidators set apart to answer this claim before the final dissolution of the company. This was not what Mr. Craig asked by his summons, but I pass that over, as the summons might have been amended.

I will now consider the effect of the scheme of arrangement. Mr. Craig clearly was entitled to be heard in opposition to that scheme. The cases to which I have referred presuppose the existence of assets not yet distributed amongst the shareholders. Until they are distributed he is entitled to be heard in opposition to any scheme for their distribution. Whether the court is bound to give effect to his opposition is a different question, and depends on the meaning of the word "creditor" in the Joint-Stock Companies Act, 1870. Considering that that Act was passed in order to enlarge the powers conferred by section 159 of the Companies Act, 1862, I agree with Wright, J., in thinking that the word "creditor" is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless. If I am right in this interpretation of the Act of 1870, Mr. Craig is bound by the scheme approved by the court, and in my opinion he is so bound. This is of itself enough for the decision of this appeal. But I will again assume in his favour that he is not so bound, and that the scheme itself did not deprive him of the rights which I have assumed that he otherwise would have had.

This brings me to the last point—viz., the effect of the approval of the scheme and of what has been done under it. In my judgment Mr. Craig has asserted his claim to have assets set aside for his indemnity far too late. As already stated, he had full notice of the proposed scheme. He did not oppose it; he did not appeal from the order approving it; he took no steps to prevent its being carried out, nor to prevent the shares of the new company from being distributed amongst the shareholders of the old company, whilst they were in the hands of the liquidators. The scheme was sanctioned on the 12th of October, 1893. Mr. Craig made no application to the court until the 9th of December, 1893, by which time the new company had been formed. Mr. Craig applied for no injunction, and long before the 5th of July, 1894, when his summons came on to be heard, all the assets of the old company had been handed over to the new company, and the

shares of the new company had been distributed amongst the shareholders of the old company. There were then no assets of the old company to impound, and it was impossible to stay their distribution. I am far from saying that Mr. Craig could have done anything effectually after he had allowed the scheme to be approved by the court without opposing it. Had he opposed it the court might have refused to sanction the scheme, for the court is not bound to approve a scheme which it thinks unjust to any one. Be this, however, as it may, it is impossible now to stay any distribution of assets, for there are none to distribute. Although it is not too late to stay the dissolution of the old company, nothing will be gained by so doing, now that the assets have all been distributed under the sanction of the court. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors, *Bircham & Co.; Ashurst Morris & Co.*

High Court of Justice.

Chan. Div. North, J. } Dec. 18.

In re MARTIN & VARLOW. (*a.*)

Practice—Costs—Petition instead of originating summons—Judgment—Order for sale of debtor's interest under 27 & 28 Vict. c. 112, s. 4—R. S. C., ord. 70, r. 1; ord. 55, r. 9b.

When a judgment creditor in possession had proceeded by petition instead of originating summons under 27 & 28 Vict. c. 112, s. 4, as amended by R. S. C., ord. 55, r. 9b, the costs of proceedings initiated by summons were only allowed.

Petition.

This was a petition under the Judgment Act, 1864 (27 & 28 Vict. c. 112), s. 4, for the sale of the interests of Messrs. Martin & Varlow in certain dwelling-houses for the satisfaction of an unsatisfied writ of *fieri facias* issued in October, 1894, and that the costs of and incident to the petition might be taxed and added to the principal debt. A receiver of the property had been appointed on the motion of the petitioners.

Section 4 of the Judgment Act, 1864, enables a creditor to whom land has been delivered in execution to obtain from the court "upon petition in a summary way" a sale of the debtor's interest.

Under ord. 55, r. 9*b*, of the Rules of the Supreme Court, "an application by a judgment creditor for an order under 27 & 28 Vict. c. 112 for the sale of his debtor's interest in any land delivered in execution shall be by originating summons."

Swinfen Eady, Q.C., and *T. A. Nash*, for the petitioners.—Ord. 70, r. 1, is in point here. We have made a mistake by proceeding by petition instead of summons; but the order enables the court to set us right. We ask for the order in Seton (4th ed.) and in *In re Cooper*, 37 W. R. 330.

F. Ritter, for the defendants.—In this case the proceedings were irregular from the beginning. Ord. 70, r. 1, applies only where proceedings which at the beginning were regular have become irregular through some informality. He referred to *Petty* v. *Daniel*, 35 W. R. 151, 34 Ch. D. 172. [NORTH, J.—That case was on ord. 52, r. 4. His lordship referred to *In re Bethlehem* v. *Bridewell Hospital*, 34 W. R. 148, 30 Ch. D. 541. There a petition was allowed for a summons]. That seems to cover the case.

W. Freeman, for other parties attending the proceedings.

NORTH, J.—I must make the same order as in Seton, 4th ed., p. 1177, and *In re Cooper*, and that subject to costs. As to costs, the petitioners' costs must be taxed, and they must only get summons costs. The costs of both parties should be taxed, and the taxing master must distinguish between the costs actually incurred and the costs that would have been incurred if the proceedings had been by summons. In regard to the defendant's costs, he must allow him back the difference between their actual costs and what they would have been if these proceedings had been by summons.

Solicitors, *J. H. Horton; Taunton & Dade; Senior, Attree, Johnson, & Son.*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. } Dec. 4, 5, 6; Jan. 16.

MACKINTOSH v. POGOSE. (*a.*)

Settlement—Post-nuptial—Separate property of wife settled by husband—Property of husband settled by him in exoneration of debt due to wife—Purchaser in good faith and for valuable consideration—Bankruptcy Act, 1883, s. 47—Proviso for cesser of husband's interest on bankruptcy—Validity—Married Women's Property Act, 1882, s. 3.

A husband and wife, immediately after their marriage in 1883, went out to India, where separate property of the wife was remitted to her from England. The husband borrowed from his wife to the extent of 51,000 rupees, 16,000 rupees of which he invested on his wife's account in his own name, speculating with the balance of 35,000 rupees and losing it. In exoneration of his debt to his wife, the husband executed in 1884 a post-nuptial settlement, in which the wife joined, whereby, with her consent therein expressed, he settled the securities representing the said sum of 16,000 rupees, and also certain property of his own, upon the usual trusts, subject, however, to a proviso that the husband's interest in the trust funds should cease in the event of his bankruptcy. The husband was made a bankrupt in 1888 on the petition of the mortgagee under a mortgage entered into by the bankrupt previous to his marriage.

On an application by the husband's trustee in bankruptcy for a declaration that the said post-nuptial settlement was void as against him,

Held, that the wife was a purchaser in good faith and for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and that the settlement was therefore valid as against the plaintiff.

On an alternative claim, that the provision for the cesser of the husband's interest in the event of his bankruptcy was void as against the plaintiff as such trustee in bankruptcy,

Held, that the property brought into settlement by the husband was, to the extent of the unpaid balance of 35,000 rupees due from him to his wife, in substance the property of the wife, and was therefore capable to that extent of being limited to the husband until his bankruptcy.

Held, further, on the authority of Ex parte Tidswell,

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

35 *W. R.* 669, *that section* 3 *of the Married Women's Property Act of* 1882 *only applies where the wife's property has been lent to the husband for the purposes of his trade or business.*

The plaintiff in this action was the official receiver in bankruptcy of Nicholas Marcar Pogose, who was adjudged a bankrupt on the 27th of April, 1888. The defendants were Margaret Pogose, the wife of the bankrupt, their two infant children, and Donald John Bagram, the sole remaining trustee of a post-nuptial settlement the subject of this action. The bankrupt and the defendant Margaret Pogose were married on the 27th of February, 1883, and immediately afterwards went out to India, where, on the 2nd of June, 1884, the said post-nuptial settlement was executed, whereby, after reciting, *inter alia*, that the husband had borrowed 51,000 rupees from his wife, investing 16,000 rupees thereof in certain securities in his own name, and applying the balance of 35,000 rupees to his own purposes, and that the husband, in consideration of the said sum of 35,000 rupees, had agreed to settle upon the trusts thereinafter mentioned certain property of his own therein more particularly described, the husband, with the consent of the wife, assigned to the trustees of the settlement the securities representing the said sum of 16,000 rupees, and also the property of the husband above mentioned, upon trust for the husband, his wife, and the children of the marriage in ordinary form, with provisions restraining anticipation of the income of the trust funds by the wife, and providing that if the husband should become bankrupt, or should attempt to assign or charge the said income, his interest in the said trust funds should immediately cease. In the year 1882, previous to his marriage, the debtor jointly with his brother, who was then in financial difficulties, mortgaged certain securities to secure an advance of £800, and interest at the rate of twelve per cent. per annum. The debtor entered into the said mortgage agreement as surety for his brother. The security at the date of the mortgage was believed by all parties to be of considerable value, but it eventually proved to be worthless. The mortgagee in 1883 sought to make the debtor a bankrupt, but owing to the absence of the latter from this country the receiving order was not made until 1888. There was nothing to show that at the date of the post-nuptial settlement the debtor was aware that bankruptcy proceedings were being taken against him.

The remaining facts sufficiently appear from his lordship's judgment.

The plaintiff, as official receiver in bankruptcy of the debtor's property, sought by this action a declaration that the post-nuptial settlement was void as against him in respect of the whole of the property comprised therein, or, in the alternative, that the provision in the said settlement as to the cesser of the debtor's life interest in the event of his bankruptcy was void as against the plaintiff as trustee of the property of the debtor.

Graham Hastings, Q.C., and *M. Muir Mackenzie*, for the plaintiff, cited the following cases:—*In re Ridler*, 31 W. R. 93, 22 Ch. D. 74; *In re Pearson, Ex parte Stephens*, 25 W. R. 126, 3 Ch. D. 807; *Ex parte Hillman*, 27 W. R. 567, 10 Ch. D. 622; *Hance* v. *Harding*, 36 W. R. 629, 20 Q. B. D. 732.

Grosvenor Woods, Q.C., and *Stewart Smith*, for the defendants.—This is a settlement of the wife's property, although its form suggests a settlement of the husband's, and it is therefore a good settlement. There is no evidence that the wife made a gift of her property to her husband, and he was under an obligation to return it. It was not necessary that there should be in the settlement first an assignment by the husband to her and then a settlement by her. The court looks at the substance, and not the form of the settlement. Section 3 of the Married Women's Property Act, 1882, does not apply, because the property was not lent by the wife to the husband for the purposes of his business or trade. Section 47 of the Bankruptcy Act, 1883, never intended that a husband should not be allowed to settle upon his wife property belonging to her which happened to be in his possession.

They cited *In re Ashby*, 40 W. R. 430, [1892] 1 Q. B. 872; *Pott* v. *Todhunter*, 2 Coll. 76; *In re Flamank, Wood* v. *Cock*, 37 W. R. 502, 40 Ch. D. 461; *Lester* v. *Garland*, 5 Sim. 205; *Whitmore* v. *Mason*, 10 W. R. 168, 2 J. & H. 204; *Hammonds* v. *Barret*, 17 W. R. 1078; *Ex parte Taylor*, 35 W. R. 148, 18 Q. B. D. 295; *Ex parte Tidswell*, 35 W. R. 669; *Butcher* v. *Stead*, 24 W. R. 462, L. R. 7 H. L. 839.

Graham Hastings, Q.C., in reply.—Section 3 of the Married Women's Property Act applies, and the property was used by the husband in such a manner as to fall within the meaning of that section. He speculated with it, and that was his business for the time being. The husband made a preferential payment to his wife by this settlement, for he had nothing left with which to pay his creditors, and therefore on that ground the settlement is bad.

STIRLING, J.—[His lordship stated the facts as above, and proceeded:—] This is a question which arises under the Bankruptcy Act of 1883 and the Married Women's Property Act of 1882. However beneficial this latter Act may have been, it has undoubtedly given rise to very many peculiar transactions between husband and wife. It is necessary, therefore, before deciding these questions, to carefully inquire into the circumstances connected with each. Now it is clear that at the date of the marriage of Mr. and Mrs. Pogose, the wife had considerable property of her own, to which she was still entitled after her marriage in consequence of the Act of 1882. Her property was remitted to her in India by means of drafts in her favour, which she indorsed to her husband.

Now in my opinion there was never any gift of this property by the wife to her husband, and the latter was clearly bound to return it in some form or other. The husband admitted this liability, and the settlement, the subject of this action, was executed by him in exoneration of such liability. [His lordship here read the settlement.] Now it is said by the plaintiff that this settlement is void under section 47 of the Bankruptcy Act of 1883, and as the terms of the settlement clearly show that there was a settlement of the husband's property as well as of the wife's, it therefore falls within the said section. But it is contended that there is consideration, and I think that contention is well founded. Now, in the first place, who is a purchaser for valuable consideration? On this point I have the guidance of the Court of Appeal in *Hance* v. *Harding*. [His lordship read the headnote and then read the judgments of Lord Esher, M.R., and Sir James Hannen (20 Q. B. D.) on pp. 737-739.] It was clearly decided in that case that the father of the bankrupt was a purchaser for valuable consideration. Now in the present case the wife has given consideration, for she settles certain property of her own and she releases her husband from the balance in which he was indebted to her in respect of the property he had borrowed. Consequently I think that she is just as much a purchaser for valuable consideration as was the father in *Hance* v. *Harding*. But in

that case the court was unanimously of opinion that all the parties had acted in good faith; and it is said that here one of the parties at least (Mr. Pogose) did not act in good faith, and that, consequently, Mrs. Pogose is not a "purchaser in good faith" within the meaning of the Act.

Now I am of opinion that a person is a "purchaser in good faith" within the meaning of section 47 of the Bankruptcy Act of 1883 if he himself act in good faith, and it is not necessary that both parties should act in good faith. My reasons for this conclusion are, firstly, because that is the natural interpretation of the statute; secondly, because it is in accordance with the principles of those bankruptcy cases decided by the courts before the passing of the Bankruptcy Acts; and thirdly, because it is in accordance with the bankruptcy statutes previous to the Act of 1883.

Now as to the first reason. I think the meaning of the words of the 47th section—*i.e.*, "a purchaser or incumbrancer in good faith and for valuable consideration"—is simply this: a person who has for valuable consideration acquired property affected with some infirmity without notice of the existence of such infirmity. Next, as to the cases before the passing of the Bankruptcy Acts. This class of cases is well illustrated by the case of *Kevan* v. *Crawford*, 26 W. R. 49, 6 Ch. D. 29. I refer to it, not as a binding authority, but merely by way of illustration. [His lordship stated the facts of the case, and then read part of Jessel, M.R.'s judgment, beginning on p. 38 with the words "The Vice-Chancellor has taken the view" to the end of the paragraph on p. 39.] This case clearly shows that in settlements before the Bankruptcy Acts it was enough if the purchaser for value had no knowledge of any fraud on the part of the settlor. Lastly, in the case of *Butcher* v. *Stead* the House of Lords held that the words (in section 92 of the Bankruptcy Act of 1869, which is, of course, no longer law) "in good faith and for valuable consideration" must be taken to mean, without notice that any fraud or fraudulent preference is intended, valuable consideration being given. For these reasons I think that Mrs. Pogose must be treated as a purchaser for valuable consideration in good faith, as it does not appear to me from the evidence that she had notice, either direct or constructive, of any fraud or fraudulent intention on the part of the settlor. Now on this last point I am far from satisfied that her husband had any dishonest intention in making this settlement. His debts were mainly due to his becoming surety for his brother under the mortgage of 1882, and it is clear that all parties to that deed believed the security to be a valuable one. Moreover, none of his creditors were pressing for payment. I do not think I ought, under these circumstances, to infer that this settlement was made by Mr. Pogose with any fraudulent intent, and any doubt I might have felt upon this point is dispelled by the decision of the Court of Appeal in *Ex parte Mercer*, 17 Q. B. D. 290, 34 W. R. Dig. 169, where it was held that the evidence was insufficient to prove that a settlement had been made with fraudulent intent, although the circumstances in that case were much more suspicious than they are here. On these grounds I hold that the post-nuptial settlement must stand, and that the main object of the action fails. With respect to the alternative claim—*i.e.*, that the provision as to the cesser of Mr. Pogose's life interest in the event of his bankruptcy is void—I desire to reserve judgment.

His lordship delivered the reserved judgment on the 16th of January, 1895, as follows:—

In this case I have held that the post-nuptial settlement of the 2nd of June, 1884, is a settlement made in favour of a purchaser—*i.e.*, Mrs. Pogose—in good faith and for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and consequently is valid as against the plaintiff, the trustee in bankruptcy of Mr. Pogose.

The further question remains whether the provision in the deed for the cesser of the life interest thereby given to Mr. Pogose on his becoming bankrupt is void as against the plaintiff as to the income of the property of Mr. Pogose comprised in or made subject to the settlement.

Two questions were argued: (1) whether the trust was invalid under the general rule of law; (2) if not, whether it is rendered bad by the provisions of section 3 of the Married Women's Property Act, 1882.

As regards the first question the principle is thus stated in a note to *Wilson* v. *Greenwood*, 1 Swans. 471, at p. 481, as follows: "The general distinction seems to be that the owner of property may on alienation qualify the interest of his alienee by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy to the disappointment or delay of his creditors, the *jus disponendi*, which for the purpose is absolute, being in the latter instance subject to the disposition previously prescribed by law."

There have been many decisions as to the application of this principle to marriage settlements, and it has been long established that if husband and wife both bring property into such a settlement a trust of the income of the wife's property in favour of the husband until his bankruptcy is good, while a similar trust of the income of the husband's property is bad: see *Lockyer* v. *Savage*, 2 Str. 947; *Higinbotham* v. *Holme*, 19 Ves. 88. If, however, the wife's is not brought into settlement, but is paid over to the husband, then it has been held that a trust of the husband's own property in favour of himself until bankruptcy is good to the extent of the wife's fortune received by him: *Ex parte Cooke*, 8 Ves. 353; *Ex parte Hodgson*, 19 Ves. 206; *In re Meagham*, 1 Sch. & Lef. 179; *Higginson* v. *Kelly*, 1 Ball. & B. 252; *Lester* v. *Garland*. The principle of these cases was stated by Lord Hatherley when Vice-Chancellor to be as follows (*Whitmore* v. *Mason*, 2 J. & H. 214):—[His lordship here read from Lord Hatherley's judgment, beginning at the words "Looking at all the cases" down to the words "which she contributed as her fortune upon the marriage," and proceeded:—] The reported decisions as to post-nuptial settlements are, as far as I have been able to discover, three only—viz.: *Montefiore* v. *Behrens*, L. R. 1 Eq. 171, 14 W. R. Ch. Dig. 44; *Hammonds* v. *Barrett*; *Learmouth* v. *Miller*, L. R. 2 Sc. App. 438, 24 W. R. Dig. 248. In *Montefiore* v. *Behrens* (decided in 1865) it was held that a settlement of a legacy to which a married woman became entitled during coverture, so as to give her husband a life interest determinable on bankruptcy, was valid as against the assignee in bankruptcy, the ground of decision being that the wife was entitled to an equity to a settlement. If the court had ordered the fund to be settled the wife would, according to the ordinary practice, have taken an immediate life interest in the settled fund, and it was considered competent to her, without the intervention of the court, to take less than she would strictly be entitled to, and to give up such life interest to her husband so long as he remained solvent.

In *Hammond* v. *Barrett* (decided in 1869) a post-nuptial settlement was made, by which £990, the property of the husband, and £4,000, the property of the wife's mother, was settled upon trust for the wife for life, with remainder for the husband for life or until he should become a bankrupt, or take the

benefit of any Act for the relief of insolvent debtors, or commit or do any act, deed, or matter, or thing whatsoever whereby the income should become vested in any other person, with remainders over. The wife died in 1862. In 1866 the husband assigned the income by way of mortgage to secure payment of a bond. In 1867 he became bankrupt, and a question arose under those circumstances whether the assignee in bankruptcy of the husband was entitled to any part of the income of the fund. It was held by Stuart, V.C., that he was not. This judgment is very shortly reported, and there are some observations in it which, taken literally, might seem to indicate his opinion to be that the settlement was not in any way obnoxious to the bankruptcy laws. The judgment, however, concludes thus: "The assignee is not entitled to any of the stock, the life interest of the bankrupt having ceased on the execution of the bond." I think that the question that was decided in that case related to the validity of the gift over upon alienation rather than upon bankruptcy, and if so the decision is in accordance with the cases of *Brooke* v. *Pearson*, 7 W. R. 638, 27 Beav. 181; *Knight* v. *Brown*, 9 W. R. 515, 7 Jur. N. S. 894; *In re Detmold*, 37 W. R. 442, 40 Ch. D. 585. *Learmouth* v. *Miller* was a Scotch appeal decided by the House of Lords in 1875. There a post-nuptial settlement was made of the legitim or share of the wife in her father's estate. The trust being for the husband for life, with remainder to wife for her life, and subject thereto for the children of the marriage, and those provisions were declared by the deed to be alimentary, and "no wise attachable for debt." The husband subsequently became bankrupt, and it was held that the trustee in bankruptcy was entitled to the income of the fund during the husband's life. According to the law of Scotland a wife is not entitled to any equity to a settlement (*In re Tweedale*, Johns. 110, 7 W. R. Ch. Dig. 92), and the decision does not necessarily govern cases where such a right exists, but I have thought it right to refer to it by reason of Lord Cairns making some observations with reference to English law. [His lordship here read from Lord Cairns' judgment on p. 440, L. R. 2 Sco. App., beginning at the words "It is a stipulation with regard to" down to the words "your lordship's bar, where it has been held valid," and proceeded:—] None of these cases quite meets the question which arises here, and upon which Lord Cairns, in the last-mentioned case, refrained from expressing an opinion, and consequently it is now necessary for me to give a decision upon it.

I think that the cases on marriage settlements show, and *Whitmore* v. *Mason* is an express authority, that the mere existence of valuable consideration does not entitle the owner of property to settle it on himself until bankruptcy. The cases, of which *Lester* v. *Garland* is a type, are only apparent exceptions to this rule, for there, as is pointed out by Lord Hatherley in the passage cited, the courts treated the property of the husband as being in substance the property of the wife. On the other hand, I cannot discover any good ground for holding that those exceptional cases are to be confined to marriage settlements. It seems to me that the principle of them applies, and I understand Lord Hatherley to so lay it down, in all cases where the court can find a definite sum which can be appropriated as the wife's property. And in all such cases that definite sum is to be treated, not merely as consideration for the settlement, but as the identical property brought by her into settlement. In my judgment such a definite sum can be discovered in the present case—*i.e.*, the balance of 35,000 rupees mentioned in the settlement of 1884, and, therefore, I am of opinion that to this extent the property settled by the husband must be treated as the property of the wife, and capable of being limited to him until bankruptcy.

The question then arises as to the effect of section 3 of the Married Women's Property Act, 1882, which, so far as material, is in these words: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise shall be treated as assets of her husband's estate in case of his bankruptcy." Now it was decided in *Ex parte Tidswell* that this section only applies where money or other estate of the wife has been lent or entrusted to the husband for the purposes of his trade or business. In *Alexander* v. *Barnhill*, 21 L. R. Ir. 511, 37 W. R. Dig. 5, decided in 1888, the Vice-Chancellor, in Ireland, expressed a contrary opinion, but *Ex parte Tidswell* was not cited, and, further, the observations of the learned judge were unnecessary to the decision of the case before him. I have been unable to find any subsequent authority bearing on the point, and although in *Ex parte Tidswell* the learned judge appears to have found great difficulty in coming to the conclusion at which he ultimately arrived, I consider myself bound by the authority of that case. Inasmuch as the fund here in question was not lent or entrusted to Mr. Pogose for the purpose of his trade or business the section does not assist the plaintiff, but I desire to point out a further difficulty. Part of the separate estate of Mrs. Pogose was no doubt at one time lent or entrusted to her husband, but it ceased so to be on the execution of the settlement of 1884, and became entrusted to the trustees of that settlement. If, as I have held, this settlement was not open to objection under the provisions of the Bankruptcy Act, it is difficult to see that the particular transaction falls within the provisions of section 3 of the Married Women's Property Act, 1882. The case of *Alexander* v. *Barnhill*, to which I have already referred, is an authority that that section does not extend to or affect every kind of dealing between husband and wife.

The plaintiff is entitled at his own risk to an inquiry as to the value of the property brought into settlement by Mr. Pogose, but in all other respects the action fails, and the plaintiff must pay the costs down to and including the trial.

Solicitors, *Clement, Chase, & Green; Nash, Field, & Withers*, for *Stuckey, Son, & Pope*, Brighton.

Q. B. Div. (Pollock, B., and Grantham, J.) — Dec. 11; Jan. 21.

PAYNE v. WILSON. (*a*.)

Sale of goods—Hire and purchase agreement—Possession of goods by hirer—Fraudulent sale by hirer before property has passed—Conviction of hirer for larceny as a bailee—Revesting of title in owner by such conviction—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 24.

A person in possession of a piano under a hire and purchase agreement, which provided that until all the instalments of the purchase-money were paid the piano was to continue the property of the owner, sold the piano before all such instalments were paid to a bona fide purchaser, who bought without notice of the owner's lien. The hirer was prosecuted by the owner for larceny

(*a*.) Reported by Sir SHERSTON BAKER, Barrister-at-Law.

as a bailee and convicted, and after such conviction the owner brought an action for conversion against the purchaser of the piano.

Held, that, by the sale, the property had passed to the purchaser under section 9 of the Factors Act, 1889, and that such property was not, by the conviction, revested in the owner by section 24 (1) of the Sale of Goods Act, 1893, as that section is inapplicable to a conviction for larceny as a bailee under such circumstances.

Appeal by the plaintiff from a judgment of his Honour Judge Bacon, at the Whitechapel County Court.

The plaintiff, a pianoforte manufacturer, sought to recover from the defendant damages for the conversion of a piano.

The facts were these. In November, 1892, the plaintiff let a piano to one Sullivan under a hire and purchase agreement in writing, by which the piano was to be paid for by a number of equal monthly payments, and until all such payments were made it was to continue the property of the plaintiff. The agreement was in the usual form. Before Sullivan had paid all the instalments he, in March, 1894, sold the piano to the defendant, who bought and received it in good faith, and without notice of any lien or other charge of the plaintiff. On the 8th of June, 1894, the plaintiff prosecuted Sullivan at the London Sessions for larceny as a bailee, and obtained his conviction. After the conviction the counsel for the prosecution applied to Sir Peter Edlin, who had tried the case, for an order of restitution against the defendant, under 24 & 25 Vict. c. 96, s. 100, but this was refused. The plaintiff then made a formal demand on the defendant to give up the piano, and on his declining to do so brought the present action in the county court for conversion.

The learned county court judge held that section 24 (1) of the Sale of Goods Act, 1893, did not apply to the case; that the property had not, under that section, revested in the owner; and that this was made clear by section 21 (2) of the Act, showing that the provisions of the Factors Act, 1889, which vested the property in the defendant, were not affected by the provisions of the Sale of Goods Act, 1893. He therefore gave judgment for the defendant.

The plaintiff appealed.

Cluer (*Groser* with him), for the plaintiff.—Upon the conviction of Sullivan for larceny as a bailee the property revested in the owner. Under section 3 of 24 & 25 Vict. c. 96 larceny by a bailee is treated as larceny, and the person guilty of the offence may be convicted of larceny. The conviction being for larceny, the case comes within section 100 of the 24 & 25 Vict. c. 96, because, however the misdemeanours mentioned in that section may be affected by the Sale of Goods Act, 1893, s. 24 (2), larceny within that section is not affected by the later Act, so that section 100 of the 24 & 25 Vict. c. 96 is still applicable, and under that section the property is to be restored to the owner upon the conviction of the offender. The case of *Bentley* v. *Vilmont*, 36 W. R. 481, 12 App. Cas. 471, decided upon that section, is now overruled by section 24 (2) of the Sale of Goods Act, 1893, but that was a case of goods obtained by false pretences, and not by larceny, and it does not affect the case of goods obtained by larceny, which is still within section 100. The present case also comes within the very words of section 24 (1) of the Sale of Goods Act; those words are "where goods have been stolen," and here the goods have been stolen, so that by that section also the property, which no doubt passed by the sale to the defendant under section 9 of the Factors Act, 1889, became revested in the plaintiff, as owner, and the plaintiff is now entitled to maintain this action.

Jelf, Q.C. (*Herbert Smith* with him), for the defendant.—The learned county court judge was absolutely right in his decision. According to the cases of *Lee* v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318, and *Helby* v. *Matthews*, 42 W. R. 514, [1894] 2 Q. B. 262, the property in the piano passed to the purchaser by the sale. The hire and purchase agreement in the present case is identical with the agreement in *Helby* v. *Matthews*, and the Court of Appeal there, as well as in the case of *Lee* v. *Butler*, held that under section 9 of the Factors Act, 1889, a good title was given to the purchaser, although the sale by the hirer was fraudulent. It is admitted here that the defendant acquired a good title by the sale, and the sole question now is whether, upon the conviction of Sullivan for larceny as a bailee, the property has become revested in the owner. Section 100 of the Larceny Act, 1861, clearly does not apply, and the only question is whether section 24 (1) applies to revest the property in the owner. That section says "where goods have been 'stolen'"; now the piano here was not stolen, but was entrusted by the owner to Sullivan under the agreement. It was not stolen by Sullivan; if it had been so stolen, then the section would have applied. Moreover, the 2nd sub-section makes this quite clear, for it says where goods have been "obtained" by fraud or other wrongful means not amounting to larceny, then the property does not revest upon the conviction. Here the governing word is "obtained"—that is, obtained in the first instance, and from the owner. Here the piano was not "obtained" from the owner by any means which could be described as a larceny, and therefore section 24 (1) does not apply to revest the property in the owner. If there were any doubt upon the point it is removed by section 21 (2), which provides that "nothing in the Act shall affect the provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner." The defendant, therefore, has a good title, and is entitled to succeed.

Cluer replied.

Cur. adv. vult.

Jan. 21.—The judgment of the COURT was read by

POLLOCK, B., who, after stating the facts as above set out, proceeded:—In order to arrive at the respective rights of the parties the first question to be settled is, What was the relative position of the plaintiff and Sullivan? The agreement between them appears to be in form identical with that which came before the Court of Appeal in *Helby* v. *Matthews*, where the court held that it was an agreement of sale, and that the person who in that case was in the same position as is Sullivan in the present case was a person who had bought or agreed to buy the piano. The same conclusion was arrived at in *Lee* v. *Butler* with respect to an agreement the terms of which slightly varied from that under discussion in *Helby* v. *Matthews*. The next question to consider is, What are the legal rights between the plaintiff and the defendant, who bought the piano from Sulivan in good faith and without notice of any title or lien of the plaintiff? For this purpose it becomes necessary to deal with two independent series of legislation.

First, the statutes by which, in accordance with the maxim, "*Spoliatus debet ante omnia restitui*," the owner of goods which have been stolen from him may obtain their restitution upon the prosecution and conviction of the thief. As to these: before the Act of Henry VIII. there was no restitution of stolen goods on indictment of the thief; the owner could only

obtain possession of them by bringing an appeal of robbery. An account of this procedure will be found in 3 Inst. 242 and 2 Hawkins P. C. 242, and in 2 Hawkins P. C. 249 it is stated that it is necessary to use the words "*felonicé cepit.*" By 21 Hen. 8, c. 11 it was provided that "if any felon or felons hereafter do 'rob' or 'take away' any money, goods, or chattels," &c., and the felon be indicted and found guilty thereof, "the party so robbed or owner shall be restored to the said money, goods, or chattels." This Act was repealed by 7 & 8 Geo. 4, c. 27, and by 7 & 8 Geo. 4, c. 29, s. 57, it was re-enacted in substance, the words used being, "if any person guilty of any felony or misdemeanour as aforesaid in stealing, taking, obtaining, or converting any chattel, &c., shall be indicted by the owner of the property and convicted, the property shall be restored to the to the owner."

Thus far it will be seen that, in order to obtain restitution, there must have been a robbery or stealing, a prosecution by the owner, and a conviction; and that the right of restitution did not exist where the dealing with the goods by a vendee or bailee was fraudulent but not criminal, but did exist in all cases in which it was criminal. The Act at present in force as to the restitution of stolen goods is the 24 & 25 Vict. c. 96. By section 100, "If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative, and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." After dealing with cases in which the property stolen consists of valuable securities or negotiable instruments, the section continues: "Provided also that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent entrusted with the possession of goods or documents of title to goods for any misdemeanour against this Act."

This for the first time provides for a particular class of cases in which there may be a criminal stealing or taking and a prosecution by the owner and yet no restitution. This, no doubt, is so provided in consequence of the creation of a new offence by the same Act. Before the passing of the Act there could, speaking generally, be no larceny by a bailee whose original receipt of the goods was lawful, but by section 3 it was provided that "whosoever being a bailee of any chattel, money, or valuable security shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." The provisions of section 100 would, therefore, but for this proviso, have applied to any larceny by a bailee within section 3. But that proviso excepts cases of theft by trustees, bankers, merchant attorneys, factors, brokers, and other agent entrusted with the possession of goods, thereby drawing a distinction between a possession by ordinary bailees and that by merchants, factors, brokers, or other agents entrusted with the possession of goods or documents of title to goods. These words would not, however, include a person who held a piano or other chattel as Sullivan did under a sale or hire agreement.

It now becomes necessary to consider how far the case is affected by what are called the Factors Acts. Prior to 1889 those Acts applied only to sales or pledges by factors, brokers, or mercantile agents, and protected only those who, by a *bonâ fide* sale or pledge, obtained goods from such agents, and did not apply to the case of a bailee, to whose employment a power to sell is not ordinarily incident, as is the case of a person who holds under an agreement for sale and return (see *Monk* v. *Whittenbury*, 2 B. & Ad. 484, and *Cooper* v. *Willomatt*, 1 C. B. 672). As, however, these and similar agreements became more common, the hardship of the law of restitution in cases where owners of goods had parted with them under a voluntary contract of sale, was strongly felt, and was expressed by the House of Lords in the case of *Bentley* v. *Vilmont*. The Legislature therefore again interfered, and, by the Factors Act, 1889, the protection was extended to dealings by way of sale or pledge to innocent purchasers by persons who could not properly be called factors or mercantile agents; and, by section 9 of this Act, it is provided that "where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original settler in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

This Act does not in terms repeal or allude to the 24 & 25 Vict. c. 100, but, according to *Helby* v. *Matthews*, Sullivan was a person who has "bought or agreed to buy" the piano within the meaning of this section, and by the section itself the delivery or transfer by him had the same effect as if he were a mercantile agent in possession of the piano with the consent of the true owner, and in our judgment the true conclusion to be drawn from the joint effect of the statutes and decisions is that the defendant in this case acquired a complete and permanent title to the piano and is not liable to restore it to the plaintiff.

One more statute which was relied upon by the plaintiff's counsel remains to be noticed—namely, the Sale of Goods Act, 1893. Section 24 provides that: "(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise. (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." This Act is more recent than any of those we have already noticed, and the language used in section 24, sub-section 1, is no doubt capable of a construction which would make it include the present case; but it must be remembered that the Act was passed to consolidate what was assumed to be the existing law by which sales of goods were regulated, and although the words "where goods have been stolen" are general, we do not consider their application is necessarily universal. On the

contrary we think that the true mode of dealing with them is to treat them as subject to the express limitations already created by statute, especially when the reasons for the limitations are apparent, and have been so recently noticed and dealt with by the House of Lords in the case of *Bentley* v. *Vilmont* and by the Legislature. It is to be noticed also that the language we are dealing with occurs in a group of sections commencing with section 21, which is headed "Transfer of Title," and by sub-section (2) of that section it is expressly provided that nothing in the Act shall affect the provisions of the Factors Acts or any enactments enabling the apparent owner of goods to dispose of them as if he were the true owner thereof. For these reasons we think the judgment of the county court judge was right, and we affirm it with costs to the respondent.

Appeal dismissed, and leave to appeal allowed.

Solicitor for the plaintiff, *H. E. Tudor.*

Solicitors for the defendant, *Proudfoot & Chaplin.*

Q. B. Div.
(Wright and Collins, JJ.) Nov. 21.

ATTORNEY-GENERAL *v.* JACOBS-SMITH AND OTHERS. (*a.*)

Inland revenue—Account duty—Voluntary dispositions—Marriage settlement—Children of widow by former marriage — Trustees — Consideration — Customs and Inland Revenue Act, 1881 (44 *Vict. c.* 12), *s.* 38, *sub-sections* (a) (c); *Customs and Inland Revenue Act,* 1889 (52 *Vict. c.* 7), *s.* 11.

Children of a widow by a former marriage taking interests under a marriage settlement made by the widow on her second marriage come within the consideration of the marriage, and are not "volunteers."

In a marriage settlement made by a widow on her second marriage shares belonging to her were given to her adult sons by her former marriage, and other shares belonging to her were assigned to trustees upon trust as to some for the benefit of other children of the widow by her former marriage, and as to the residue upon the trusts of the settlement.

Held, that the settlement was not voluntary as regards the children of the former marriage or the trustees, and that, upon the death of the wife, the Crown was not entitled to account duty as upon a voluntary disposition in respect of the shares taken by the children of the former marriage or of the shares taken by the trustees.

Information filed by the Attorney-General on behalf of her Majesty, claiming account duty from the defendants.

A marriage settlement was executed on the 18th of March, 1890, between Anne Smith, widow, of the first part, George Edward Jacobs-Smith, one of the defendants, of the second part, and the two trustees of the settlement, the other defendants, of the third part. This settlement recited that Anne Smith was entitled to certain businesses of the estimated value of £195,000, and that a marriage was intended to be solemnized between Anne Smith and the defendant George Edwards Jacobs-Smith, and that, in consideration thereof, it was agreed that Anne Smith was to form a company for the acquisition and carrying on of these businesses; that the capital of the company was to be 20,000 shares of £10 each; that Anne Smith was to sell to this company all the said businesses and assets thereof, reserving to herself the right to use the mill-house and premises without payment of any rent, in consideration of 19,500 fully paid-up shares in the capital of the company. The sale and transfer were to take effect as from the 1st of May, 1890, and to be completed on the 30th of June, 1890, when the shares were to be allotted to the nominees of Anne Smith.

As to the disposition of these 19,500 shares under the settlement, 1,000 shares were to be allotted to each of the four adult sons of Anne Smith by a former marriage as the nominees of Anne Smith, thus disposing of 4,000 shares. The balance of 15,500 shares were to be allotted to the trustees of the settlement, who were to set apart 1,000 shares for each of the two infant sons of Anne Smith by her former marriage, and 600 of such shares for each of her two married daughters by her former marriage, thus making 3,200 shares allotted to the trustees in trust for the four other children of Anne Smith by her former marriage.

The trustees were to hold the residue—namely, 12,300 shares, called the wife's trust fund—upon trust to pay thereout an income of £1,000 a year to the intended husband during his life, and subject to this annuity to pay the income of the wife's trust fund to Anne Smith for life for her separate use without power of anticipation, and after the death of Anne Smith the sum of £25,000, part of the wife's settled fund, was to be held on trust for such person or persons and generally as Anne Smith should by will appoint, and the residue of the wife's trust fund (including any part which should be unappointed under the general power of appointment), was, subject to the husband's annuity, to be held upon trust for such of her children by her former marriage as she should by will appoint.

By another indenture of the same date certain property belonging to the intended husband was settled upon trusts in favour of himself, the said Anne Smith, and the issue of the marriage.

The marriage was duly solemnized; the company was formed and the shares allotted according to the agreement, and 15,500 shares were issued to the defendants (the trustee) to be held by them upon the trusts of the settlement, and 1,000 shares were issued to each of the four adult sons of Anne Smith.

Anne Smith died on the 2nd of August, 1890, having by her will exercised both the general power of appointment over the £25,000, and also the power of appointment in favour of her said eight children given to her over the residue of the wife's trust fund.

Under the above circumstances the Crown claimed (1) account duty under sub-sections (*a*) and (*c*) of section 38 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), and section 11 of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), from the trustees on the value of the 15,500 shares allotted to them under the settlement (after deducting the sum of £25,000 on which probate duty had been paid as part of the estate of Anne Smith, and the amount invested to secure the annuity to the husband); (2) account duty under sub-section (*a*) of the Act of 1881 and section 11 of the Act of 1889 from each of the four adult sons of Anne Smith on the 1,000 shares taken by him under the settlement. There was also a claim for estate duty, which was admitted.

The Customs and Inland Revenue Act, 1881, provides, section 38 (2), that personal property to be included in an account and liable to account duty shall be property (*a*) "taken under a voluntary disposition made by any person" (dying after the 1st of June, 1881) "purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise"; and (*c*) "any property passing under any past or future voluntary settlement . . . whereby an interest in such pro-

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

perty for life . . . is reserved, either expressly or by implication, to the settlor," &c.

This was amended by the Customs and Inland Revenue Act, 1889, s. 11, which provides that "the description of property marked (c) shall be construed as if the expression "voluntary settlement" included "any trust . . . in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such instrument was made for valuable consideration or not as between the settlor and any other person."

Sir R. T. Reid, A.G., and *Vaughan Hawkins*, for the Crown.—The interests taken by the trustees and the children of the former marriage are voluntary dispositions within the meaning of these clauses. The settlement may be good as between husband and wife, but it may be a voluntary settlement as regards those who take benefits under it and give no consideration. The persons from whom this duty is claimed take a gift of these shares and give no consideration whatever for it, and therefore they are volunteers. Children of the widow by her former marriage when included in the settlement are volunteers: *Mackie* v. *Herbertson*, 9 App. Cas. 303, 32 W. R. Dig. 176; *De Mestre* v. *West*, [1891] A. C. 264, 39 W. R. Dig. 204; *In re Cameron and Wells*, 36 W. R. 5, 37 Ch. D. 32.

Jelf, Q.C., and *Micklem*, for the defendants.—Neither the dispositions in favour of the children of the former marriage nor those in favour of the trustees upon the trusts of the settlement are voluntary dispositions within the meaning of the sections. The children of a widow by her former marriage when included as beneficiaries in a marriage settlement made by the widow on her second marriage come within the consideration of the marriage, and are not "volunteers." This is clearly settled by the authorities: *Newstead* v. *Searles*, 1 Atk. 265; *Clarke* v. *Wright*, 9 W. R. 571, 6 H. & N. 849; *Gale* v. *Gale*, 25 W. R. 772, 6 Ch. D. 144.

WRIGHT, J.—In this case the estate duty is admitted, and the only questions now to be dealt with are as to the account duty. The question as to account duty arises, first, on the item of 4,000 shares and 3,200 shares. The marriage settlement did not, in respect of this, in my judgment, "purport to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise," because the settlement was an ordinary settlement giving a life estate to the intended wife, and in the events which have happened to particular persons. I do not think that that is the meaning of sub-section (*a*) of section 38 of the Act of 1881, nor is it brought within that provision by section 11 of the Act of 1889, because, as it seems to me, that applies only when the trust was such that, in the ordinary course, possession might have been taken under the settlement when it was made. Then, as to the 12,300 shares—less the £25,000 which it is agreed ought to be deducted—I should have said, apart from authority, that no valuable consideration had been given by the *cestui que trusts* in question, though it must be conceded that in *Gale* v. *Gale*, and at least one of the cases there cited by Fry, J., there is language which seems to go the length of saying that even between these parties and the settlor valuable consideration might be considered to be given. That is not necessarily conclusive. I think we are bound by the cases from *Newstead* v. *Searles* downwards, which show that, although *cestui que trusts* under settlements of this kind may not take for valuable consideration, yet they are protected against subsequent purchasers, as if they had been parties to the marriage consideration, and are therefore for the most important of all the purposes of a settlement of this kind treated as not volunteers. There is, no doubt, much in the judgment of the Privy Council in *De Mestre* v. *West*, in 1891, and something also in the judgment of Lord Selborne in *Mackie* v. *Herbertson*, tending to show that the case of *Newstead* v. *Searles*, is to be supported on special grounds. I am not sure that the same special grounds do not exist in this case, because some property valued at £1,000 was brought into settlement by the husband. But, apart from that, I think we are bound by the course of the decisions, whatever criticisms may have been made in some of the later cases as to the grounds on which those decisions were based. Common sense requires, unless there is something contrary to the language of the statute, that we should apply the same construction to the word "volunteer" in this statute as has been applied to it in relation to the only other purposes as to which any legal meaning has been given to that word; and effect has been given to that word in such a sense as to make the children of the former marriage not within the ordinary rule as to volunteers. A provision for the children of a former marriage often is a proper, and sometimes a necessary, part of a settlement on a second marriage. A woman who marries a second time certainly alters very materially the possibilities of succession on the part of the children of her former marriage. She makes it much less likely that such children will receive the benefits which they might have received if she had not married a second time. In the absence of any attempted evasion of the law, I think we ought not to hold that such a reasonable part of the marriage settlement would be at all within the mischief of the Act. Of course this judgment would not apply to any class of beneficiaries who are not within the rule laid down in *Newstead* v. *Searles*. It would not apply to any class of beneficiaries who are not within the scope of the marriage consideration. I think, therefore, that, as regards both parts of the case as to the account duty, the prayer of the Crown fails.

COLLINS, J.—I am of the same opinion. The argument for the Crown is, as I understand it, that the particular trusts which are included here are mainly in favour of persons who, giving no valuable consideration themselves, must be deemed to be volunteers; and the Attorney-General, while admitting that the instrument itself cannot be described as a voluntary settlement, contends that the particular disposition in favour of these individuals can be isolated from the rest of the settlement, and as they have given no consideration it must, as against them, be deemed to be, and brought into account as, a voluntary settlement. When we are construing the word "volunteer" in sub-section 3 of section 11 of the Act of 1889, we must look to the meaning which that word bore in courts of equity when dealing with a subject-matter similar to that now in question; and it seems to me that courts of equity did at that time regard the wife's children of the former marriage as not coming within the category of volunteers. I think the case of *Newstead* v. *Searles* shows that the wife's children by her former marriage do not come within the category of volunteers.

Now in both the cases of *Newstead* v. *Searles* and *Gale* v. *Gale* there was an application on the part of the wife's children by a former marriage to have the trusts in the settlement between her and her future husband executed in their favour. They applied both to have those trusts executed in their favour, and also to avoid any subsequent trusts, which, under the statute of Elizabeth, would have defeated the trusts in their favour if they had been volunteers. If they had been volunteers they would not have been in a

position to demand the assistance of courts of equity, and, therefore, the first point whether or not they are entitled to the relief claimed—that is, to specific performance of the settlement in their favour—could not be decided without deciding whether they were volunteers or not. That was decided in their favour by Lord Hardwicke, which involved the decision that they were not volunteers. He then decided the other question, Whether or not they had lost their right by reason of the subsequent conveyance for value to a purchaser? He decided that also in their favour, and, therefore, it seems to me that on both points he was of opinion that they did not come within the category of volunteers. That case is dealt with by Fry, J., in *Gale* v. *Gale*, and he there refers to a series of other decisions—one of them, *Clarke* v. *Wright*, in the Exchequer Chamber—to the same effect, and he points out that in *Newstead* v. *Searles* Lord Hardwicke did decide those two points, and, having reviewed those authorities, he came to the conclusion in *Gale* v. *Gale* that the children of the wife by a former marriage could enforce provisions in a settlement in their favour. That does not deal with the point under the statute of Elizabeth, but he lays down, as it has been laid down in a number of cases, that a mere volunteer cannot come to a court of equity and ask that court to enforce some voluntary disposition in his favour. He repeats that, and comes to the conclusion that the children in that case were in a position to enforce such a provision. That involves a direct decision that in his judgment they were not volunteers. He explains that such persons are deemed to come within the consideration of the marriage. If you once get them within the consideration of the marriage, that is equivalent to saying that they are not volunteers. They are within the consideration; and are persons deemed to be giving consideration, and, therefore, they are not volunteers. It seems to me clear that at the time this statute was passed, persons in the position of the wife's children here could not have been described as volunteers, and could not have been defeated if they had sought to enforce the trusts for their benefit in an application to a court of equity.

That being so, did this Act intend to take away the rights of such persons or not? In using the term "volunteers" without giving any definition of it, the statute must be construed as dealing with the class of persons who, in the view of courts of equity, would at that time have been deemed volunteers, and I do not think that these persons are volunteers. The decision in *Newstead* v. *Searles* was a decision of the Lord Chancellor. That was followed by the decision of the Exchequer Chamber in *Clarke* v. *Wright*, and by Fry, J., in *Gale* v. *Gale*. It would therefore be quite impossible for us to refuse to follow that case, and nothing short of a decision of the House of Lords would destroy its authority. No doubt certain *dicta* of Lord Selborne have been cited from a decision of the Privy Council. Though these *dicta* are of the greatest possible weight, they cannot in any way affect the authority—as upon us—of the judgment of the Exchequer Chamber or of the Lord Chancellor. The other authorities cited are *dicta* in a Scotch appeal to the House of Lords, which would be no authority upon us. Here again Lord Selborne has put an interpretation upon *Newstead* v. *Searles* which was not the law adopted by the Exchequer Chamber, which followed it. Professing the most profound respect for anything coming from Lord Selborne upon that subject, I feel that I am not at liberty to act upon it, if I were prepared even to accept it. It seems to me that the case before us stands on the authority of *Newstead* v. *Searles*, *Clarke* v. *Wright*, and *Gale* v. *Gale*, and under these circumstances I think the case for the Crown fails.

Judgment for defendants, with costs of information.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Tarry, Sherlock, & Co.*, for *Blyth*, Norwich.

Prob. Div. & Adm. Div. Divorce. } Nov. 5, 15.

TASKER v. TASKER AND LOWE. (*a*.)

Married woman—Husband and wife—Gifts of jewels during marriage—Claim by husband—Paraphernalia—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.

A husband possessed of considerable wealth gave to his wife jewels at Christmas time, on her birthdays, and at other times as "peace-offerings," they remained in her possession except when they were deposited at the bank for safe custody, and then in her name, and the cases were marked with her initials, and the husband never asserted any claim to them until a petition for divorce was presented, when he claimed them.

The Court *confirmed the registrar's finding on the evidence, that as a fact the jewels were given absolutely to the wife.*

Semble, *the Married Women's Property Act*, 1882, *does not affect the law as to paraphernalia.*

Claim under section 17 of the Married Women's Property Act, 1882, by a husband for jewels given to his wife. The facts and arguments are set out in the judgment.

Nov. 5—*Inderwick, Q.C.*, and *Priestley*, for the husband, the claimant.

Whateley, for the respondent.

Cur. adv. vult.

Nov. 15—JEUNE, P.—In this case a claim was made by a husband, the petitioner in a divorce suit, for jewels of considerable value, against his wife, under section 17 of the Married Women's Property Act, 1882. The claim was referred to the registrar, and I had his report before me. It appears from that document and from figures supplied to me on the argument that the value of the jewels originally in dispute was £9,319 5s., but that as to a portion of those jewels worth £1,163 5s. the claim of the husband was withdrawn, for the reason, as to almost all of them, that they were presents before the marriage.

The learned registrar states that it was said, but not proved, that the husband's income was about £40,000 a year. I was told that this was an exaggeration, but that undoubtedly he is a man of large means. Before the registrar the husband contended that the jewels were his absolute property, and that he only allowed his wife to use them. The wife, on the other hand, maintained that the jewels were given to her absolutely. The only witnesses were the husband and wife, and there can be no doubt that their evidence was in complete contradiction. He alleged that he had used expressions to his wife about the jewels clearly indicating that they were to remain his property, all of which the wife denied.

The learned registrar has stated that from the demeanour of the wife he considered her evidence

(*a*.) Reported by J. G. LAING, Esq., Barrister-at-Law.

was to be relied upon rather than that of the husband, and he thought that she was corroborated by the following circumstances: first, that notwithstanding his evidence to the contrary, the husband never, till the suit was threatened, gave his wife to understand that the jewels were only lent to her for her use; secondly, that the jewels given after marriage were handed to the wife in the same manner and, in effect, in the same words as those given before marriage; thirdly, that the jewels were always in her possession, and when the husband and wife were abroad were, with his knowledge and approval, deposited in her name at the bank; fourthly, that some of the articles were purchased about Christmas time and the time of her birthdays, thus tending to confirm her statements that they were Christmas or birthday presents; fifthly, that the cases of all the articles were marked with her initials—namely, those of her maiden name before her marriage and of her married name after marriage, and this, the registrar has found, was done in every case by the husband's orders.

I see no reason to differ from the learned registrar on the question before him on his findings of fact. It was a case in which much depended on the demeanour of witnesses, whom the registrar had the opportunity of seeing. I also agree with the registrar that the circumstances mentioned by him corroborate the wife's account, and I may add that it appears further to have been proved that a portion of the jewels in question of considerable value, were given as what were termed "peace-offerings" on occasions when differences between the husband and wife had arisen and been dispelled.

Before me, however, at chambers another point was taken as an alternative to that submitted to the registrar, and this point was wholly, or almost wholly, relied on before me in court. It was said that, admitting that these jewels were given by the husband to the wife, they were given as paraphernalia, and that so the husband could alien, and can reclaim them. The effect of a divorce was not suggested, but I should suppose, on divorce, a wife would lose her right to paraphernalia. The law of paraphernalia, and the practice of constituting paraphernalia, are unfamiliar, if not antiquated. But no doubt before the Married Women's Property Act, 1882, if a husband expressly indicated his intention to make a gift of paraphernalia, he could do so, and, even if he had never heard of paraphernalia, if the intention were made manifest that the jewels were given to the wife, not absolutely, but for her use as a wife, this peculiar kind of property might be created. But I think that in some way, either from the use of apt words, or by inference from the facts of the case, it must have been shown that the intention was not to make a present of jewels, as of any other article not of personal use in the ordinary sense, which would formerly have created a trust for separate use, and would not vest the property in the wife, but to hand over the jewellery only for the wife's decoration so long as the husband, during his lifetime, chose she should be so adorned.

It was suggested to me that the Married Women's Property Act, 1882, abolished paraphernalia. I do not think that Act affects a gift of paraphernalia, although the best writers might have taken a different view: see Macqueen, Husband and Wife, 3rd ed., p. 115; Lush., Husband and Wife, p. 41. The creation of paraphernalia did not imply, nor was it dependent on, the legal identity which, for most purposes, existed between husband and wife before that Act, and which is so largely modified by it. The question, therefore, whether any gift was a gift of paraphernalia is to be determined now on the same principles as before that Act.

In the case of *Graham* v. *Londonderry*, 3 Atk. 393, a question arose before Lord Hardwicke as to various articles given to Lady Londonderry. Some of them were given to her by her father-in-law, Governor Pitt, before her marriage, some by the Regent of France during her marriage with Lord Londonderry. All these were held to be gifts to her separate use as given by strangers to the coverture. Lord Hardwicke further referred to several cases, in which gifts of jewels and other property to a wife by a husband were held to be gifts to her separate use. But with regard to the diamonds in a necklace given by Lord to Lady Londonderry, Lord Harwicke said: "This is not to be considered a gift merely to the separate use of the wife. I have, indeed, admitted a husband may make such gifts, but where he expressly gives anything to a wife, to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention." It was not, indeed, in that case necessary to decide whether these jewels were an absolute gift or paraphernalia, because in either case, as Lord Hardwicke points out, the plaintiff, Lady Londonderry's second husband, was entitled to them. But what is, I think, to be observed, is that, although we do not know what the evidence before Lord Hardwicke was, by the words "when he expressly gives anything to a wife to be worn as ornaments of her person only," his lordship would seem to be referring to some words or act showing the husband's intention, and to indicate that some proof of the kind is necessary. In the case of *Northey* v. *Northey*, 2 Atk. 77, previously decided by Lord Hardwicke, there was evidence which pointed to a gift of paraphernalia, because it would seem that the husband himself kept the jewels, and only sometimes permitted his wife to wear them. In the case of *Jervoise* v. *Jervoise*, 2 W. R. 91, 17 Beav. 566, the husband bequeathed to his wife the use during her life of "all his jewels," and an annuity as well as some other property. There were certain family jewels which the wife had worn; some pearl ornaments had been given to her by her husband's aunt; and her husband had given her two diamond bracelets. It was held that the family jewels did not pass to the wife either to her separate use or as paraphernalia. It would appear, therefore, that as the will could operate on them, it was not material whether the pearls and bracelets belonged to the wife, either to her separate use or as paraphernalia. It was, however, no doubt, decided that both the pearls and the diamond bracelets were paraphernalia. With regard to the pearls, I feel a difficulty in reconciling the decision of the learned judge on what was, as I have said, not a material point, with the rule laid down by Lord Hardwicke, that articles cannot be paraphernalia which come from a stranger to the coverture. But, as regards the bracelets, there was evidence on which it might well be held that they were paraphernalia. They were not given by the husband on any particular occasion, but were rather given to be worn, as they were, with the family jewels, and one bracelet was given to match the other. "The husband," the Master of the Rolls said, "evidently bought them for the purpose of adorning his wife."

In the present case the evidence seems to me to point to a different conclusion. Clearly most, if not all, the jewels were Christmas or birthday presents, or were peace-offerings in the sense I have referred to.

Jewellery liable at any moment to be reclaimed would not make a very graceful or grateful offering, and I see nothing to show that the husband intended to impress the character of paraphernalia on his gifts. The case of *In re Vansittart, Ex parte Brown*, 41 W. R. 32, [1893] 1 Q. B. 181, was referred to by the counsel of the husband as showing the legal effect of a gift of jewels from a husband to a wife. In that case it was held that such a gift was a settlement within section 47 of the Bankruptcy Act, 1883, on the ground that the donor contemplated the retention by his wife of the present that he gave her. But the inference which I draw from that case is the reverse of that suggested to me. It may well be that a voluntary settlement voidable by creditors was created, because the jewels were given, not as some small sums might be given, for immediate expenditure, but to constitute a permanent possession of the wife. But the jewels became the property of the wife, and no doubt she could have given a good title had she sold them: see *In re Vansittart, Ex parte Brown*, 41 W. R. 286, [1893] 2 Q. B. 377. And therefore the inference drawn by the learned judge from the facts, which, as to the occasions of the gifts, were very like those in the present case, was not that the wife took the jewels as paraphernalia, but rather as settled to her separate use. Indeed, it does not seem to have occurred to anyone to think of paraphernalia in connection with that case, though such a view would have been conclusive in favour of the creditors.

I think therefore that the jewels in this case belong to the wife, and that the husband's claim fails.

Claim disallowed.

Solicitors for the claimant, *Hawkes, Stokes, & McKewan.*

Solicitor for the respondent, *E. Hutchinson.*

Lunacy.

(Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 17.

In re SHORTRIDGE. (*a.*)

Lunacy — Exercise on behalf of a person lawfully detained as a lunatic, of a power of appointing new trustees — Vesting of right to call for a transfer of stock — Lunacy Act, 1890, *ss.* 116, 128, 129.

S., a person lawfully detained as a lunatic, had vested in her a power to appoint new trustees of a settlement all the trustees whereof were dead. By an order made by the judge in Lunacy, A. was appointed to exercise such power on behalf of the lunatic by appointing certain persons named in the order, and by the same order it was declared that, upon the appointment of such new trustees, they should be, and they were thereby, appointed to call for a transfer of certain Government stock standing in the names of the deceased trustees.

Held, that the judge in Lunacy had jurisdiction, under the Lunacy Act, 1890, *to make such an order.*

In re Bowmer, 7 *W. R.* 313, 3 *De G. & J.* 658, *discussed and followed.*

Observations as to the future practice under such orders.

This was an application made to the court sitting in Lunacy for the purpose of meeting certain objections taken by the Bank of England to an order dated the 19th of March, 1894, made in Lunacy, and in the matter of Louisa Jane Shortridge, widow, a person lawfully detained as a lunatic, though not so found by inquisition.

Under or by virtue of an indenture dated the 8th day of February, 1864, being a settlement made prior to the marriage of the said L. J. Shortridge, certain trust funds, including a sum of Three per Cent. Bank Annuities, were assigned and transferred into the joint names of three trustees upon certain trusts, under which the said L. J. Shortridge took the first life interest, and by the same indenture the said L. J. Shortridge was empowered, in the usual terms, to appoint new trustees in the place of the said trustees.

All the said trustees are dead, and the said L. J. Shortridge having become of unsound mind, and her husband being dead, an application was made in Lunacy by Selina Jane Stoyle, the sister of the said L. J. Shortridge, on a number of points concerning the estate of the said L. J. Shortridge.

Upon this application an order was made by the judge in Lunacy on the 19th of March, 1894, by which, *inter alia*, it was ordered that the said S. J. Stoyle be authorized in the name and on the behalf of the said L. J. Shortridge, to exercise the power of appointing new trustees vested in the said L. J. Shortridge by the said indenture of settlement by appointing E. B. Bennett and S. Wolferstan as new trustees in the place of the deceased trustees, and to do and execute such acts, deeds, and instruments as might be necessary and proper; and that, upon the appointment of the said E. B. Bennett and S. Wolferstan as such new trustees as aforesaid, they should be and were thereby appointed to call for a transfer into their joint names of certain Consolidated Stock standing in the books of the Bank of England in the joint names of the deceased trustees, and to receive the dividends thereon until such transfer.

In pursuance of the said order, by an indenture dated the 16th of April, 1894, the said L. J. Shortridge, acting by the said Selina Jane Stoyle, appointed the said Ellery Arthur Bennett and Sedley Wolferstan trustees of the settlement in the place of the deceased trustees.

The engrossment of the last-mentioned deed was approved by the judge in Lunacy, but was not in any manner verified or approved by the court after execution.

The said order of the 19th of March, 1894, was duly served on the Bank of England together with the said indenture of the 16th of April, 1894, but the bank refused to act on it, and raised two objections to it (so far as is material to this report): (1) That paragraphs 7 and 8 ought to have been the subject of separate orders; and (2) that the court had no power to make a vesting order in this case.

Miss Stoyle therefore made the present application, in which by her notice of motion, served upon the bank, she asked that the order of the 19th of March, 1894, as above set forth, might stand and be passed and entered, and that the Bank of England might be ordered to act upon and give full effect to such order.

Rowden, for Miss Stoyle, relied upon section 116, sub-section (*c*), and sections 128 and 129 of the Lunacy Act, 1890, and pointed out that sections 128 and 129 are respectively re-enactments of sections 137 and 138 of the Lunacy Act, 1853.

He cited *In re Garrod*, 34 W. R. 157, 31 Ch. D. 164; and *In re Bowmer*, 7 W. R. 313, 3 De G. & J. 658.

Latham, Q.C., for the bank, argued that *In re Bowmer* was not law. [LINDLEY, L.J.—It is suggested to me that in that case the reference to section

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

137 of the Act of 1853 is wrong. Section 136 is the one in point.] He also argued that the order ought to have been intituled in the matter of the Trustee Act, 1893, and further that the case is not provided for by the Lunacy Act, 1890, the lunatic not having the power as a trustee, nor yet for her own benefit. [*Rowden.—In re Skeats' Trusts*, 42 Ch. D. 522, 38 W. R. Dig. 202, decides that a power of appointing new trustees is a fiduciary power.]

He also cited *In re Noyce*, 40 W. R. 371, [1892] 1 Q. B. 642.

Lord HALSBURY.—I am of opinion that this order is correct, and that the objections of the Bank of England ought not to prevail. We have the precedent of *In re Bowmer* in 1859, which, when it is looked into and explained, seems to me entirely to embrace this case, because the somewhat hypercritical objection upon the words of the 128th section of the Lunacy Act, 1890, that this power is vested in the lunatic in the character of trustee or guardians is abundantly satisfied by the decision of Kay, J., in *In Skeats, Skeats* v. *Evans*. That view has also been adopted by the Lords Justices sitting in Lunacy in the case of *In re Blake*, W. N., 1887, p .173. Therefore, I think that the 128th section does apply. When one has the 128th section applying to this case, then it appears to me that the 129th section also applies. The whole scheme of section 129 was that, instead of having to go first to one branch of the court and then to another, the order should be made by one court, and I think that the 129th section was intended, in a compendious form, to get rid of all the circumlocution, and to get the thing done under one piece of parchment, and to give the power to the judge in Lunacy to do everything necessary for the benefit of the lunatic, and not to multiply different steps, whereby costs and every inconvenience were multiplied. I think that we ought to construe the 129th section as embracing not only the order, but everything under it. That is what was intended to be done by this order, and that I think is right.

One point, and one only, has made an impression on me, and that is this: It does seem unreasonable that where the deed is brought to the bank it should be the duty of the bank's clerk to verify the execution of the deed or the genuineness of the person supposed to execute it. And I think that in future it would be as well that some certificate should be brought with the deed, so as to justify the bank and assist them in keeping the books correctly. That, however, was not the objection made. In future, if it is thought right, I have no doubt some communication will be made by the master. For myself, I am satisfied that the order as drawn up is right, and I think that the objections to it ought not to prevail.

LINDLEY, L.J.—I think that the objection that this order is *ultrà vires* is untenable upon the construction of the sections of the Lunacy Act of 1890. No doubt when section 116, which is one of the most beneficial sections, was introduced it was foreseen that there would be very great difficulty and expense in making orders under that section if parties had to go before both the High Court of Chancery and before the judge under the lunacy jurisdiction. I cannot help thinking that one of the main objects of this section was to invest the judge in Lunacy with power to make orders in Lunacy appointing new trustees, and that that was more or less skilfully incorporated in the Act of 1890. I do not know that they are incorporated quite so skilfully as they might have been, but I am satisfied that under section 116, sub-section 2, and sections 128 and 129 there is ample power to make the order which is said to be *ultrà vires*. That a person who has a power of appointing trustees is within section 128 has been decided more than once. As I understand it, that decision was arrived at in 1859 in the case of *In re Bowmer* by one of the most cautious and experienced judges who ever sat, who we know looked after the accuracy of these orders most vigilantly. That has been followed more or less ever since. We are asked to say that that is all wrong. I decline to do so. Moreover, Cotton, L.J. (in *In re Blake*, referred to in an anonymous case of *In re X.*, 42 W. R. 657, [1894] 2 Ch. 415), held that such a person did come within the Lunacy Regulation Act, 1853. Then there is the decision of Kay, L.J. (then Kay, J.), in the case of *In re Skeats*, to the effect that the power of appointing new trustees is a fiduciary power. I have no doubt about it myself, and when we put that to Mr. Latham and suggested that such a person must come within the terms of the section, he suggested that the power was vested in the trustee in some ministerial character. I decline to accept that suggestion.

Then it is said that apart from that the order is wrong, because it is not in two parts. That appears to me not to be supported by any sound reason. Nothing is more common than for orders to be made that upon such a thing happening such a thing shall follow. So far as that objection goes I think it is untenable.

No doubt it is desirable for the Bank of England to have what they call clean orders, and there is some sense in it, and it is desirable that our orders should not trammel the business of the bank, who have enormous duties to discharge. If they had suggested that they were not satisfied that the particular deed had been executed, if they had raised that point, I cannot help thinking that there would have been good sense in it. But, instead of that, they say, "Your order is all wrong," and they want to force the court to draw up its orders in a way that suits them. I protest against that; I thank them for pointing out any slip which makes the order wrong; but when the order is right it is for the bank to obey it. I will speak to the master and get what I think will be convenient—namely, that there should be something put in the order or some kind of certificate which will be better than the letter of the solicitor to show that that is the deed on which the bank have to act. I think that they are entitled to that; but that is not what they wanted. They wanted to put the lunatic's estate to the expense and trouble of getting what they call a clean order. I protest altogether against that. It is the bank's business to obey the order.

A. L. SMITH, L.J., concurred.

Solicitors, *Surr, Gribble, & Co.*, for *Bulteel, Rowe, & Munday*, Plymouth; *Freshfields & Williams*.

Court of Appeal.

Original motion.
(Lord Esher, M.R., and Lindley and Rigby, L.JJ.) — Jan. 28.

ROBARTS v. FRENCH. (a.)

Practice—Dismissal of action for want of prosecution—Order for new trial—Default in entering action for new trial.

Where the Court of Appeal has ordered a new trial,

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

and the party who has obtained the order has not entered the action for trial, the Court of Appeal has no original jurisdiction to entertain a motion to dismiss the action for want of prosecution.

The proper place to make the application is at chambers.

Motion to dismiss the action for want of prosecution.

A verdict and judgment having been entered for the defendant, the Court of Appeal, on the 5th of June, 1894, ordered a new trial. The plaintiff did not set down the action for trial, and the defendant now moved as above.

Stephen Lynch, for the defendant.—It is submitted that this court is the proper court to which to make this application. [Lord ESHER, M.R.—Ought you not to have applied at chambers?] No time having been limited in the order for setting down the action for a new trial, a master at chambers has no power to limit that order. This court alone can deal with and interpret it. The defendant does not want to go to the expense of setting the action down for trial and having his witnesses present when the plaintiff may not appear.

Montague Lush, for the plaintiff.

Lord ESHER, M.R.—In my opinion we have no jurisdiction to hear this application, which does not come before us by way of appeal.

LINDLEY, L.J.—I have no doubt that the proper place to make this application is at chambers. I fully appreciate the technical point that has been put to us, but I do not think that it is in any way inconsistent with our order of the 5th of June last, that an application should be made at chambers to dismiss the action for want of prosecution.

RIGBY, L.J., concurred.

Motion dismissed.

Solicitor for the plaintiff, *H. Keeble.*

Solicitors for the defendant, *Champion & Henderson.*

From Lancaster Palatine Court of Chancery. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Jan. 17.

KENNEDY v. DODSON. (a.)

Practice—Discovery—Interrogatories—Relevancy of.

The plaintiff, the trustee in bankruptcy of C., by his statement of claim alleged that C. and the defendant had carried on business in co-partnership as dealers in landed property, and that certain property conveyed to C. and the defendant as tenants in common had been purchased for the purposes of the said business. The plaintiff claimed a declaration that this property belonged to C. and the defendant as co-partners, and that the defendant was liable to account to the plaintiff for the share of C. therein. The defendant denied that he had carried on business in co-partnership with C., or that the property in question was partnership property. The plaintiff administered interrogatories to the defendant, whereby he asked the defendant, among other things, to give a list of the properties he and C. had been jointly interested in prior to and subsequent to a certain date, and also to state whether there were any, and, if so, what, written articles of agreement between C. and the defendant with reference to the purchase of landed properties.

Held, that these interrogatories were not relevant to the issue, and ought to be disallowed.

The decision of the Vice-Chancellor of the County Palatine reversed.

Appeal from the decision of the Vice-Chancellor of the County Palatine of Lancaster.

This action was brought by the trustee in bankruptcy of Hugh Carswell, deceased. The plaintiff, by his statement of claim, alleged that Carswell and the defendant had carried on business in co-partnership as sellers of, and dealers in, landed property, and that amongst purchases made for the purposes of their said business was a purchase of certain property in Manchester conveyed to Carswell and the defendant as tenants in common by an indenture dated the 18th of September, 1873. The plaintiff claimed a declaration that the premises comprised in this indenture belonged to Carswell and the defendant as co-partners, and that the defendant was liable to account to the plaintiff for the share of Carswell therein, and for the gains and profits arising therefrom. The defendant, by his defence, denied that he had carried on business with Carswell, and denied that the premises comprised in the indenture of the 18th of September, 1873, were purchased as part of, or for the purposes of, any partnership business.

The defendant, by his affidavit of documents, disclosed, among other documents, an account indorsed: "Carswell & Dodson's property accounts.—J. B. Dodson in account with Hugh Carswell. Closing account." The account was headed, "Messrs. Carswell & Dodson in account with Hugh Carswell," and referred to several properties in Manchester other than the property in question.

The plaintiff having administered certain interrogatories to the defendant, the Vice-Chancellor, on the application of the plaintiff, made an order that the defendant should answer these interrogatories, as altered by the Vice-Chancellor.

The interrogatories, as altered, were as follows:—

1. Give a list of the properties you and the late Mr. Hugh Carswell were jointly interested in prior to and subsequent to the 21st of January, 1873.

2. State the terms and conditions between you and the said Hugh Carswell with respect to the purchase or acquirement of such properties.

3. Also state in what proportion the purchase-money of such properties was found in each instance.

4. State how, and when, such properties respectively were disposed of, and in what proportions was the purchase-money divided between you and the said Hugh Carswell.

5. State how and in what proportions were the rents or profits arising from such properties disposed of as between yourself and the said Hugh Carswell.

6. Were there any, and if so what, written articles of agreement between you and the said Hugh Carswell with reference to the purchase, management, or sale of any such properties?

The defendant appealed.

Astbury, for the appellant.—The interrogatories are irrelevant to the issue in the action, and should be disallowed.

He referred to *Hollis* v. *Goldfinch*, 1 B. & Cr. 205, at p. 218.

Maberly, for the plaintiff.—The interrogatories are relevant: see Stephen's Digest of the Law of Evidence, Part I., chap. 2. The 6th interrogatory is at all events admissible, for a party may interrogate as to a special document in spite of a general denial: *Hall* v. *Truman*, 29 Ch. D. 320, 33 W. R. Dig. 73.

Lord HERSCHELL, L.C.—In this case an action was brought by the plaintiff, as the trustee in bankruptcy of one Carswell, against the defendant, for a declara-

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

tion that a plot of land comprised in an indenture of the 18th of September, 1873, belonged to Carswell and the defendant as co-partners, and that the defendant was liable to account to the plaintiff on that footing. In that action the defendant denied that he and Carswell acquired this property as co-partners, though he did not deny that they acquired it as co-owners. That was the question at issue. Thereupon the plaintiff, having got discovery of documents and an affidavit that the defendant had no other document in his possession relevant to the issue, administers interrogatories to the defendant. The issue is, What were the terms on which the parties, who were admittedly co-owners, purchased this property? No interrogatories are admissible the answer to which would not be relevant to that issue; that is, interrogatories the facts stated in answer to which, one way or the other, would be not relevant. [His lordship read the interrogatories.]

In my opinion these are not interrogatories the answers to which would be revelant to the issue. Suppose the defendant says, I did enter into such and such transactions at such and such dates on such and such terms, would that be relevant to the issue what were the terms on which this property was purchased? Suppose the defendant stated that the other properties were purchased on terms entirely different, are these issues which could be entered into in trying this question? Could the plaintiff say to the judge, I will show you that Carswell and the defendant purchased twenty properties on certain terms before 1873, and that they purchased ten properties afterwards? Would the judge be bound to try the terms on which all those properties were purchased for the purpose of determining the terms upon which the property in question was purchased? No doubt there are cases in which evidence of what happened in one transaction may be relevant to the question of what happened in another. I do not dispute that general proposition. In the present case the suggestion is this, that if it can be proved that in a number of prior transactions Carswell and the defendant had been purchasing land on partnership terms, that would render it probable that that was the nature of this transaction also. But that is not relevant evidence. Cases of this description are not determined upon probabilities, but upon specific evidence of what happened upon the particular occasion. It is said that many of these questions might be put to the defendant on cross-examination, but that would not be for the purpose of proving what this particular transaction had been, except to the extent of showing that the defendant's evidence as to this particular transaction was not to be credited because of the admissions made by him with regard to the other transactions. But because these questions might be put to the defendant in cross-examination it by no means follows that the evidence as to such transactions would be relevant evidence to be given in chief by the plaintiff. I entertain a strong opinion that interrogatories of this description, unless strictly relevant to the point at issue in the action, ought to be rigorously excluded. They cause a great amount of hardship and oppression. They cast upon a defendant, merely because a writ has been served upon him, the burden of submitting to an intolerable amount of trouble and annoyance, and if he refuses to answer he may be sent to prison. Here the defendant is asked to give a list of all properties prior to 1873 in which he and the bankrupt were jointly interested, and to state the terms and conditions on which such properties were purchased. In order to answer that question he must rake up all these transactions, it may be for a period of twenty years before 1873.

It is said that he may have diaries relating to these transactions. So much the worse for him. Lucky man if he has destroyed them. Nothing better shows the practical wisdom of destroying books and papers which relate to transactions which are done with. In my opinion there has sometimes been too great laxity in the past in allowing interrogatories. It is that system which has largely contributed to make the very name of law stink in the nostrils of many sensible men. They say they would rather pay a claim for which they are not legally responsible than take the trouble necessary to answer interrogatories of this kind. In my opinion neither party ought to be compelled to answer interrogatories of this description, which cause a great amount of trouble and difficulty, unless they are clearly relevant to the issue. It is said that the last interrogatory, which suggests the existence of articles of partnership, ought to be allowed. I think that that interrogatory comes within the same category as the others, but, further, I think that it is answered by the defendant's affidavit of documents, which sets out a number of documents, and contains the usual statement that the defendant had not in his power or possession any other document relevant to the matters in question. It is true that, notwithstanding the general denial contained in an affidavit of documents, if the court has reason to believe that some specific document has been omitted, it may allow interrogatories to be put as to that. But in this case there is nothing to suggest the existence of any articles of partnership. I see nothing in the account which has been produced by the defendant which points to partnership as distinguished from co-ownership. It is true that the account is headed "Carswell & Dodson's Property Accounts," and it is more common to find the names coupled in the case of partners than in the case of co-owners. But that in itself is far too slight a thing to afford any ground for belief in the articles of partnership. I think that the defendant ought not to be compelled to answer these interrogatories, and that the judgment of the Vice-Chancellor must be reversed.

LINDLEY, L.J.—I am of the same opinion. Under ordinary circumstances one would not think of interfering with the court below in a matter which is very much a matter of discretion, but I cannot help thinking that these interrogatories are vexatious and oppressive to such an extent that the defendant ought not to be compelled to answer them. They are opposed to the fundamental principles of discovery which are stated in Wigram, V.C.'s book on Discovery. The second proposition, stated on p. 15, is as follows:—"It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit." That renders it necessary to say a few words as to what are "matters of fact which, being well pleaded in the bill, are material to the plaintiff's case." What ought a properly drawn bill to contain? It ought to contain a statement of those facts, and those facts only, which, if proved, will entitle the plaintiff to a decree. It ought not to contain the evidence of those facts. Of course in some cases it is difficult to draw the line between those facts which are properly contained in the bill and those which are not, but in cases of doubt the practice of the court has always been to find out whether the facts as to which information is required are so material as to render discovery reasonable. At p. 165 Wigram, V.C., says this: "In determining

whether particular discovery is material or not, the court will exercise a discretion in refusing to enforce it where it is remote in its bearings upon the real point at issue, and would be an oppressive inquisition." The facts properly stated in this statement of claim are that Carswell and defendant bought a certain property in Manchester, and that the plaintiff claims that that property is partnership property, and relief on that footing. The plaintiff is entitled to discovery with reference to those allegations, but he wants information as to a number of other transactions which took place between the parties in order to raise a probability that this was a partnership transaction. To ask the defendant to take the trouble to go through his books and papers for so many years is, in my opinion, vexatious and oppressive to the last degree. The vexation and oppression of such a task can only be properly estimated by persons who have to answer interrogatories of that kind. I doubt very much whether this information would be admissible in evidence, but supposing it would, it does not follow that the plaintiff would be entitled to discovery of it. Examining witnesses at the trial and obtaining discovery before the trial are two totally different matters. If the decision of the Vice-Chancellor were anywhere near the line I should be slow to differ from him in a matter which is largely a matter of discretion, but, in my opinion, to compel the defendant to answer these interrogatories would be most oppressive. I think the appeal should be allowed.

A. L. SMITH, L.J.—I have come to the conclusion that these interrogatories ought not to be allowed. In my opinion the legitimate use, and the only legitimate use, of interrogatories is to obtain admissions from the party interrogated of facts which it is necessary for the party interrogating to prove in order to establish his case, and if the party interrogating goes further, and seeks by his interrogatories to get from the party interrogated matters which it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted. The plaintiff is the trustee in bankruptcy of a person named Carswell. He brings an action against Dodson with reference to the purchase of a plot of land in 1873, and he claims that that land was bought by Carswell and Dodson as partnership property. That is the issue between the parties. The plaintiff then administers interrogatories to the defendant. What does he ask him? Does he ask him a single question relevant to that issue? Does he ask him, "Did you enter into partnership with Carswell in respect of this piece of land?" He does nothing of the sort. What he does ask him is this: Prior to 1873 and subsequent to 1873 did not you have dealings with Carswell with respect to land? He may have had twenty dealings with Carswell with regard to other properties; the issue is, What was his dealing with Carswell with respect to this property. I agree that if Dodson were in the witness box and denied he was ever in partnership with Carswell it would be relevant to the question whether he was telling the truth to ask him whether he had not dealings with regard to properties A., B., C., D., and E., and whether he was not in partnership with Carswell in respect of each of those properties. But that is a different matter. In my opinion these interrogatories ought not to be admitted, and the appeal ought to be allowed.

Appeal allowed.

Solicitors, *D. P. Boote*, for *Boote & Edgar*, Manchester; *Crofton, Craven, & Worthington*, Manchester.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 6.

HANFSTAENGL v. AMERICAN TOBACCO CO. (a.)

Copyright — International copyright — Registration — Foreign picture—Country where "first produced"— International Copyright Act, 1886 (49 & 50 *Vict. c.* 33), *ss.* 2 (3), 11.

It is not necessary, in order to maintain an action brought under the International Copyright Act, 1886, *for infringement of the copyright in a foreign picture, that the plaintiff should register his copyright in this country.*

The country in which a picture is "first produced" within the meaning of section 2, *sub-section* 3, *of the International Copyright Act*, 1886, *is that in which it is first published.*

Hanfstaengl Art Publishing Co. *v.* Holloway, [1893] 2 *Q. B.* 1, 41 *W. R. Dig.* 56, *approved.*

Appeal from the judgment of Pollock, B., at the trial of the action without a jury.

The action was brought in respect of the infringement of the plaintiff's copyright in a picture called "The Love Letter." The picture was painted at Florence by an Italian artist, by whom, while it was in his studio, it was sold, together with the copyright therein, to an Italian picture dealer, who subsequently sold the copyright to the plaintiff at Munich. The plaintiff, who was a German art dealer, had a photograph taken of the picture at Munich, after which the picture itself was sent back to Italy. The plaintiff published the photograph, and sold copies in Germany and England. The defendants, who were American tobacco merchants, had caused copies of the picture to be made, and were exhibiting and distributing them in England as advertisements of their tobacco. The plaintiff claimed an injunction to restrain the defendants from continuing so to exhibit or distribute copies of the picture.

The plaintiff had not registered his copyright either under the Fine Arts Copyright Act, 1862, or under any of the provisions of the International Copyright Acts.

The question raised at the trial was whether non-registration under the latter Acts precluded him from maintaining the action. The plaintiff contended that, according to the true construction of the International Copyright Act, 1886, the case was governed by German law, under which registration was not necessary. The defendant contended that the case was governed by Italian law, and that under that law registration was a condition precedent to an action.

The International Copyright Act, 1886, was passed for the purpose of giving effect to a convention, which was agreed to at an international conference held at Berne in September, 1885, for protecting the rights of authors over their literary and artistic works. The contracting parties to the convention were the following States: Great Britain, Germany, Belgium, Spain, France, Hayti, Italy, Switzerland, and Tunis.

By article 1: "The contracting States are constituted into an union for the protection of the rights of authors over their literary and artistic works."

By article 2: "Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

hereafter grant to natives. The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin. The country of origin of the work is that in which the work is first published, or, if such publication takes place simultaneously in several countries of the union, that one of them in which the shortest term of protection is granted by law. For unpublished works the country to which the author belongs is considered the country of origin of the work."

The International Copyright Act, 1886, after reciting that by the then existing International Copyright Acts her Majesty is authorized by Order in Council to direct that, as regards literary and artistic works first published in a foreign country, the author shall have copyright therein during the period specified in the order, and, after reciting the Berne Convention, provides by section 1, sub-section 3, that "this Act and the International Copyright Acts shall be construed together, and may be cited together as the International Copyright Acts, 1844 to 1886." By section 2: "The following provisions shall apply to an Order in Council under the International Copyright Acts: (3) The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." By section 3: "An Order in Council under the International Copyright Acts may provide for determining the country in which a literary, or artistic work, first produced simultaneously in two or more countries, is to be deemed for the purpose of copyright to have been first produced." By section 4: "Where an order respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order." By section 11: "The expression 'author' means the author, inventor, designer, engraver, or maker of any literary or artistic work, and includes any person claiming through the author. The expression 'produced' means, as the case requires, published or made or performed or represented."

By an Order in Council made on the 28th of November, 1887, under the International Copyright Acts, 1844 to 1886, it was ordered that the Berne Convention should have full effect throughout her Majesty's dominions. The Order in Council contained the following provisions:—"3. The author of a literary or artistic work, which on or after the commencement of this order is first produced in one of the foreign countries of the Copyright Union, shall, subject as in this order and in the International Copyrights Acts, 1844 to 1886, mentioned, have, as respects that work throughout her Majesty's dominions, the same right of copyright, including any right capable of being conferred by an Order in Council under section 2 or section 5 of the International Copyright Act, 1844, or under any other enactment, as if the work had been first produced in the United Kingdom, and shall have such right during the same period: provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein than that which he enjoys in the country in which the work is first produced. 5. A literary or artistic work first produced simultaneously in two or more countries of the Copyright Union, shall be deemed, for the purpose of copyright, to have been first produced in that one of those countries in which the term of copyright is shortest." The Order in Council did not provide for the application of any of the provisions of the International Copyright Acts with respect to registry or delivery of copies of works.

Pollock, B., thought that, on the true construction of the International Copyright Act, 1886, and the Order in Council, Italy was the country in which the picture was first produced, and that, therefore, the case was governed by Italian law. He accordingly gave judgment for the defendants, on the ground that failure to register was a bar to the plaintiff's claim.

The plaintiff appealed.

Dickens, Q.C., and *R. M. Bray*, for the plaintiff.—This picture, though it was painted in Italy, was first published in Germany, and Germany is the country in which it was first produced within the meaning of the Act and the Order in Council. The Berne Convention describes the country of origin of a work as being that in which it is first published. And the object of the Act and Order is to give effect to the convention. The word "produced" is used throughout the Act as being a convenient general word applicable to all cases, and then the interpretation clause defines "produced" as meaning, as the case requires, published or made or performed or represented. The learned judge seems to have construed this as meaning "published" in the case of a book, "made" in the case of a picture, "performed or represented" in the case of a dramatic work. But section 3 of the Act and clause 5 of the Order in Council, which speak of a work being "first produced simultaneously in two or more countries," show that "produced" cannot mean "made" when applied to a picture. In order to give effect to the Berne Convention the word "produced" when it is applied to a picture must be construed to mean "published." This picture having been first published in Germany, registration is not necessary.

Crackanthorpe, Q.C., and *Morton Smith*, for the defendants.—The word "produced," which is used and defined in the Act, cannot be limited in its meaning by the use of the word "published" in the convention. "Produced" is to mean, as the case requires, published or made or performed or represented. The word "made" is used with respect to pictures in the Fine Arts Copyright Act, 1862. It is there applied to paintings, drawings, and photographs, being the only word which could apply to all three. The case here requires that "produced" should be construed to mean "made." As the picture was made or painted in Italy, that is its country of origin, and by Italian law registration is necessary. But independently of the question of registration under the International Copyright Acts, it was necessary for the plaintiff to register in this country under the Fine Arts Copyright Act, 1862. The necessity for such registration was affirmed by Stirling J., in *Fishburn* v. *Hollingshead*, [1891] 2 Ch. 371, 39 W. R. Dig. 62. That decision is to be preferred to the judgment of Charles, J., in *Hanfstaengl Art Publishing Co.* v. *Holloway*, [1893] 2 Q. B. 1, 41 W. R. Dig. 56.

They also cited *Tuck* v. *Priester*, 36 W. R. 93, 12 Q. B. D. 629.

Dickens, Q.C., replied.

Lord ESHER, M.R.—I am of opinion that the whole matter depends on the true construction of the International Copyright Act, 1886. The question as to the necessity for registration under the Fine Arts Copyright Act in such a case as this was considered by Charles, J., in *Hanfstaengl Art Publishing Co.* v. *Holloway*. He held that such registration is not

necessary. There is the judgment of Stirling, J., in *Fishburn* v. *Hollingshead* to the contrary effect. I prefer the judgment of Charles, J. It seems to me to be immaterial to consider how the case would have stood under the International Copyright Act, 1844, or under the Fine Arts Copyright Act, 1862.

Now, for a long time foreign authors and artists were in the same condition in this country with regard to lack of protection for their works in which they now are in America. They were aggrieved at this, and asked for relief. They only obtained that relief by steps, the last step being in 1886. All the International Copyright Acts were passed for the purpose of securing protection to foreign authors in this country, on condition that English authors should be entitled to be treated with reciprocal benefit in foreign countries. The first International Copyright Act was that of 1844, but foreign authors were not satisfied with that. They then obtained the Acts of 1852 and 1875, and section 12 of the Fine Arts Copyright Act, 1862, but still they were not satisfied. At last they obtained the Act of 1886, with which they must be satisfied for the present. This Act was passed in consequence of the convention agreed to at a conference held at Berne, which was attended by representatives of all the countries belonging to the Copyright Union. The convention having been agreed to, it was seen that it could not be carried into effect in her Majesty's dominions without the authority of Parliament. The Act was, accordingly, passed for the purpose of enabling her Majesty to accede to the convention, and for the purpose of carrying its provisions into effect in this country.

It is therefore necessary to see what the convention is. Its object is to give protection to the authors of literary and artistic works. It says that authors of any of the countries of the union shall enjoy in the other countries the same rights with regard to their works as the respective laws grant to natives, subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work. The convention then defines "country of origin" to be that country "in which the work is first published." It was in order to carry that into effect that the Act of 1886 was passed. This was to be done by means of an Order in Council. Section 2, sub-section 3, says that the International Copyright Acts and any Order in Council made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced. The word "produced" is a more general word than "published," which is used in the convention. But the Act, in section 11, gives a definition of "produced." It is to mean, "as the case requires, published or made or performed or represented." The contention is that when the word "produced" is used with reference to a picture it must mean "made," and that consequently the place where a picture is first produced is the place where it is made or painted, the word "published" being applicable to literary works, and "performed or represented" to dramatic works. But, according to the definition, the word is to have one meaning or another, "as the case requires," which, in my opinion, means, not as the subject-matter requires, but as the transaction requires; that is to say, as may be required for the purpose of carrying into effect the Convention of Berne. In pursuance of the Act an Order in Council was made, by which it was ordered that the Berne Convention should have full effect throughout her Majesty's dominions, and it was provided that an author should not have any greater right in his work than that which he enjoyed in the country in which the work was first produced.

The object of the Act and of the Order in Council being to carry into effect the Berne Convention, I think that they ought to be construed in such a way as will best give effect to what the convention says. In my opinion, therefore, the word "produced" must be construed in the Act and the Order in Council to mean "published" wherever such construction is necessary in order to carry into effect the Berne Convention. Keeping that view in mind, I think that the proper question to be asked in this case is where the picture was first published, not, as Pollock, B., thought, where it was first made. It was pointed out that in some of the earlier statutes the word "made" was specifically used with reference to pictures; but it does not appear to be so used here.

The question where the picture was first published not having been inquired into, there must be a new trial for that purpose. I agree with the construction placed on the Act of 1886 by Charles, J., in *Hanfstaengl Art Publishing Co.* v. *Holloway*: "It was not designed to impose disabilities, but rather, if they existed, to remove them, and to leave the foreign and native author as nearly as might be on an equality. The foreigner who complies with the requirements of the law of his own country is to be protected in England; the Englishman who complies with the requirements of English law is to be protected in the foreign countries of the Copyright Union."

I am therefore of opinion that the appeal succeeds.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *H. Bentwitch.*

Solicitor for the defendants, *C. Urquhart Fisher.*

High Court of Justice.

Chan. Div. Stirling, J. } Jan. 11; Feb. 8.

TREGO v. HUNT. (*a.*)

Partnership—Goodwill—Stipulation that on determination of partnership the goodwill should belong to one partner—Other partner making a list of customers with a view to use it on expiration of partnership—Injunction.

Where by the articles of a partnership between A., B., and C. it was agreed that, after the expiration of the partnership, the goodwill of the business should belong to A. solely,

Held, that C. could not be restrained from making from the partnership books a list of the customers of the firm in order, after the expiration of the partnership, to use it for the purposes of competing with A. in a similar business.

Motion for interlocutory injunction.

The plaintiffs, Anna Trego and W. W. Smith, and the defendant, George S. Hunt, were partners, the partnership between them being constituted by an agreement dated the 13th of February, 1889. That agreement provided that a partnership which had previously been subsisting between the parties should be dissolved as from the 31st of December, 1888, and clause 1 thereof provided that the plaintiffs and defendant should be partners in the business which had been previously carried on for the term of seven years from the 1st of January, 1889, "provided, neverthe-

(*a.*) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

less, that the goodwill of the said trade or business shall be and remain the sole property of the said Anna Trego." Clause 15 provided that proper books of account should be kept by the partners and proper entries from time to time made therein of all dealings and transactions in anywise relating to the partnership, and that the same should be kept at the counting-house for the time being of the said partnership, and that "each of them the said partners shall have full access to such books, writings, and documents, and be at liberty to inspect the same and take copies thereof or extracts therefrom at all reasonable times."

It having come to the knowledge of the plaintiffs that the defendant had recently been extracting from the partnership books a list of the names and addresses of the customers of the firm, the plaintiffs on the 24th of December, 1894, issued the writ in the action, and served upon the defendant a notice of motion asking that the defendant might be restrained from making or causing to be made any copy or extract of or from the books of the partnership existing between the plaintiffs and defendants for any purpose other than the purposes of the business of the said partnership and from otherwise committing any breach of the articles of the said partnership.

At the hearing of the motion it was admitted on behalf of the defendant for the purpose of the argument that the defendant intended in the event of the partnership coming to an end to use the said list for the purpose of soliciting customers of the firm, he proposing then to engage in business of a similar nature to that carried on by the firm.

Hastings, Q.C., and *O. Leigh Clare*, for the plaintiffs.—*Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, does not apply; during the partnership the defendant is not entitled to take extracts for the purposes of competing with the owner of the goodwill after the partnership has come to an end. [STIRLING, J.—*Labouchere* v. *Dawson*, 20 W. R. 309, L. R. 13 Eq. 322, is good sense; if it is not law it is difficult to see what "goodwill" means.] This is a breach of the article as to good faith.

Buckley, Q.C., and *George Henderson*, for the defendant.—*Vernon* v. *Hallam*, 35 W. R. 156, 34 Ch. D. 748. The cases prior to *Pearson* v. *Pearson* went upon the notion that there was an implied covenant.

Hastings, Q.C., replied.

STIRLING, J.—[His lordship stated the facts, and proceeded:—] The question which I have to decide is whether the defendant is entitled to make such use of the list.

Though the question does not now arise, it is necessary, in the first place, to consider what the defendant will be able to do as of right after the expiration of the partnership. Now it is not disputed that the defendant will, upon the expiration of the present partnership, be entitled to carry on a business precisely similar to that which is now carried on by the partnership, and to do so, if he sees fit, at premises in the immediate neighbourhood of those where the partnership business is now carried on. He will certainly be entitled, as was laid down in the case of *Hookham* v. *Pottage*, 21 W. R. 47, L. R. 8 Ch. App. 91, to state that he formerly was a partner in the firm of Tabor, Trego, & Co., but he will not be able to use the name of that firm, or to represent that the business he carries on is the business of that firm or a continuation of it, or that the plaintiffs have any interest in it whatever. That is all well settled by the case of *Churton* v. *Douglas*, 7 W. R. 365, Johnson, 174, which is constantly referred to. According to the case of *Labouchere* v. *Dawson*, he would also be subject to this restriction, that he would not be at liberty to solicit the customers of the present firm to cease dealing with those who continue the business of the present firm, or to give their custom to himself. It appears to me that that case was overruled by the majority of the Court of Appeal in *Pearson* v. *Pearson*, a decision which is binding on me. I must take it (indeed, it was not disputed in argument) that he will then be at liberty to solicit the customers of the present firm. It is contended, however, that he is not entitled to use for this purpose the list which he has compiled from the partnership books, and this is a point on which there is no direct authority.

The general rule as to the obligation of the agent with regard to the use of information acquired while in the employment of his principal has recently been considered by the Court of Appeal in *Lamb* v. *Evans*, 41 W. R. 495, [1893] 1 Ch. 218, and it is thus stated by Lindley, L.J., at p. 226, "an agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. The principal has, in my judgment, such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got." Now, it will be observed that the rule extends to materials which the agent has obtained only from his principal. In a partnership there exists between the partners the relation of principal and agent, but in the peculiar form that each partner is principal as well as agent, and consequently the materials which each partner obtains in the course of the partnership are obtained, not for the benefit of his co-partners only, but for himself as well. The books of the partnership, consequently, which, in the absence of express stipulation to the contrary, exist for the benefit, not of the plaintiffs alone, but for the benefit of the defendant also, and the information and materials there to be found have been obtained, not for the plaintiffs alone, but for the defendant also. The present case, therefore, does not fall within the rule as stated by Lindley, L.J.

It was contended that the right to make copies and extracts from the books must be confined to the purposes and business of the partnership, and the notice of motion is framed on this basis. In my opinion this is in any case too narrow a view of the rights of the partners. Every partner is entitled, as it seems to me, at the very least, to make all such extracts from the books as may be proper to enable him to assert his rights as a partner, either against his co-partners or third parties, or to protect himself against claims which are or may be founded on his position as a partner, whether made by his co-partners or by third persons; but even this seems to be, having regard to the authorities, too narrow a limit. In the case of *Aas* v. *Benham*, [1891] 2 Ch. 244, 39 W. R. Dig. 146, the question arose as to how far one partner could, during the existence of the partnership, avail himself for his own purposes of information acquired by him as a partner. [His lordship read the headnote.] Now, in giving the judgment Lindley, L.J., says, at p. 255, "*Dean* v. *MacDowell* shows that a partner is not bound to account to his co-partners for profits made by him in carrying on a separate business of his own unless the case can be brought within one or other of the two principles to which I have alluded, even if he carries on such separate business contrary to one of the partnership articles. As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong

to the firm, he must account to the firm for any benefits which he may have derived from such information; but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business, nor does the language of Cotton, L.J., in *Dean* v. *MacDowell* warrant any such notion. By 'information which the partnership is entitled to' is meant information which can be used for the purpose of the partnership. It is not the source of the information, but the use to which it is applied which is important in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd. Suppose a partner to become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject, could the firm claim the profits thereby obtained? Obviously not, unless by publishing the book he in fact competed with the firm in their own line of business." Bowen, L.J., says, "I think that when Cotton, L.J., said that a partnership was entitled to the profits which arose out of information obtained by one of the partners as partner, he was speaking of information to which the partnership was entitled in the sense in which they are entitled to property. I think you can only read the sentence in which the expression occurs in that way. It is as follows: 'Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property.' The language, like all Cotton, L.J.'s language, is perfectly precise and neat. He is speaking of information which a partnership is entitled to in such a sense that it is information which is the property or is to be included in the property of the partnership, that is to say, information the use of which is valuable to them as a partnership and to the use of which they have a vested interest."

Now the test which is there applied appears to be whether the information is used for the purpose of competing with the firm, by which I understand competing improperly so as to be liable to account for the profits to be derived from such competition. If this be so, then on the expiration of the partnership the defendant would be properly entitled to compete with the firm, and would not be liable to account for his profits, and consequently the test adopted in *Aas* v. *Benham* appears to me to fail. The clauses of the Partnership Act which bear on the question are 29 and 30. Clause 29 runs thus: "Every partnership must account to his firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection." From that I remark that it appears to me to be directed to transactions which occur during the continuance of the partnership, because sub-section 2 goes on, "This section applies also to transactions undertaken after a partnership had been dissolved by the death of a partner and before the affairs thereof have been completely wound up either by any surviving partner or by the representatives of the deceased partner." Section 30 is, "If a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in that business." That is really the substance of the actual decision in *Aas* v. *Benham*. It may be right also to refer to what was laid down by the late Turner, L.J., when Vice-Chancellor, in dealing with the analogous case of a trade secret in *Morison* v. *Moat*, 9 Hare, 241. There the partnership had been formed to carry on business which consisted of the manufacture of a secret medicinal preparation. The secret was the exclusive property of the plaintiffs, who, under the terms of the partnership, were bound to communicate it to their other partners. The defendant was a former partner, who, during the continuation of the partnership, became acquainted with the secret, but, as the Vice-Chancellor held, surreptitiously and without the knowledge or consent of the plaintiffs. An injunction was granted to restrain the defendant from availing himself of the knowledge thus acquired, but the Vice-Chancellor, in the course of his judgment, makes the following remarks at p. 262: "If the defendant, after he became a partner in the concern, openly took part in compounding the medicines and used the secret for the purpose; if with the knowledge and concurrence of the partners he was permitted to acquire, and did acquire, a full knowledge of the mode of compounding these medicines and of the secret process in the manufacture of them, it would be difficult for any of those partners afterwards to restrain him from using any knowledge so acquired or any secret so disclosed; they would, I think, in such a state of circumstances be considered to have waived any right to preserve the secret for their separate benefit." *A fortiori*, would this be the result if it had appeared that the plaintiffs had contemplated from the beginning that the defendant Moat would become acquainted with the secret, and had not required from him any covenant not to make use of it?

In the present case the goodwill of the business is the property of Mrs. Trego; the partnership agreement contemplated that the defendant should have the ordinary rights of a partner, as regards knowledge of the affairs of the partnership. It contains no express stipulation which prevents the defendant from competing with Mrs. Trego after the termination of the partnership, or from soliciting customers of the firm, or from making use of the information acquired by him during the partnership. All these matters might have been expressly provided for had the parties thought fit to do so.

One mode in which the case may be looked at is to consider whether under these circumstances an agreement ought to be implied to abstain from doing any of these things. It seems to me to be clear that I cannot imply a stipulation that would prevent the defendant from competing with Mrs. Trego after the termination of the partnership or from soliciting the customers of the firm, and I cannot see any good ground why I should introduce the stipulation that he should not use the information acquired by him in the course of the partnership for that purpose.

I am sorry to confess that I have come to this conclusion with reluctance, but I must also add that I should have been most reluctant also to depart from what was laid down and decided in *Labouchere* v. *Dawson*. In saying that I am not to be supposed to dissent or differ from the conclusion arrived at by the Court of Appeal in *Pearson* v. *Pearson*. It would not be right for me to do so, and, indeed, I think that the decision in *Pearson* v. *Pearson* is more in accordance with the other decisions than is that of *Labouchere* v. *Dawson*. I only wish to say I should have been glad if the Court of Appeal had seen its way to confirm the doctrine of *Labouchere* v. *Dawson*. As it did not, it seems to me that the result at which I have arrived is the fair and necessary consequence.

I think, therefore, the motion must be refused.

Motion refused.

Solicitors, *R. Miller, Wiggins, & Naylor.*

Chan. Div. Stirling, J. } Jan. 11.

COMYNS v. HYDE. (a.)

Copyright—Periodical—Coloured supplement not physically connected therewith—Registration under Literary Copyright Act of 1842, *but not under Fine Arts Copyright Act of* 1862—*Infringement—Injunction.*

Where a coloured supplement is issued, but not physically connected, with a periodical, registration of the periodical under the Literary Copyright Act of 1842 *will protect such supplement, although not registered under the Fine Arts Copyright Act of* 1862, *from infringement, if there is clear evidence to show that the supplement is a part of the periodical; and the court will restrain such infringement by injunction.*

Motion.

The plaintiff in this case was the proprietress of a periodical called the *Feathered World*, which was published weekly, and with which, on the 15th of October, 1893, was issued a coloured plate or picture representing an Orpington cock, the same being an illustration of an article upon that particular breed of fowl appearing in that week's number. The picture in question was on a separate sheet of paper, across the top of which was printed, "Supplement to the *Feathered World* for October 15th, 1893." The article above mentioned referred to the picture as "our illustration for this week," but the picture was not physically connected with the rest of the publication.

The defendant was a dealer in a particular kind of poultry food, and he issued, by way of advertisement, a picture of an Orpington cock, which, it was admitted, was an infringement of the picture in the said supplement to the plaintiff's paper.

The plaintiff's publication was registered under the Literary Copyright Act of 1842, but the picture in the supplement was not registered under the Fine Arts Copyright Act of 1862.

This was a motion by the plaintiff for an injunction to restrain the defendant from infringing her copyright in the said picture by reproducing the same in his advertisements as above mentioned.

Sebastian, for the plaintiff.—This coloured plate is a part of the publication, and is, therefore, protected by registration under the Literary Copyright Act. It is not necessary that the picture should be actually fastened to the paper with which it was issued so long as it is described on the face of it as being a part thereof.

Buckley, Q.C., and *George Henderson*, for the defendant.—Registration under the Literary Copyright Act is not enough. The picture must be registered under the Fine Arts Copyright Act before the plaintiff can sustain an action for an injunction. If this be not the case, the registration of a paper like the *Graphic* as a book, would protect the coloured illustrations issued as supplements to its Christmas numbers.

STIRLING, J. (after stating the facts), proceeded: I am of opinion that this case falls within *Maple* v. *The Junior Army and Navy Stores*, 31 W. R. 70, 21 Ch. D. 369. The decision of the Court of Appeal in that case conclusively shows that an illustration will be protected unless it can be proved that it is no part of the registered publication. That, of course, is a question of fact. Now it is not disputed that this periodical is a book within the meaning of the Literary Copyright Act of 1842, and that all the letterpress is consequently protected, but the picture, it is said, is not protected, because it is not physically connected with the periodical. It seems to me that this is a very narrow construction of the Act, and I cannot adopt it. This coloured picture is clearly a part of the plaintiff's publication, for not only is it referred to in the periodical as "our illustration," but it also bears on its face a declaration that it is a supplement to the said paper. I am, therefore, of opinion that the plaintiff is entitled to succeed upon the motion.

Injunction granted.

Solicitors, *Robins, Billing, & Co.; George Coote.*

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. } Jan. 11.

MANDELBERG v. MORLEY. (a.)

Patent—Action for infringement—Dismissed with costs, plaintiff offering no evidence—Certificate that particulars of objections were reasonable and proper—Patents, Designs, and Trade-Marks Act, 1883, *s.* 29, *sub-section* 6.

Where an action for infringement of a patent has been dismissed with costs, the plaintiffs offering no evidence, the court will not grant a certificate, under section 29, *sub-section* 6, *of the Patents Act of* 1883, *that the defendant's particulars of objections were reasonable and proper in the absence of evidence to that effect, nor will the court inquire into the facts of the case for the purpose of obtaining such evidence.*

Summons.

This was a summons taken out by the defendants in an action to restrain an alleged infringement of certain patents of the plaintiffs, asking the court to grant a certificate under section 29, sub-section 6, of the Patents, Designs, and Trade-Marks Act, 1883, that the particulars of objections delivered by them in the action were reasonable and proper, and that the costs of them might be allowed.

The plaintiffs, in their statement of claim, alleged that they were the owners of certain letters patent, and they sought by this action an injunction restraining the defendants from infringing the same.

The defence was that the plaintiffs were not the owners of the letters patent, that there had been no infringement, and that the letters patent were invalid for reasons set out in the particulars of objections, which were very lengthy, and included every objection usually urged in cases of this nature.

The action was set down for trial by the defendants and came into the paper, but before it was heard the plaintiffs took out a summons to stay, on the ground that the parties had already agreed to compromise the action. This summons failed, Stirling, J., being of opinion that no such agreement had been made, and he refused to stay the proceedings. The plaintiffs offered no evidence in the action, which was dismissed with costs; but the court declined for the present to grant a certificate that the defendants' particulars of objections were reasonable and proper, liberty to apply on this point being reserved to the defendants.

In the absence of this certificate, the taxing master refused to allow the costs of the said particulars, and the defendants then took out the summons.

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

Graham Hastings, Q.C., Bousfield, Q.C., and *E. S. Ford*, for the summons.

J. F. Moulton, Q.C., and *O. Leigh Clare*, for the plaintiffs.

STIRLING, J., after stating the facts, continued: The question here is simply whether or not these objections are reasonable and proper. If they are, the defendants will be clearly entitled to the costs thereof. Now, as to some of these objections, there is some evidence of their nature already before me, but as to others there is none. How, then, can I decide upon the nature of these latter objections, concerning which no evidence is before me—that is to say, how can I declare these objections to be reasonable and proper when I do no know anything about them. In order to decide this question I should have to go into the whole matter, from beginning to end, and practically try the action. Now the Court of Appeal in *Longbottom* v. *Shaw*, 37 W. R. 792, 6 Rep. Pat. Cas. 143, decided that the court would not go into all the facts of a case of this nature simply with the object of deciding whether or not the defendant was entitled to a certificate that his objections were reasonable and proper when it was possible to dispose of the action in some other shorter and simpler manner. There is nothing inconsistent with this decision of the Court of Appeal in those cases, such as *The Germ Milling Co.* v. *Robinson*, 34 W. R. 194, 3 Rep. Pat. Cas. 256, where the case for the plaintiff had been gone into and his witnesses examined and cross-examined, and it had then appeared to the the judge that the objections, or some of them, were reasonable and proper, and he had given a certificate to that effect. Consequently I cannot certify those objections reasonable and proper upon which I have no evidence. With respect to that class of objections on which there is evidence, I have before me materials whereon I can exercise my judgment, but I do not think they are such as would justify me in finding those objections reasonable and proper. Consequently I am of opinion that this application must be dismissed with costs.

Summons dismissed.

Solicitors, *Phelps, Sidgwick, & Biddle; Rowcliffes, Rawle, & Co.*, for *A. & G. W. Fox*, Manchester.

Chan. Div.
Vaughan Williams, J. } Nov. 21, 22.

In re THE ISSUE CO. (LIMITED).
HUTCHINSON'S CASE. (*a.*)

Company—Director—Contributory—Agreement to become member—Qualification of director—Winding up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

Where the articles of association of a company provide and require that the directors shall hold a certain qualification in shares, the mere acceptance of the office of director, coupled with acting as such, is not sufficient to enable the court to infer a contract of membership within section 23 *of the Companies Act*, 1862. *The proper contract to be inferred in such a case is a contract to qualify as a director*—i.e., *to take the required number of shares—within a reasonable time, either from the company or from outside persons. Such a contract is not a contract of membership, nor does a contract of membership arise from the mere lapse of a reasonable time.*

The above-named company was incorporated under the Companies Acts in March, 1893, with a capital of £125,000 in preference and ordinary shares of £5 each. It was provided by the articles of association (clause 88) that the first directors should be appointed by the signatories to the memorandum and articles, or a majority of them. That the qualification of every director should be the holding in his sole name of shares or stock to the nominal value of £500 at the least (clause 90). By clause 93 (*d*) the office of a director was to be vacated if he ceased to hold the required amount of shares or stock to qualify him for the office. The company never carried on any business or went to allotment, and, proving entirely abortive, was ordered to be wound up in December, 1893.

This was a summons by the liquidator in the winding up asking to have the names of Alfred Betzold, J. K. K. Benjamin, and R. H. P. Hutchinson placed on the list of contributories in respect of 100 shares each as directors' qualification shares. Betzold and Benjamin signed the memorandum for one share each (as to which there was no dispute), and Betzold, Benjamin, and Hutchinson were appointed first directors, and accepted the office. Betzold and Benjamin acted as directors and attended meetings, but it did not appear that Hutchinson ever attended any meetings or acted as director. He resigned in July, 1893, and his resignation was accepted in October.

It appeared that neither Betzold, nor Benjamin, nor Hutchinson ever applied for or had been allotted any shares in respect of directors' qualification, nor was there a register of members. It also appeared that the acts of the board of directors were merely preparatory or preliminary to commencing business.

Betzold, Benjamin, and Hutchinson now applied to have their names removed from the list of contributories in respect of the directors' qualification shares.

Channell, Q.C., and *Clarendon Hyde*, for Hutchinson.

Farwell, Q.C., and *G. F. Hart*, for Betzold; and

Macnaghten, for Benjamin, referred to *Hewitt's and Brett's case*, 32 W. R. 234, 25 Ch. D. 283; *In re Wheal Buller Consols*, 36 W. R. 723, 38 Ch. D. 42; *Ex parte Cammell*, [1894] 2 Ch. 392; *In re Bread Supply Association*, W. N., 1893, p. 14; and *Isaac's case*, 40 W. R. 362, 518 [1892] 2 Ch. 158.

Bramwell Davis, for the liquidator.—In a case like this there is a continuing authority to place the directors on the list in respect of their qualification shares. The point is left open by the cases. *In re Bread Supply Association* is a direct decision in my favour.

He referred to *Miller's case*, 3 Ch. D. 661, 25 W. R. Dig. 54, and *Ex parte Lord Inchiquin*, 39 W. R. 610, [1891] 3 Ch. 28.

VAUGHAN WILLIAMS, J.—These cases are cases to remove the names of certain persons from the list of contributories in respect of directors' qualification shares. The cases differ a little from each other, but so little that I shall deal with the general principle first. In my view none of these gentlemen should have their names on the list of contributories unless it can be made out that they have agreed to become members of the company. I do not think that it has been made out that any of them have agreed to become members. The question what is an agreement to become a member within section 23 of the Companies Act, 1862, has been very frequently discussed. There are many decisions. I do not propose to go through these decisions. Each decision depends on its particular facts. In some of these cases the court found there had been an agreement, in others

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

that there had not. I shall only try to ascertain whether in any one of the cases now before me there has been such an agreement. It is admitted that there has been no express agreement, and that there has been no application for shares and no allotment. That being so, the agreement, if any, must be an implied one. Implied from what? It is said these gentlemen accepted the office of director. That is not enough. It was then said that they accepted office in a company having an article requiring the directors to hold qualification shares. [His lordship read clauses 90 and 93 (*d*) of the articles, and continued:—] I do not understand Mr. Bramwell Davis to contend on behalf of the liquidator that the mere acceptance of the office of director, coupled with the fact that the articles require a director to be qualified, is sufficient to cause the court to infer an agreement to become a member. What else have we got here? We have the fact that these gentlemen acted as directors more or less. Two attended meetings, and one (Hutchinson) is stated to have signed an attendance book—a circumstance which he now says is not true. They all acted more or less as directors, and Mr. Bramwell Davis does not contend that all these facts put together are in themselves sufficient to constitute a contract of membership.

The proper contract is a contract to qualify—*i.e.*, to obtain the shares from the company or from outsiders within a reasonable time. That is not a contract of membership. It is said that when the reasonable time has elapsed there is a contract of membership. I do not agree with that at all. At the end of that reasonable time the director must be held to offer to take the shares, but something else must happen to fix him with a contract of membership. The offer may be accepted by a resolution to allot, or by placing the name of the director on the register of members, or if, after the reasonable time has elapsed, the person acts as a director, so assuming that his offer has been accepted. The mere lapse of time does not, in my opinion, constitute a complete contract. It is said that *Hewitt's and Brett's case* leaves this point open. I agree with that. Cotton, L.J., says: "There is a difference of opinion between the members of the court on the question whether the contract entered into by these directors to obtain a qualification does amount to an agreement to take shares within the meaning of section 23, and in the view of this case in which we all agree, it is not necessary to decide, and we think it better not to express any opinion, on this point." I am holding here that the contract entered into to qualify, does not amount to an agreement to take shares within the meaning of section 23. I am not deciding this case upon the authority of *Hewitt's and Brett's case*, or on my own personal reasoning. The judgments of the court in subsequent cases show (though the point is not expressly decided) that acting as a director of a company with a qualification article does not amount to an agreement to take shares within section 23. Two cases involve this. They are *In re Wheal Buller Consols* and *Ex parte Cammell*. I will take the latter case first. In that case the articles provided that the qualification of a director should be the holding of £200 share capital, that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification, and that the office of a director, in the case of a first director, should be vacated if he failed to obtain the requisite shares within the prescribed period, or if he sent in a written resignation. There was an allotment of shares in circumstances in which the director could not be heard to say that he was not aware of it. Lindley, L.J., says: "Cammell was named as an original director in a prospectus issued shortly after the company was formed, and he attended one or two meetings during the first month of the company's existence. On the 29th of March, 1893, at a meeting at which he was not present, forty shares were allotted to him and the other directors as their necessary qualification. On the 7th of April another meeting was held, at which the minutes of the previous meeting were read. Cammell was not present at that meeting, but he was present at a meeting held on the 14th of April, when the minutes of the meeting of the 7th of April were read. There was some controversy whether he knew of the allotment. Stirling, J., came to the conclusion that he did not, and I accept that conclusion. On the 29th of April the month expired within which the original directors were bound to acquire their qualification shares. After the expiration of the month, and before there was any registration book of the company in existence, but after Cammell's name had been put on the allotment list, on the 29th of March, in respect of the forty shares, the secretary sent to Cammell a form of application for these shares, which Cammell never signed, and which he ultimately returned. In the beginning of May Cammell wrote once or twice excusing himself from attending the meetings of the directors, and on the 7th of May he sent in his resignation. On the 26th of July Cammell, having then recently ascertained that his name was on the register of members, wrote to the secretary requesting to have his name removed. In September he received a notice of a call in respect of these shares, and in October proceedings were commenced against him to enforce the call. On the 1st of November he gave notice of motion to rectify the register by removing his name therefrom." There was, in the circumstances of that case, no constructive agreement to take shares, though there had been acceptance of the office of director, acting as such, and attendance at meetings. Lindley, L.J., said in his judgment: "Mr. Buckley contended that the articles conferred on the company an irrevocable authority to put him on the register after the expiration of a month. I do not think we can spell out of the words of the articles any such authority as that. These articles are not so strong as the articles in *Isaacs' case*, where such an authority was implied. I do not think that the fact that Cammell sent in his resignation is conclusive, but I am much impressed with this fact—that the company did not treat him as being a shareholder in respect of these forty shares on the 29th of April, because the secretary of the company, instead of treating him as a shareholder, asks him, on the 1st of May, to sign an application for shares. His resignation, coupled with his refusal to do that which the company had invited him to do—viz., sign the application for shares—is, in my judgment, sufficient to put an end to the authority of the company. The company, therefore, had no warrant for putting his name on the register on the 23rd of May."

In my view there is no completed contract to take shares by the mere lapse of a definite time and, therefore, certainly not by the lapse of an indefinite time. It is said that *Ex parte Cammell* does not apply, because Cammell had actually withdrawn from his office. There has here been no exercise by the directors of their authority to put the applicant on the register.

It seems to me the same idea is evolved in *In re Wheal Buller Consols*. Cotton, L.J., said: "No one has ever decided that acting as a director amounts to an agreement to take the shares requisite for a qualification. There are cases where a director has been held not liable for the shares requisite to qualify him. There have, in some cases, been observations to the effect that acceptance of the office and acting as

director may make a person liable as if he had taken the qualification, but no judge has ever acted on that view."

If that case is looked at it will be seen that on the facts the court assumed that a reasonable time had elapsed, and it was held that the mere fact of acting as a director was not enough to constitute a contract of membership as distinguished from a contract to qualify. I hold that the mere lapse of a reasonable time will not constitute a contract of membership. But I also consider that a reasonable time had not elapsed when the winding-up order was made. The object of the qualification clause is to protect the outside public who come in to take shares. So long as there has been no allotment there has been no lapse of a reasonable time.

The names of the applicants ought, therefore, not to be on the list of contributories.

Solicitors, *Hurrell & Mayo; Lindo & Co.; Collisson & Prichard; Munns & Longden.*

Q. B. Div. (Divisional Court) (Wills and Wright, JJ.) } Jan. 31; Feb. 7.

O'SULLIVAN v. THOMAS. (a.)

Gaming—Stakeholder—Revocation of authority to pay—Action by depositor—Gaming Act, 1892 (55 *Vict. c.* 9), *s.* 1.

The plaintiff and H. deposited £5 each in the hands of the defendant. It was agreed that the £10 so deposited should be handed to the winner of a race run between the plaintiff and H. The plaintiff, having lost the race, demanded that his money should be returned. The defendant paid the £10 to H.

Held, that the £5 was not a "sum of money paid" by the plaintiff within the meaning of the Gaming Act, 1892, *and that the plaintiff was entitled to recover the £5 from the defendant.*

Appeal by the defendant from the decision of his Honour Judge Williams in the county court of Aberdare.

The plaintiff and one Hughes agreed to run a race. They deposited £5 each in the hands of the defendant, as stakeholder, and it was agreed that he should hand the £10 to the winner of the race.

The plaintiff, after losing the race, called upon the defendant to return him his money.

The defendant paid the £10 to Hughes.

The plaintiff sued the defendant for the £5 he had deposited.

By the Gaming Act, 1892 (55 Vict. c. 9), s. 1: "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract or of any services in relation thereto or in connection therewith shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

The marginal note to section 1 is as follows: "Promises to repay sums paid under contracts void by 8 & 9 Vict. c. 109 to be null and void."

The county court judge gave judgment for the plaintiff, but gave leave to appeal.

Montague Lush, for the appellant.—The question must be determined by the words of the Gaming Act, 1892, s. 1, which has altered the law in regard to betting transactions. The plaintiff "paid" a sum of money in respect of a gaming contract. It was held in *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189, that, although 8 & 9 Vict. c. 109 made all wagering contracts null and void, it did not apply to the recovery of a sum deposited in the hands of a stakeholder, and that a deposit might therefore be recovered before it was paid over. In *Diggle* v. *Higgs*, 25 W. R. 777, 2 Ex. D. 422, the same principle was affirmed, and a depositor was allowed to recover the stake which he had handed to the stakeholder. This case comes within the decision in *Tatam* v. *Reeve*, 41 W. R. 174, [1893] 1 Q. B. 44, where it was held that a plaintiff could not recover sums which he had paid for the defendant to persons with whom the defendant had lost bets on the ground that they were paid "in respect of" a gaming contract. Here the plaintiff can only bring his action on an implied promise by the defendant to return his money, if he should revoke his authority to pay it over to the winner of the race, and such a promise is void under the Act of 1892. [WRIGHT, J.—The statute ought to be called an Act to Encourage Betting, if the depositor can no longer revoke the authority to pay over. WILLS, J.—The stakeholder, according to your view, might keep the money.] That was the view of Cockburn, C.J., in *Diggle* v. *Higgs*.

W. Evans, for the respondent.—The Act of 1892 contemplates only actions by persons who have actually paid money on behalf of defendants, and is not intended to apply to the case of a deposit. *Diggle* v. *Higgs* is still the authority in point. Before a case can be brought within the Act a payment must be made on behalf of someone, and it is the "promise to pay" a sum so paid that the Act has in view.

Lush, in reply.—In *De Mattos* v. *Benjamin*, 42 W. R. 284, the defendant had received money on behalf of the plaintiff. Such a case is not within the Gaming Act of 1892. But the plaintiff here, having "paid" money, has brought himself within the terms of the section. The marginal note to section 1 says that a "promise to repay" such a sum is void; but the word "repay" does not occur in the section itself.

Cur. adv. vult.

Feb. 7.—WILLS, J.—This case arises under the Gaming Act, 1892, which runs as follows: [The learned judge read section 1]. The plaintiff handed to the defendant as stakeholder a sum of money which was to be paid over to a third person if the plaintiff should lose his bet. The plaintiff, before the money was paid over, and having lost the bet, did not wish to pay, and claimed his money back from the stakeholder. But for this Act the plaintiff could have revoked his authority, and the only question is whether money handed over to a stakeholder can be said to be a "sum of money paid" by the plaintiff. If it can, the plaintiff cannot recover it; if it cannot, the action will lie. I think the action will lie. The word "paid" means paid out and out, and does not mean a sum deposited for the purpose of paying somebody else. I am not sorry to come to that conclusion, because another construction would make this Act the charter of betting men. It has been held in *De Mattos* v. *Benjamin* that an agent who has received money in respect of bets made by him on behalf of a principal cannot keep that money as against his principal. If we were now to hold that a depositor could not get his money back from a stakeholder there would be a complete chain of legal liability. I do not think that such a result was contemplated by the Legislature. If I did think so, I should not hesitate so to hold. But one feels safe in

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

saying that the Act in question has not been conceived in the spirit of giving legal facilities to the betting world for carrying out their betting operations in the law courts.

WRIGHT, J., read the following written judgment: At the time when the Act of 1892 was passed such a wagering contract as was made in this case was not what is called illegal. It was void in the sense that no action could be maintained in which the cause of action was that contract, and, of course, an authority given by one of the parties to his agent to pay money to the other party could be revoked before payment. But if (1) the agent had received the money from his principal and had not paid it over, or (2) he had received it for his principal from the other party, or (3) he had, at the request of his principal, paid money to the other party in respect of the wager, there was in each of these cases a cause of action—against the agent in the two first cases, and by the agent in the third case—independently of the void contract itself. The question is, How far the Act of 1892 has affected the right of action in one of these three cases? It clearly takes away the agent's right of action in the third case if the agent has paid the money with notice or knowledge of the purpose, and perhaps, according to *Tatam* v. *Reeve*, even in the absence of such notice or knowledge.

It equally clearly does not take away the principal's right of action in the second case, because, whatever the intention of the framers of the Act may have been, the words "money paid by him" cannot be construed as including money received for him. And I think it does not take away the principal's right of action in the first case. The expression "money paid by him" does not appear properly to apply to a revocable deposit. And it seems difficult wholly to disregard the consideration that a different construction would tend directly and almost necessarily to defeat the very object of the Act, by preventing a revocation of the deposit and so giving to the winner of the wager a practical certainty of being paid his bet, which advantage he did not previously possess.

Appeal dismissed; leave given to appeal.

Solicitors for the appellant, *Bell, Brodrick, & Co.*, for *Linton & C. & W. Kenshole*, Aberdare.

Solicitors for the respondent, *Purkis & Co.*, for *Thos. Phillips & Son*, Aberdare.

Q. B. Div. (Wills and Wright, JJ.) — Feb. 1.

ABBOTT & CO. v. WOLSEY. (a.)

Sale of goods—Memorandum in writing—Acceptance—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-sections* 1, 3.

The defendant made a contract, subsequently referred to by him in letters under his signature, for the supply to him by the plaintiff of a quantity of hay, to be delivered by the 21st of July, or order cancelled. After that date, the hay not having been delivered, the defendant verbally agreed to accept delivery on the 8th of August. On that day, the goods having arrived, the defendant went on board the barge in which the hay had been conveyed, took a sample, and said, "This hay is not according to my sample, and I won't have it."

Held, first, that there was not a sufficient memorandum in writing for a contract to deliver hay on the 8th of August within section 4, *sub-section* 1, *of the Sale of Goods Act*, 1893; *secondly, that there was no evidence of such a dealing with the goods by the defendant as to constitute an acceptance of them by him within section* 4, *sub-section* 3.

Appeal from the decision of his Honour Judge Lushington in the county court at Wandsworth.

Some time in July, 1893, Wolsey, the appellant, who was the defendant in the action, ordered of Messrs. Abbott & Co. a quantity of hay; and on the 13th of July the latter sent a sold note in the following terms:—

"Sold to W. H. Wolsey, Nine Elms, about 20 tons second quality Dutch hay at 72s. 6d. per ton, delivered alongside Wolsey's Wharf, two clear days allowed for discharging . . . barge to be alongside before Saturday, 21st July, or order cancelled." The hay was not delivered by the 21st of July, but on the 4th of August Abbott & Co. sent a messenger to Wolsey to ask him if he would still take the hay, and Wolsey replied (verbally), "I will take the hay if the barge is alongside by Wednesday, the 8th of August." Accordingly the hay was sent, and duly arrived on the 8th alongside Wolsey's wharf. The lighterman handed over to the defendant's man a receiving note, and ought to have received in return a receipt note, but this was never given. On the same day the defendant came on board, looked at the hay, rolled over a portion, and taking a sample, said, "This hay is not up to my sample, and I won't have it."

In the course of the correspondence that subsequently took place Wolsey referred to the contract, as contained in the sold note of the 13th of July, and maintained that it was cancelled owing to the delivery not having taken place by the 21st of July.

In that correspondence there was no mention or admission of the agreement on his part to take the hay if delivered by the 8th of August. Abbott & Co. then sold the hay against the defendant, and sued him for non-acceptance. The county court judge found that the original contract had become cancelled but that there was a new verbal contract to take delivery on the 8th of August, and that the goods were accepted and received under that contract within the meaning of section 4, sub-sections 1 and 3, of the Sale of Goods Act, 1893, that is to say, that when the defendant did on the 8th of August in regard to the hay was "an act in relation to the goods which recognizes a pre-existing contract of sale."

Cluer, for the appellant.—There was no evidence of acceptance. The statute says "an act," therefore mere words are not sufficient, otherwise it would suffice if the defendant were to say, "It is a verbal contract, and I rely on the Statute of Frauds." The question is, Has there been a dealing with the goods? Mere looking at them, even when accompanied by a certain amount of delay, is not enough: *Taylor* v. *Smith*, 40 W. R. 486, [1893] 2 Q. B. 65. The statute, in section 34, expressly provides that the buyer is to have an opportunity of examining the goods. A dealing with the goods, to come within the exception, must be a dealing which is only consistent with a pre-existing sale. The words used here, and the conduct of the defendant in relation to the goods, are just as consistent with the case of the defendant buying the hay on the spot. [WRIGHT, J.—Do not the words used by the defendant show a contract of sale by sample? If so, it is not the contract set up. The contract set up is a contract for sale by description. The words used by the defendant cannot refer to it.

Forman, for the respondents.—The original contract is still in existence. That contract is referred to in a letter signed by the defendant, and can the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

fore be sued on. The defendant's determination to accept delivery on the 8th of August amounted to nothing more than a waiver of the condition for delivery by the 21st of July, which need not be in writing. The contract was not to be void if the goods were not delivered by the 21st of July, but merely voidable at the option of the defendant, otherwise we would have this result, that the plaintiff could, by failing to deliver on the date specified, secure the benefit of a rising market. That being so, what the defendant said on the 4th of August did not amount to the substitution of a new term on the contract for the old one, but the defendant in effect said, "I will not exercise my option of cancelling if the goods are delivered by the 8th of August." At any rate, the defendant is now estopped from denying that the time for delivery extended till the 8th of August, for the plaintiff, acting on his intimation, had the barge sent, some distance, to his wharf. With regard to the question of acceptance and receipt the learned judge found that there was a receipt of the goods. The foreshore belonged to the defendant and the barge was lying alongside the wharf. That being so, the case was similar to *Page* v. *Morgan*, 33 W. R. 793, 15 Q. B. D. 228. The opening of some of the sacks in that case was analogous to the action of the defendant in rolling over the hay and taking a sample. [WILLS, J.—Did the foreshore belong absolutely to the defendant.] It is the foreshore of the river Thames at Nine Elms. The defendant in his evidence admits "the barge was lying on my foreshore."

Cluer, in reply, said that at the time that the defendant recognized the original contract it had already become cancelled and of no effect.

WILLS, J.—I have come to the conclusion pretty clearly that the county court judge was wrong. It is quite clear that the first recognition by the defendant of the original contract is contained in letters written on and about the 9th of August, in which he accompanies it with a reference to the condition that it was to be cancelled if not performed by the 21st of July.

The facts establish that the words used by the defendant on the 4th of August were not to be considered as an offer to keep alive the original contract under any circumstances. Therefore the letters contained nothing more than an expression of his intention to act on the option of cancelling. Apart from that, it is said that was a new verbal contract on the 4th of August to take an August delivery on the 8th, and that, there being a sufficient acceptance to satisfy the Statute of Frauds, the plaintiff may, notwithstanding, recover on the new contract. What I cannot see is that there is any evidence of the defendant doing more than a person going to buy would do. I thought at first there was something in the suggestion made by Mr. Forman that the goods were on the defendant's foreshore; but I am satisfied that when the defendant speaks of "my foreshore" he only means the foreshore opposite his wharf. Then, would anyone who was going to buy do less than this man did? I think not. That being so, it cannot be said to be "an act in relation to the goods which recognizes a pre-existing contract of sale." I thought at first that the letter of the 8th of August might throw light on the matter of the examination with a sample, as showing that there was in existence a contract for sale by sample. It does, indeed, recognize a contract already entered into, but it is the old one, which was repudiated, and so no light is thrown upon the character of the examination. I think, therefore, though one is always reluctant to give effect to the Statute of Frauds, that there is no evidence of acceptance such as is required.

WRIGHT, J.—I agree. There was no sufficient memorandum in writing of the contract. The contract sought to be enforced is a contract for an August delivery. The difference between an August delivery and a July delivery is vital in a contract for the supply of hay. There is not a trace that the defendant made any contract for an August delivery. He admits the July delivery, but that was cancelled. On the question of an acceptance and receipt to satisfy the statute, the receipt is not in question. The case falls rather within *Taylor* v. *Smith* than *Page* v. *Morgan*. All the defendant did was what a person considering whether he would buy or not would do. He merely took out a pinch of hay and looked at it. That was not such a dealing as to be explicable only on the assumption that the defendant had agreed to buy.

Appeal allowed.

Solicitor for the appellant, *W. Batham.*

Solicitor for the respondent, *G. H. Knott.*

(Lawrance and Kennedy, JJ.) Q. B. Div. — Jan. 15.

NORRIS v. BIRCH. (a.)

Metropolitan Carriages Act (6 & 7 *Vict. c.* 86), *ss.* 8, 22—*Defacement of driver's licence—Jurisdiction of police magistrate—"Matter of complaint"—Evidence of loss and damage.*

Under 6 & 7 *Vict. c.* 86, *s.* 8, *the registrar is authorized to grant licences to the drivers of hackney carriages, and the proprietors are required to indorse on the licences of drivers whom they employ the dates of entering and leaving their service. A proprietor, by his agent, in entering the dates, omitted one of the dates of entering and added a signature, the effect of which was to prejudice the driver in the eyes of other proprietors. The driver produced two proprietors who said they would not have employed a man producing a licence so marked.*

Held, that this was a "matter of complaint" within section 22 *of the Metropolitan Carriages Act,* 1843, *and that the magistrate had jurisdiction to hear the claim.*

Held, also, that there was a defacement of the licence, and that there was evidence of loss and damage whereon the magistrate could assess compensation.

Case stated by the metropolitan police magistrate under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

On the 3rd of August, 1894, the appellant appeared before the magistrate at the Westminster Police Court in support of a summons under the Metropolitan Carriages Act, 1843, wherein it was alleged that the respondent, being the proprietor of a certain hackney carriage, and having employed the appellant as driver, did unlawfully deface his licence.

The appellant, who was a licensed cabdriver, entered the employ of the respondent on the 16th of March, 1894, and continued to be employed by him till the 2nd of May, 1894, but during that time there were breaks in the employment, when the appellant left the respondent for a short time and then returned to him.

By the Metropolitan Carriages Act, 1843, s. 8, the cab proprietor is authorized and directed, on returning the driver's licence, after quitting his service, to make an indorsement thereon. For that purpose a form is provided at the back of the licence, which is divided into four columns. In the first and second columns

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the proprietor must enter his name and address, in the third the date when the driver entered his employ, and in the fourth the date when he quitted it. Now it was the custom in the trade to consider, and it was so found by the magistrate, that anything written in the last column over and above the date of leaving the service implied something against the man's character. It was known by the name of "chairmarking."

In the present instance the form was filled in, not by the proprietor, but by his manager, a man named Louis Johnson. The first two columns were filled up correctly. The third contained only the date, the 16th of March, 1894, and the last column was filled in thus—"23rd March, 1894, 2nd May, 1894, Louis Johnson." The magistrate found as a fact that, though these entries were in every respect true, yet they were made in such a way as to prejudice the appellant with other proprietors; a cab strike having about this time taken place, the entry might be presumed to, in some way, connect him with it.

At the hearing in the police court the appellant produced as witnesses two cab proprietors, who said that they would not have employed a man who produced a licence marked in that manner; but he did not produce anyone who had actually refused to employ him. The respondent did not appear, but only his manager, Louis Johnson. The magistrate dismissed the summons on two grounds—(1) that the facts did not disclose such a matter of complaint as is within 6 & 7 Vict. c. 86, s. 22; (2) that the plaintiff gave no evidence of any damage or loss upon which to assess compensation.

Section 22 of 6 & 7 Vict. c. 86 is as follows:—"It shall be lawful for any justice of the peace to hear and determine all matters of complaint between any proprietor of a hackney carriage or metropolitan stage carriage and the driver or conductor of the same respectively, and to order payment of any sum of money that shall appear to be due to either party for wages or for earnings in respect of any such carriage, or on account of any deposit of money, and to order compensation to the proprietor in respect of damage or loss which has arisen through the neglect or default of any driver or conductor to the property of his employer entrusted to his care, or in respect of any sum of money which such proprietor may have been lawfully ordered by a justice of the peace to pay, and which has been actually paid in pursuance to such order on account of any negligence or wilful misconduct of his driver or conductor, and to order such compensation to either party in respect of any other matter of complaint between them as to such justice shall seem proper."

Morton Smith, for the appellant.—The respondent is liable to the appellant for damage sustained by the appellant by reason of the defacement of his licence. The respondent has written on it something that he was not authorized by any statute to write: *Rogers* v. *Macnamara*, 2 W. R. 19, 23 L. J. C. P. 1; *Hurrell* v. *Ellis*, 15 L. J. C. P. 18. The magistrate has jurisdiction to hear the claim under section 22. It is a "matter of complaint" within that section. *Clemson* v. *Hubbard*, 24 W. R. 312, 1 Ex. D. 179, and *Hindley* v. *Haslam*, 27 W. R. 61, 3 Q. B. D. 481, which are cases under the Employers and Workmen Act, illustrate the sort of dispute intended to be heard under this section. There was some evidence of damage, and in an action for defacing a licence a man may recover substantial damages: *Wennhak* v. *Morgan*, 36 W. R. 697, 20 Q. B. D. 635. In this case it would be impossible for the driver to procure a new licence.

W. B. Campbell, for the respondent.—It is true that if a bailee of a document puts marks on it calculated to lessen its value to the bailor, he is liable for the loss that ensues. But here the respondent was authorized by a statute to write on the document, and what he wrote was a substantial compliance with the statute. In the cases cited the proprietor had added something which he was not authorized by the statute to add. Here your lordships are asked to say that the omission of a date in the third column is a defacement. In this case the magistrate has no jurisdiction. The general words in section 22 must be read with reference to the particular words, and they cannot be taken to refer to any dispute that may arise between a cab proprietor and his driver. For instance, suppose the proprietor had uttered slanderous words against the driver, it could not be contended that the magistrate would have jurisdiction. No more can it be supported in this case, where, if there is any claim, it is in respect of a libel. As to the second question, there was no evidence of loss, and it was competent for the magistrate to dismiss the summons on that ground.

LAWRANCE, J.—I am of opinion that the magistrate was wrong on both points. The terms of the Metropolitan Carriages Act, 1843, s. 8, have not been complied with. It was the duty of the proprietor to enter on the back of the licence his name and address, and the dates of entering and leaving the service. What he did was to put down one date as the date of entering, and two dates as the dates on which the driver quitted, his employ. He omitted, therefore, one of the dates of entering, and added the name of Louis Johnson. What he wrote was such as to prejudice the driver. I have come to the conclusion that this was not a compliance with section 8, and that the effect of it was a defacing under the statute. With regard to the question as to whether the magistrate has jurisdiction to deal with this claim under the 22nd section, I think that he has. Particular sorts of disputes are pointed out by the section as being within the jurisdiction. These are with respect to payments of money due by way of earnings, deposits, damage to the carriages, and loss to the proprietors through the driver's negligence. And then there are the general words "any other matter of complaint." These words must be read as meaning any other matter of complaint in reference to the trades or employments of proprietor and driver of cabs. It seems to me that the present claim is one of the very cases that it is contemplated might arise.

I do not think that there was no evidence wherewith to assess compensation. Two cab owners said that if they had read the indorsement they would not have employed the man. There was something prejudicial to the driver written on his licence.

KENNEDY, J.—In this case, by 6 & 7 Vict. c. 86, s. 8, the proprietor is required to enter on the back of the driver's licence his name and address and the dates of entering and leaving his service. Jervis C.J., in *Rogers* v. *Macnamara*, states that under the statute it is clear that it is the duty of the proprietor to indorse on the licence only that which he is authorized to do, and unless it is established that a man was authorized to write all that he did write he is liable for the consequences. The magistrate in this case found as a fact that anything written in the third column beyond what the statute required was supposed to be against the man's character. In the column two dates appear and also a signature. Therefore, something has been written on the licence which was not authorized, and in such a way as to imply something against the man. This is clearly a case of defacing. We have not got to deal with

case in which a date has been correctly stated, but, an omission having been made, the significance of the rest is altered. I am not prepared to say that if that had been so I should have considered it a defacement. When such a case arises it will have to be decided on its own merits. But here we have not only an omission, but an insertion of a signature, which was such a writing as is not required by the statute.

As to the question of jurisdiction, I think that this is exactly one of the cases which were intended to fall within section 22. There was evidence also of loss of employment. It is impossible for me to say that I think the magistrate was right in saying there was no evidence.

Case remitted to the magistrate.

Solicitor for the appellant, *W. Holloway.*

Solicitor for the respondent, *Duerdin Dutton.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Rigby, L.J.) — Dec. 20.

KENT COUNTY COUNCIL *v.* VIDLER & SONS. (*a.*)

Highway — Extraordinary traffic—"Person by whose order such traffic has been conducted"—Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

The appellants, having undertaken to supply ballast for the purposes of the construction of a railway as and when the contractor might direct, entered into arrangements with three several traction engine proprietors for the carriage of the ballast. In accordance with these arrangements the appellants from time to time, on receiving directions from the contractor, required one or other of the engine proprietors to carry the ballast which was wanted and deliver it as directed. The appellants exercised no control over the proprietors as to the weights they should carry or otherwise. The carriage of the ballast by all the engine proprietors together constituted extraordinary traffic on a certain highway.

Held, that the appellants were liable, under section 23 *of the Highways and Locomotives Amendment Act,* 1878, *to pay the expenses incurred by the highway authority in consequence of such extraordinary traffic, as being the persons by whose order such extraordinary traffic had been conducted.*

Appeal from a decision of a divisional court on a special case stated by justices of the county of Kent under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33.

At a special sessions of the peace, held at Cranbrook, in the county of Kent, on the 17th of May, 1894, a complaint was heard at the instance of the Kent County Council against Messrs. Vidler & Sons, under section 23 of the Highways and Locomotives Act, 1878. The charge was that Vidler & Sons did, on divers days between the 1st of December, 1891, and the 31st of August, 1893, in the parish of Hawkhurst, cause extraordinary traffic and excessive weight to be conducted along a certain highway, being a main road, which the county council were liable to repair, and that thereby damage had been caused to the said highway, and that the county council had incurred extraordinary expense in repairing the same to the extent of £350.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

It appeared that during the years 1891 to 1893 the Cranbrook and Paddock Wood Railway was in course of construction, and the contractor for the work, one Firbank, required ballast for the purposes of the construction. He accordingly made a contract with Vidler & Sons, by which they agreed to supply the required ballast at a certain price, to include delivery at such places as from time to time should be indicated by him. Vidler & Sons, having determined to carry out their contract by the use of traction engines, then entered into arrangements with three several traction engine proprietors to haul the ballast as it might be required from time to time from a wharf belonging to Vidler & Sons to the places indicated for delivery by Firbank, and there deliver the same to him. In accordance with these arrangements the manager of Vidler & Sons, on receiving orders from Firbank, required one or other of the engine proprietors to carry and deliver the amount of ballast which was wanted. Vidler & Sons exercised no control over the engine proprietors as to the time for delivery, the engines they were to use, the weights they were to carry, the route they were to follow, or otherwise. Altogether an amount of 1,555 tons of ballast was carried along the road in question by the engines of the three proprietors, and it was admitted that such carriage constituted an extraordinary user of the road, and was extraordinary traffic.

The justices were of opinion that Vidler & Sons were not, within the meaning of section 23 of the Highways and Locomotives Act, 1878, the persons by whose order the traffic in question had been conducted, and they therefore dismissed the complaint; but they stated this case for the opinion of the High Court.

The Divisional Court (Grantham and Lawrance, JJ.) reversed the decision of the justices, and ordered the case to be remitted to them with an expression of the opinion of the court that the justices ought to determine how much damage had been occasioned by the traffic complained of, and that Vidler & Sons were liable as being the persons who gave the order for the extraordinary traffic.

Vidler & Sons appealed.

Dickens, Q.C., and *F. Low,* for the appellants.

Tindal Atkinson, Q.C., and *Hohler,* for the respondents.

Lord ESHER, M.R.—There is no doubt that there was extraordinary traffic on this road. That traffic was not carried on by means of the engines of any one of the engine-owners, but by means of the engines of all the owners. It may be that not one of the owners used the road to an extraordinary extent. But the usage of the road by all of them together, did amount to extraordinary traffic. Who ordered that traffic to be carried on? Firbank had entered into a contract for the construction of a railway, and for this purpose it was necessary that a quantity of ballast should be delivered at various places. He entered into a contract with Vidler & Sons, by which they agreed that they would deliver the ballast at such places as he from time to time should direct. They resolved to carry out their contract by means of traction engines. They accordingly made several contracts with different firms of engine-owners. Those contracts might have been that the owners should carry the ballast as and when ordered by Firbank. But that was not the arrangement made. The contracts were that, as and when Vidler & Sons required, one or other of the firms should supply traction engines and perform the traffic, and that in every such case the firm should charge Vidler & Sons at a specified rate. Therefore nothing

was to be done by the engine-owners under these contracts until something had been first done by Vidler & Sons. Vidler & Sons did from time to time, as they received orders from Firbank, give orders to each of the firms to carry ballast along the road in question.

The result altogether is that Vidler & Sons are the persons who ordered this extraordinary traffic, and they are therefore liable under section 23 of the Highways and Locomotives Act, 1878.

The appeal must be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Sole, Turner, & Knight*, for *W. C. Cripps & Son*, Tunbridge Wells.

Solicitors for the respondents, *Palmer & Bull*, for *Brennan & Turner*, Maidstone.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 14, 19.

HENDERSON & CO. v. WILLIAMS. (a.)

Sale of goods—Fraud of third person—Warehouseman—Attornment—Title to goods—Conversion—Measure of damages.

Sugar, the property of G. & Co., was warehoused with the defendant. F., by fraudulently representing himself to be a customer of G. & Co., obtained an authority from them to the defendant to hold the sugar at the order and disposal of F., who subsequently negotiated a sale of the sugar to the plaintiffs. The defendant sent to the plaintiffs a memorandum stating that he held the sugar on account of F., and would deliver the same to them on F.'s transfer in their favour. The plaintiffs not being satisfied, the defendant wrote across the memorandum the words: "I hold the within at your order and disposal."

Before the sugar was delivered to the plaintiffs the fraud of F. was discovered, and the defendant, acting on the instructions and indemnity of G. & Co., refused to deliver the sugar.

Held, that the defendant was estopped by his attornment to the plaintiffs from denying their title, and that the plaintiffs were entitled to judgment, the damages being the market value of the sugar at the time of the defendant's refusal to deliver.

Whether, without such attornment, the plaintiffs' title was superior to that of G. & Co., quære.

Kingsford *v.* Merry, 5 *W. R.* 151, 1 *H. & N.* 503, *considered.*

Appeal from Cave, J.

The plaintiffs, J. Henderson & Co., were sugar merchants at Hull, and the defendant was a warehouseman at Hull and Goole.

On the 3rd of June, 1894, one W. Fletcher, by pretending that he was one Robinson, negotiated a purchase of 150 bags of sugar from a firm of Grey & Co., they believing that they were dealing with Robinson, an old customer of theirs, through Fletcher as his agent.

Grey & Co. instructed the defendant, who then held the 150 bags of sugar in a warehouse at Goole to their order, to hold them to the order of Fletcher, and on the 6th of June, 1894, the defendant communicated to Grey & Co. as follows: "I have your telegram to transfer the 150 bags to Mr. W. Fletcher, of Leeds, at whose disposal I have placed the sugar."

Fletcher then negotiated with the plaintiffs to sell the sugar to them, together with other sugar which was in the defendant's warehouse.

As Fletcher desired to be paid for the sugar in cash, the plaintiffs inquired of the defendant if the sugar proposed to be sold to them was in his warehouse to Fletcher's order. The defendant, in reply, sent to the plaintiffs the following memorandum:—"Memorandum.—J. L. Williams to Messrs. Henderson & Co., Hull. June 7th, 1894.—R. A. V. 150 bags of sugar, P. R. 36 bags of sugar, Star 50 bags of sugar, lying at Goole. I hold the above on account of W. Fletcher, Leeds, and will deliver same to your order on receipt of his transfer in your favour."

The plaintiffs not being satisfied with this memorandum, the defendant wrote across it the following words: "I hold the within at your order and disposal."

The plaintiffs then completed the purchase of the sugar and paid Fletcher by cheque, which was cashed by him, £167 15s. 11d., which, with a sum of £130 odd already due from Fletcher to them, and for which the plaintiffs held a dishonoured cheque, made up the purchase-money of £301 7s. 5d.

Grey & Co. subsequently discovered Fletcher's fraud upon them and requested the defendant not to deliver the 150 bags of sugar to the plaintiffs. The defendant accordingly, upon being indemnified by Grey & Co., refused to deliver the 150 bags.

Grey & Co. made no claim to the 36 and 50 bags, the value of which was £100, and the defendant delivered them to the plaintiffs.

Cave, J., at the trial of the action, gave judgment for the plaintiffs for £67 odd, being the difference between the £167 paid to Fletcher and the value of the sugar other than the 150 bags.

These were cross appeals from the decision of Cave, J.

The plaintiffs appealed on the ground that the damages were insufficient, and the defendant appealed on the ground that the plaintiffs were not entitled to recover at all.

Forbes, Q.C., *Scott Fox*, and *Lacey Smith*, for the plaintiffs.—We are entitled, by way of damages, to the market value of the goods at the time of conversion. [They were stopped by the court.]

Pickford, Q.C., and *T. Willes Chitty*, for the defendant.—Judgment should be for the defendant. If the defendant's statements were to be taken as a warranty, no doubt the judgment is right, but Cave, J., did not take that view. There is no estoppel in this case: *Attenborough* v. *London and St. Katherine's Dock Co.*, 26 W. R. 583, 3 C. P. D. 450; *Biddle* v. *Bond*, 13 W. R. 561, 6 B. & S. 225. There was no contract between Grey & Co. and Fletcher, and no property passed: *Kingsford* v. *Merry*, 5 W. R. 151, 1 H. & N. 503.

They also referred to *Cundy* v. *Lindsay*, 26 W. R. 406, 3 App. Cas. 459, and *Higgins* v. *Burton*, 5 W. R. 683.

Forbes, Q.C., in reply, referred to *Burkinshaw* v. *Nicholls*, 26 W. R. 819, 3 App. Cas. 1004; *Stonard* v. *Dunkin*, 2 Camp. 344; *Hawes* v. *Watson*, 2 B. & C. 540; *Gosling* v. *Birnie*, 7 Bing. 339; *Knights* v. *Wiffen*, 19 W. R. 244, L. R. 5 Q. B. 660. [LINDLEY, L.J., referred to *Rogers* v. *Lambert*, 39 W. R. 114, [1891] 1 Q. B. 318.]

Cur. adv. vult.

Lord HALSBURY [after stating the facts down to

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

the defendant's communication of the 6th of June, 1894, said :] I pause here to consider what was at this time the relative situation of the parties. Messrs. Grey, the real owners of the goods, had placed, with full powers of disposition, these sugars in the name of Mr. Fletcher; and if the question now to be determined was whether or not any property passed under these circumstances into Mr. Fletcher, I should say that, inasmuch as Fletcher was only the designated consignee, and not a person purporting to enter into a bargain or a contract at all, no such property would pass; and I think that that view would be in accordance with the decision in *Kingsford* v. *Merry*, with respect to which I have to say a word or two presently. But that is not the position in which I regard the transaction so far. It appears to me that, quite apart from any contract which might be affirmed or disaffirmed afterwards, the question here is, whether the true owner of the goods has so invested the person dealing with them with the indicia of property as that, when an innocent person enters into a negotiation with the person to whom these things have been intrusted with the indicia of property, the true owner of the goods can afterwards complain that there was no authority to make such a bargain. I think a confusion has arisen in the sort of inferences to be drawn from the case of *Kingsford* v. *Merry*, a confusion of two totally different things. If a contract is induced by fraud, that contract may be affirmed or disaffirmed, and until it is disaffirmed any person dealing on the faith of that contract is protected, because until it is disaffirmed it is a perfectly good contract. I think it was made out, and justly made out before us, that here there was no contract at all, and if it had been upon that question alone, I should say that no property had passed.

But this is not the only question. There may be a question where, although no property has in fact passed, yet the true owner has allowed another person to hold himself out as the owner in such a way as to make an innocent person enter into a contract, which contract, being performed, cannot be set aside. The case of *Kingsford* v. *Merry*, as to which, as I say, a considerable amount of misapprehension has existed before now, was a case in which, in truth, there was neither a holding out nor was there in fact a contract. Whatever the true facts of the case may have been, the Court of Exchequer originally was under the belief that the question before them was whether or not a contract obtained by fraud, until disaffirmed, was capable of giving a good title to an innocent holder for value; and upon that ground the case in the Court of Exchequer was decided. It is within my knowledge, personally, that more than one member of the Court of Exchequer complained that, after they had given a decision upon that hypothesis, the parties in the then state of practice (the new practice having just come in, of appeal in lieu of a bill of exceptions, to the Court of Exchequer Chamber) agreed to a statement of facts which the Court of Exchequer—certainly some of the members of it—always complained did not state the same facts as were in evidence before them. The matter, when fought before the Court of Exchequer, was, of course, upon the facts as proved at the trial. The question, as it came before the Court of Exchequer Chamber, was upon an agreed statement of facts in writing, agreed upon between the parties. Now let us see what was the *ratio decidendi* of the Court of Exchequer Chamber. The Court of Exchequer Chamber said, "The judgment of the Court of Exchequer appears to have been founded upon the assumption that the plaintiffs would have been warranted, by the circumstances stated in the case, in treating the transaction between them and Anderson as a contract of sale which, by reason of the fraud of Anderson, they might disaffirm, if they pleased, or affirm and proceed as for goods sold and delivered. . . . We are, however, of opinion that, upon the facts stated in the case, the plaintiffs and Anderson never did stand in the relation of vendor and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm." It is manifest that if these were the facts which the Court of Exchequer Chamber assumed as the basis of their judgment, no relation between these parties existed at all, any more than in the case of a person who might have stolen a delivery order and presented it at the proper office. But it is remarkable to observe that in giving that judgment, and upon the argument in that case it is expressly distinguished from those cases in which a person has given the indicia of title to another so as to enable him to pass as the true owner; and a long line of authorities, of which I have only selected two, establishes conclusively that where that is the case it is no longer a question of affirming or disaffirming any contract between the owner of the goods, but a question whether the owner of the goods has, by his conduct, allowed the person who has either cheated him or to whom he has entrusted goods, so to behave himself and to appear and to hold himself out as the owner, as to give a good title to a *bonâ fide* purchaser for value. That is the case of *Williams* v. *Barton*, 3 Bing. 139. After dealing with the facts in that case, which are not material to my purpose, and after speaking of the power of obtaining a good title in market overt, the learned judge proceeds: "This exception in our law proves that if a person acquires the possession of property in any mode other than that of sale in market overt, he cannot keep it against the owner; it proves at the same time that, as commerce is now carried on, the purchaser or pawnee should have the same protection against him who permits another to deal with his property as if it were his own." And again, in *Dyer* v. *Pearson*, 3 B. & C. 42, Abbot, C.J., says, referring to the case before him: [His lordship read the judgment of Abbott, C.J., in that case, and proceeded:—]

But I have thought it right to deal here as if the only parties to this question were the true owner of the goods and the purchaser for value. The question, of course, arises here in a different form, although, perhaps, only circuitously. Here the warehouse keeper has been induced to attorn to the ownership of the fraudulent person Fletcher, and in that character to transfer to Fletcher, and to Fletcher's order, the property given to his charge; and I am of opinion that it would be impossible for him to resist an action by the person to whose title he has attorned against him if no other question existed in the case.

This is an action in which it is admitted that the warehouse keeper is acting under the indemnity of Messrs. Grey, and I have thought it right to trace the question up to its source, and to treat Greys, the true owners, as the persons who are the practical defendants in this case. Treating Greys as the defendants in this case, I am of opinion that upon these facts they have no answer. The real truth is that Greys are the persons who have permitted this fraud to be committed by entrusting the goods to the order and disposition of Fletcher, and, apart from the authorities to which I have already referred, I think that it is not undesirable to refer to an American authority (*Root* v. *French*, 13 Wendell, 570), which, I observe, was quoted in the case of *Kingsford* v. *Merry*, in which, in the Supreme Court of Judicature, Savage, C.J., makes observations which seem to me to be well worthy of consideration. He says: "The *bonâ fide* purchaser is justified in purchasing such property, and giving value for it, . . . he is pro-

tected in doing so upon the principle just stated, that where one of two innocent persons must suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions and destroy that confidence upon which what is called the usual course of trade materially rests."

It appears to me, therefore, that when once the correspondence is looked at upon which these goods were confided to Fletcher to his order and disposition, and Fletcher was invested with a full power of disposition, it is impossible to argue that this was not a holding out, by the true owner of the goods, of Fletcher as capable of giving a good title. It is admitted that the present plaintiff dealt *bonâ fide* with the person who was thus in complete dominion of the property in question, and who was, under these circumstances and from this correspondence, held out by the true owner of the goods as the true owner. Therefore, any contract made innocently by a *bonâ fide* purchaser for value is protected.

That brings me to the only remaining question—namely, the question of damages; and I confess I am wholly unable to understand the mode in which these damages are assessed. If I am right in the conclusion at which I have arrived, the truth is that the plaintiff here was entitled to the market value of the goods. It is immaterial in what form the payment was made. If I were to go into that, I should say that the question of the extinguishment of Fletcher's debt and the return of his cheque would be an ample consideration; but I protest against being involved in any such inquiry. These goods were the goods, under the circumstances, of the plaintiffs. They ought to have been delivered and were refused. That is a conversion of those goods; and it appears to me, therefore, that the ordinary rule of law applies, that the plaintiff complaining of conversion of his goods is entitled to the market value of those goods at the time of the conversion; and for these reasons I am of opinion that the verdict should be increased to £200 odd, and that the cross-appeal should be dismissed with costs.

LINDLEY, L.J., after stating the facts, said:—It will be convenient to dispose of the defendant's appeal first. He contends—(1) that he is not estopped from setting up Grey's title; and (2) that Grey's title is better than that of the plaintiffs. I am of opinion that the defendant is wrong upon the first point, even if he is right on the second. The distinct attornment by the defendant to the plaintiffs on the 7th of June, 1894, clearly, in my opinion, estopped the defendant from denying the plaintiffs' title. The cases cited by Mr. Forbes, beginning with *Stonard* v. *Dunkin* and ending with *Knights* v. *Wiffen*, are conclusive on this point, and any other decision would be most mischievous in a business point of view. Mr. Pickford, in his very able argument for the defendant, urged that *Attenborough* v. *London and St. Katharine's Dock Co.* was an authority to show that there was no estoppel in this case. But there the defendants had not attorned to the plaintiffs, and the attornment makes all the difference.

With respect to the second point there is more difficulty. If there were no estoppel, and the court had to decide whether Grey or the plaintiffs had the better title to these 150 bags of sugar, my judgment would be in favour of the plaintiffs, if it were not for the case of *Kingsford* v. *Merry*. The case stands thus:—Grey authorized the defendant, his agent, to hold the sugar to Fletcher's order, and, before that authority was revoked, the defendant acted upon it, and transferred the sugar to the plaintiffs, who are *bonâ fide* purchasers of it for value from Fletcher, without notice of anything wrong. It seems to me that, whether Fletcher was the owner of the goods or not, still, as he was expressly authorized to dispose of them, it would be contrary to principle to hold that Grey could recover the sugar from the plaintiffs.

But Mr. Pickford cited *Kingsford* v. *Merry* to show that Grey could do so. I have looked carefully through the report of that case. An order was there given by the plaintiffs to their warehouseman in substance like the order given by Grey to the defendant on the 6th of June in this case. I understand that this order comprised the goods sued for. I also understand that this order was acted upon by the warehouseman before it was revoked, just as was the case here. He had transferred the goods into the name of the defendant, who was a *bonâ fide* pledgee for value from the person whose orders were to be obeyed. The decision of the court was, nevertheless, in the plaintiffs' favour, on the ground that no property passed from the plaintiffs to the person to whom they gave the delivery order, and that, no property having passed to him, he could confer none on the defendant. The case was treated as if it were the case of a sale of goods by a person who had obtained possession of them by false pretences. Such a person, having no title, can confer none, except by sale in market overt: see *Cundy* v. *Lindsay*. I confess I find great difficulty in distinguishing the facts of that case from the facts of this, although I think too little attention was paid to the authority given and acted upon before it was revoked. But perhaps the order to which I have referred did not include the goods sued for.

On the ground, however, of estoppel by attornment the defendant's appeal in the present case must be dismissed, with costs.

As regards the damages, I am unable to adopt the view taken by Cave, J. The value of the 150 bags of sugar was £215. Fletcher sold to the plaintiffs other sugars, and the price of the whole came to a little over £300. Fletcher was indebted to the plaintiffs on other transactions, and they held a dishonoured cheque of his. Instead, therefore, of paying Fletcher £300 odd, the plaintiffs deducted the amount of the dishonoured cheque and paid Fletcher the balance—£167 odd. Cave, J., has deducted the price of the other sugars from this sum, and has given the plaintiffs only £67. But, if he went into these calculations at all, he should have deducted the price of the other sugars from the £300 odd, and not from the £167 odd. If this had been done, the judgment would have been for £200 odd, and the plaintiffs would, no doubt, have been satisfied. In my opinion, however, the defendant being estopped from denying the plaintiffs' title, this action ought to be treated as an action to recover the value of goods belonging to the plaintiffs. The ordinary rule ought, therefore, to be adopted, and the proper measure of damages is the market value of the 150 bags of sugar at the time of their wrongful conversion by the defendant. This value is £215, and the judgment ought to be for this sum, and the plaintiffs must have the costs of their appeal.

A. L. SMITH, L.J.—In order to bring out clearly the point raised, it will be convenient to treat this action as an old action of trover, to which the defendant has pleaded not guilty and not possessed. The first question that arises is whether the defendant is estopped from denying what he traverses by his plea of not possessed—viz., the plaintiffs' right to possession of the 150 bags as against the defendant at the date of the refusal to deliver. It appears to

me that if he is, the defendant's appeal to have judgment entered for him fails, and, subject to a point upon the damages, the judgment for the plaintiffs must stand.

The principle upon which an estoppel *in pais* is created is laid down in the well-known cases of *Pickard* v. *Sears*, 6 A. & E. 469; *Freeman* v. *Cooke*, 2 Ex. 654; and *Cornish* v. *Abington*, 7 W. R. 504, 4 H. & N. 549, and need not be stated here, for it is familiar to all lawyers. It is upon this principle that many warehousemen in like circumstances to those of the defendant have found themselves estopped from denying the plaintiffs' title and from setting up a title in a third person; and as examples I will take the cases of *Stonard* v. *Dunkin*, *Hawes* v. *Watson*, and *Gosling* v. *Birnie*, in which Tindal, C.J., said: "The defendant is estopped by his own admissions; for unless they amount to an estoppel the word may as well be blotted from the law." The admission in the present case—viz., the statement by the defendant that he held the sugar at the plaintiffs' order and disposal—is not less strong than in *Gosling* v. *Birnie*; and, lastly, the case of *Knights* v. *Wiffen*, in which the principle upon which an estoppel *in pais* is again enunciated, and it is again pointed out how it applies. To get rid of these authorities, which, in my opinion, are conclusive in the plaintiffs' favour, Mr. Pickford, in an excellent argument for the defendants, suggested that, as they were mostly cases prior to the case of *Biddle* v. *Bond*—in which it was held that the estoppel against a bailee from disputing the title of his bailor and setting up a *jus tertii* ceases when the bailment is determined by what is equivalent to an eviction—the above-mentioned cases were no longer law. But this is not so; for Blackburn, J., who delivered the judgment of the court in *Biddle* v. *Bond*, took care to state that the court in no way questioned these cases, and the learned judge pointed out at the same time in such clear language what those cases had decided that I will repeat what he said. He said: "Several cases were cited, and more might have been cited, in which a bailee, who by attorning to a purchaser of goods in effect represented to him that the property has passed to him (though such was not the fact), and thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the title of the person to whom he has thus attorned by setting up a title in a third person inconsistent with the representation on which he had induced the purchaser to act. We in no way question that those cases were rightly decided."

It was next argued that, if this were not so, the case of *Attenborough* v. *London and St. Katharine's Dock Co.*, in this court, had overruled them. This case, when looked at, will be seen to fall short of any attornment by the bailee to the bailor; all that had taken place was that the dock company had issued warrants making the wine deliverable to Dolaro or his assigns. There was no statement that they would hold the wines to his order and disposal, or its equivalent. This case leaves untouched the cases above referred to, and consequently the authorities are clear that in the circumstances of this case the defendant is estopped from denying the plaintiffs' right to the possession of the 150 bags of sugar at the date of the defendant's refusal to deliver to the plaintiffs, and from attempting to set up the title of Grey & Co.

Both the pleas, therefore, of not guilty and not possessed are disproved. This being so, and the action being undefended, in my judgment it follows that the plaintiffs are entitled to the market value of the 150 bags of sugar at the date of refusal to deliver, which is £300, less the £100 worth of sugar actually delivered—that is, £200.

I do not propose to discuss the point, so much argued at the bar, as to whether Messrs. Grey & Co., after their order of the 6th of June, 1894, could or could not set up title to the 150 bags of sugar, for, in my judgment, as the estoppel point is clear, it is immaterial whether they could do so or not.

My brother Cave came to the conclusion that the plaintiffs were entitled to £67 and no more. He appears to have thought that the plaintiffs were only entitled to damages which resulted from the representations made by the defendant to them, and he proceeded thus: The plaintiffs, he said, had in their pockets £167 when the representation was made, and upon the faith of that representation they parted with this money; they have received £100 worth of sugar against their £167, therefore their damages are £67, the debt of Fletcher to them never being worth anything. I cannot agree in this. I would point out that this is not, and never could have been, an action for damages founded upon misrepresentation, for it certainly was not fraudulent. The action is, as I began by saying, founded in trover, and nothing else. The plaintiffs succeeded in that action—it is true upon an estoppel by representation—but the action in which they succeed is none the less an action of trover, and consequently the measure of damages is, as I have above stated, the market value of the goods at the time of the refusal to deliver, which comes out at about £200, after giving credit for the sugar received, that is, £100.

For the above reasons the defendant's appeal fails, and must be dismissed, with costs. The plaintiffs' cross-appeal as to damages succeeds, and must be allowed, with costs, and judgment must be entered for the plaintiffs for £215 12s. 6d., which is the proper amount when the figures are worked out.

Plaintiffs' appeal allowed. Defendant's appeal dismissed.

Solicitors, *Pritchard & Sons*, for *Jackson & Co.*, Hull; *Wynne, Holme, & Wynne*, for *Simpson, North, Harley, & Birkett*, Liverpool.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Dec. 14.

MOORE *v.* VESTRY OF THE PARISH OF FULHAM. (*a.*)

Res judicata—*Money paid under process of law—Right to recover—Summons withdrawn on payment.*

Money paid under process of law cannot be recovered by independent proceedings.

The defendants issued a summons against the plaintiff for a sum which they alleged to be due, and the plaintiff paid the amount on the day upon which the summons was returnable. The hearing of the summons was adjourned. The plaintiff subsequently disputed his liability and demanded the return of the money. He, however, took no steps to defend the summons, which was finally withdrawn.

In an action brought to recover the money,

Held (affirming the decision of Day, J.), *that the plaintiff, having had the opportunity of defending the summons and not having done so, could not be allowed to recover money the payment of which he might have resisted.*

Caird *v.* Moss, 35 *W. R.* 52, 33 *Ch. D.* 22, *explained.*

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Appeal from a decision of Day, J.

On the 7th of June, 1893, the vestry of Fulham, having passed a resolution for the paving of a new street within the parish, demanded from the plaintiff, under threat of legal proceedings, the sum of £35 13s. 9d. toward the expenses of such paving.

The money not being paid, the vestry, on the 19th of September, issued a summons against the plaintiff, returnable on the 3rd of October.

On the latter day the plaintiff sent a cheque for the amount, receiving a receipt in the usual form.

The summons was thereupon adjourned till the 24th of October, the defendants informing the plaintiff of the adjournment.

The plaintiff then put the matter into the hands of his solicitor, who, on the 19th of October, wrote to the defendants demanding the return of the money, and informing them that if it was not returned he would attend the adjourned hearing of the summons. Neither the plaintiff nor his solicitor, however, attended the adjourned hearing, and the summons was withdrawn.

On the 17th of November the plaintiff's solicitor again wrote demanding the return of the money, and on the 30th of January, 1894, the money not having been returned, the plaintiff issued his writ in this action, whereby he claimed the sum of £35 13s. 9d. for money had and received by the defendants to the use of the plaintiff, and also for money paid under a mistake.

At the trial of the action Day, J., held that, as the plaintiff had neglected his opportunity of trying the case before the police magistrate, he could not afterwards issue process to re-try the case in the High Court. He therefore dismissed the action.

The plaintiff appealed.

Radcliffe, for the appellant.—The money was obtained by reason of a *bonâ fide* mistake, and is recoverable. When the present action was commenced there was no legal process in existence. The legal process was dead, and the plaintiff could not proceed under it.

He referred to *Marriott* v. *Hampton*, 7 T. R. 269; *Moses* v. *Macferlan*, 2 Burr. 1005; *Caird* v. *Moss*, 35 W. R. 52, 33 Ch. D. 22, *per* Lopes, L.J.; and Leake on Contracts, 3rd ed., p. 79.

Macaskie, for the defendants, was not called upon.

LORD HALSBURY.—I think this appeal must fail. The principle of law was not accurately stated by the appellant. It is, that where money has been paid under legal process it cannot be recovered. The appellant had an opportunity of defending the summons, and, not having done so, he cannot now be allowed to recover money the payment of which he might have resisted.

The principle was laid down in *Milnes* v. *Duncan*, 6 B. & Cr. 671, where Holroyd, J., said: "If the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back," and other judges have concurred in that statement of the law.

That is the broad principle. It is said that it should be confined to the bare case where money has been recovered by process of law, and the appellant relied on the judgment of Lopes, L.J., in *Caird* v. *Moss*. In that case the learned judge referred to the judgment as still standing, because it was under a judgment that the money was actually recovered. He accordingly held that that judgment was not to be interfered with. That case, perhaps, looks at first sight like a qualification of the general principle, but it is not so in reality. The rule that money paid under a judgment is not recoverable follows *à fortiori* from the general principle.

LINDLEY, L.J.—I am entirely of the same opinion. The case is covered by a string of authorities, of which *Hamlet* v. *Richardson*, 9 Bing. 644, where the defendant said, in effect, "I will pay rather than fight," is a good example. Of course money is frequently recovered which has been paid under a judgment, but that is when the judgment has been reversed by the Court of Appeal.

A. L. SMITH, L.J.—I also think the appeal should be dismissed. There is a line of cases, from *Marriott* v. *Hampton* onwards, laying down the principle of law.

Appeal dismissed.

Solicitors, *W. Tyndale Moore; T. Blanco White.*

From Q. B. Div. (Bank.) (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 7.

In re ISAACSON.
Ex parte MASON. (*a*.)

Bill of sale—Registration—Statutory form—Assignment of chattel and hire-purchase agreement in one instrument—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

The bankrupt had executed a deed by which he assigned a piano and a hire agreement whereby the piano was let. The assignment was not registered under the Bills of Sale Acts, 1878 *and* 1882.

Held, that the assignment of the piano was separable from the assignment of the hire agreement, and that the assignment of the hire agreement was not void.

Cochrane *v.* Entwistle, 38 *W. R.* 587, 25 *Q. B. D.* 116, *and* In re Burdett, Ex parte Byrne, 36 *W. R.* 345, 20 *Q. B. D.* 310, *followed.*

Decision of the Divisional Court (ante, *p.* 128) *affirmed.*

Appeal by the trustee in bankruptcy of Isaacson from the decision of the Divisional Court (Vaughan Williams and Kennedy, JJ.), reported *ante*, p. 128.

The judge of the county court of Monmouthshire (his Honour Judge Owen) refused to make a declaration that a deed of assignment executed by the bankrupt, Isaacson, was void under the Bills of Sale Acts as not having been registered, and not being in the statutory form. The Divisional Court affirmed the decision of the county court judge.

The bankrupt, a dealer in pianos, had been in the habit of selling pianos on the hire-purchase system.

On the 2nd of May, 1892, the bankrupt, as owner, entered into an agreement with one T. Yeomens as hirer, whereby he agreed to let on hire to the hirer one of his pianos, and the hirer agreed to pay to the bankrupt a hire instalment of £5 on the date of the agreement, and £4 10s. on the second day of each succeeding quarter. It was provided that if the hirer failed to perform his part under the agreement the owner might terminate the hiring, and retake possession of the piano; and license was given to him by the agreement to enter any premises occupied by the hirer for the purpose of so retaking possession. It was further agreed that the hirer might terminate the hiring by delivering up the piano to the owner. That the piano should become the absolute property of the

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

hirer if he should punctually pay the instalments till they amounted to the full sum of £71 8s., and that, till that sum was paid, the piano should continue to be the sole property of the owner.

On the 11th of February, 1893, the bankrupt executed a deed by which, in consideration of £25, the bankrupt, as beneficial owner, assigned the piano to one E. Bishop absolutely, as well as the above-mentioned agreement for hire of the 2nd of May, 1892, and the full benefit and advantage thereof. It was admitted that, though this assignment was absolute in form, it was in fact intended only as security for the £25.

The Divisional Court held that the deed was not void *in toto* under the Bills of Sale Acts, as the assignment of the hiring agreement could be severed from that of the piano itself, and if the assignment of the piano was void under the Bills of Sale Acts, the assignment of the hiring agreement remained valid.

Leave to appeal was given.

By the Bills of Sale Act, 1878, ss. 4 and 8, the expressions "bill of sale" and "personal chattels" are defined, and it is provided that bills of sale shall be void unless attested and registered.

By the Bills of Sale Act, 1882, s. 9, "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The trustee appealed.

Moulton, Q.C., and *F. Cooper Willis*, for the trustee.—The piano and the hiring agreement were so inseparably connected that the two assignments could not be severed, and the deed was, therefore, void.

They cited *In re Davis, Ex parte Rawlings*, 37 W. R. 203, 22 Q. B. D. 193; *Cochrane* v. *Entwistle*, 38 W. R. 587, 25 Q. B. D. 116; *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310.

H. Reed, Q.C. (*Johnston Watson* with him), for the respondent Bishop.—The cases of *In re Burdett, Ex parte Byrne* and *Cochrane* v. *Entwistle* have already decided the point. The Bills of Sale Acts only apply to chattels personal. The hire agreement was a *chose in action*, and can be separated from the agreement as to the piano itself. [He was stopped by the court.]

Moulton, Q.C., replied.

Lord ESHER, M.R.—The appeal must be dismissed. If the assignment of the piano stood alone in the deed of the 11th of February, 1893, all rights of property in the piano were assigned by it; but in the same document there is also the assignment of an agreement for hire. Now, if the latter agreement refers only to proprietary rights, it is mere surplusage, and is not wanted, but if it contains stipulations which are not merely proprietary, and relate to contractual rights and liabilities, it assigns other and different rights over and above the proprietary rights. This deed, in fact, assigns rights over the piano, and also rights under a contract, and the question is, whether, applying the Bills of Sale Acts, we can apply them to the chattel and leave them unapplied as to the contract. If the contract alone had been assigned by the deed, and the property in the piano had been assigned by another instrument, the Bills of Sale Acts would not apply to the contract at all, for no form and no registration is required in such a case. That being so, Are not the two things separate? Can these two things be said to be inseparable? I should say that if two different things gave different rights and remedies, they were clearly separable. I should have thought that, even if the question came before us for the first time; but the point is decided by the cases of *Cochrane* v. *Entwistle* and *In re Burdett, Ex parte Byrne*. In those cases it was held that if you assign the proprietary rights over a chattel by an instrument, and in the same instrument do a different thing, then the two transactions can be separated, and the Bills of Sale Act applies to one. That is the result of the judgments of Fry, L.J., and Lopes, L.J., in *Cochrane* v. *Entwistle*. Fry, L.J., says in that case: "The one applies to general chattels only; the other applies to personal chattels and also to chattels real. Consequently, the bill of sale is not made 'in accordance with' the statutory form, and it is void as regards the personal chattels." The appeal, for these reasons, must be dismissed.

LOPES, L.J.—In the deed in question two things were included. To one of them the Bills of Sale Acts applied, to the other they did not; the one thing being a piano and the rights of property in it, the other being the contractual rights over it—that is to say, a *chose in action*. It appears to me to be clear that the two assignments are separable. The piano might have been assigned by one document to A. on one day, and the *chose in action* might have been assigned by another instrument to B. on another day. Being separable, the Bills of Sale Acts apply to the assignment of the piano itself, and not to the assignment of the hire agreement. The point had already been distinctly decided in *In re Burdett, Ex parte Byrne* and *Cochrane* v. *Entwistle*.

RIGBY, L.J.—I concur. There is no question before us as to the hire agreement itself or its validity. The real question is whether the assignment of that hire agreement was valid. As to the piano itself, the document is void. Can we sever the assignment of the piano from the rest of the document? I think we can do so, following the process of reasoning employed in *Cochrane* v. *Entwistle* and in *In re Burdett, Ex parte Byrne*. When we have done that, the case is free from difficulty.

Appeal dismissed.

Solicitor for the appellant, *H. Stanley Sugden.*

Solicitor for the respondent, *W. Maskell.*

High Court of Justice.

Chan. Div. North, J. — Nov. 8.

In re KNAPP.
KNAPP *v.* VASSALL. (*a.*)

Settlement — Voluntary settlement — Class—Period for ascertaining class.

The rule in Andrews *v.* Partington, 3 *Bro. C. C.* 401, *that in a will, if there be a direct devise or bequest of real or personal estate to the children of A., those living at the testator's death take to the exclusion of those born afterwards, and the class to take will not be enlarged by a gift over on the death of any of the class under twenty-one, nor by a gift over in default of children,*

Held to apply to voluntary settlements.

This was an originating summons to determine the interests of certain parties under a voluntary settlement. The facts, so far as material to the issue, were as follows:

Under a voluntary settlement, dated the 30th of August, 1882, Arthur J. Knapp covenanted with the

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

trustees therein named that he would pay to the trustees a sum of £14,000, with four per cent. interest, upon such trusts as he should appoint, and in default of such appointment in trust to divide the same equally among the younger children of Mathew G. S. Knapp who being sons or a son should attain the age of twenty-one years or being daughters should attain that age or marry, to the intent that the said sum of £14,000 should be in addition to the portions provided for the said younger children under a settlement dated the 28th of September, 1866. This settlement was made by M. G. S. Knapp, tenant for life of certain real estate under a power of appointment of portions to younger children conferred under the deed settling the estate. Under it he charged the estate with the payment of £6,000 to such younger children as and when he should appoint, and failing appointment to such children as should attain twenty-one, or if daughters marry under it. Such shares were to be vested on the child attaining twenty-one, or if a daughter on marriage. By another clause the sum payable was reduced to £2,000 in the event of there being only one child, to £6,000 in the event of there being only two, and to £10,000 in the event of there being only three. Powers were inserted for the raising of money for the education and advancement of infants entitled under the settlement.

Arthur J. Knapp died without exercising the power of appointment. Mathew G. S. Knapp had five children, of whom two, Robert B. Knapp and Catherine A. Knapp, had attained twenty-one years. £2,000 under an order in chambers had already been paid to Robert B. Knapp.

The summons asked whether Robert B. Knapp was entitled to have a further £1,000 paid to him, whether Catherine A. Knapp was entitled to receive £3,000, and what were the rights of the infant children. The summons was taken out by Robert B. Knapp and Catherine A. Knapp, and served on the trustees and the infants.

Swinfen Eady, Q.C., and *Whateley*, for the plaintiffs.—The rule in *Andrews* v. *Partington*, 3 Bro. C. C. 401, applies to this case—the eldest child is of age and is entitled to receive his share, and any after born children must be excluded.

They also referred to *In re Smith*, 2 J & H. 594, 11 W. R. Ch. Dig. 130; *Gillman* v. *Daunt*, 3 K. & J. 48; *In re Emmet's Estate*, 28 W. R. 401, 13 Ch. D. 484; *In re Mervin*, 39 W. R. 697, [1891] 3 Ch. 197.

H. Fellows, for the infants.

Everitt, Q.C., and *Warrington*, for the trustees.—The rule in *Andrews* v. *Partington* applies only to wills. It acts unfairly by unborn children, and should not be extended.

NORTH, J.—I think that the order made in chambers is the order which I must follow now; it seems to me to have been right. If Knapp, the settlor, had done what he has done by his will, instead of by a voluntary settlement, it is not disputed for a moment what the position of the parties would be. The children who had attained their age of twenty-one years would be entitled to have their shares actually paid over to them. The result would be that the shares must be ascertained, and that being so no person who is not alive can have a share set apart for him. That is the rule in *Andrews* v. *Partington* and a great many other cases, and it is too clearly settled for there to be any doubt about it at the present time.

There are only two cases I want to refer to; one is *Emmet's case*. In *Emmet's case* the property stood limited by a will "on trust to convert, and after payment of debts to invest, and to permit H. E. during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of H. E. equally, the shares to be conveyed and paid to them as they should attain twenty-one as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. The testator gave another third part of the estates after the death of H. E. in favour of the children of his sister, and the remaining third part in trust for all and every the children of G., the shares to be conveyed and paid at the ages and times above mentioned; and in case H. E., the tenant for life, should die without children, the share given for them was to be divided between his sister's and G.'s children, as the two-thirds given to them. H. E. died a bachelor. At his death G., a widower, had two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom lived to attain twenty-one. Another child was born afterwards. Here it was held by Hall, V.C., and the Court of Appeal that the six children, or their legal personal representatives, were entitled to a moiety of the estates. That looks very much like a decision on this exact point, but in point of fact it was not anything of the kind. The question really raised and argued was whether the six children took, or whether two of them took to the exclusion of the other four; and the case of the seventh child seems to have been thought so clear that there was no person to represent that child before the court. It was decided in the absence of that child and treated as a perfectly clear settled point about which there could be no dispute. There were reasons on the cases for suggesting that it was two instead of six, and that was what was negatived by both courts; but the law laid down by Sir G. Jessel is perfectly clear and in accordance with the earlier cases, and a portion of that I must read. He says (13 Ch. D., at p. 490): "The will appears as clearly and as well drawn as any will need be. Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child want its share it is convenient that the payment of a share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is that so soon as any child, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. The rule of convenience, being opposed to the rule of intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." I do not think I need read it further, because that is a very clear statement of the law with respect to it. The result is that you may have to take the testator's death as the time when the class is ascertained, but if there is a life estate which prevents the distribution of the fund till the life estate is over, then you look to the period of distribution, which is in that case the termination of the life estate, and then you find, not the persons who will take, but you fix the maximum number of which the class can consist and then divide the shares as far as they are divisible on that footing. If there are six children living, one of whom has attained twenty-one, he will get his one-sixth, if another attains twenty-one he will get his one-sixth afterwards, if a third dies under twenty-one he does not take a share and the fund will be divisible in fifths and the first two who have

had their sixth shares would be found entitled each to one-fifth of another sixth, and so on. In the case of a life estate the period of distribution is the death of the tenant for life, but it is not necessarily the determination of a life estate. Anything that fixes the period at which the fund has to be distributed marks the time that actually has to be taken, and in *Watson* v. *Young*, 33 W. R. 637, 28 Ch. D. 436, the period of distribution was got at in another way. There was a devise there, in trust for J. for life, and after his death in trust for his children who should attain twenty-one years, and the issue of any child who should attain that age, but in case there should be no child nor the issue of any child of J. who should attain twenty-one—that is the event that happened—the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, if more than one in equal shares. So that J. was tenant for life, and on his death without children according to the usual rule the class would be fixed. So it would be if it stopped there, but there was this further provision: "Provided always that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally if more than one, of R. who should attain twenty-one." J. died without ever having had a child. R. had six children who attained twenty-one, the youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation. Therefore, although the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution, therefore, in that case, the period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty-one years. The learned judge seemed to think it was a new case. I think it was a new case of circumstances to which the rule had to be applied, though he had no difficulty in applying the rule to that new state of things.

In the present case the settlor has given to the children of M. G. S. Knapp who being sons shall attain twenty-one years or being daughters shall attain that age or marry. There was no life estate, and if there had been a will the thing would be perfectly clear that as soon as any child had attained twenty-one that child was entitled to have his or her share paid, and there are various indications in the settlement pointing that way. The income is given for maintenance during minority only, and the shares vest at twenty-one. This is all the more reason for saying that as soon as a child attained twenty-one the time had come when he was entitled to his share when he came and asked for it.

There are two reasons suggested why the general rule should not apply to this case; the first is that this is not a will, but is a voluntary settlement. Now what difference does that make? I confess I cannot see that it makes any difference. I do not see any logical difference, and I do not see any legal difference. If this gentleman had chosen to do it by his will, the matter would have been perfectly clear, and that he did it by a deed instead seems to me to come to precisely the same thing. In point of fact it was as nearly like a will as it could possibly be, because, although he made the settlement, he reserved to himself the general power of appointment over the whole, so that the power remained in his entire control down to the time of his decease. But neither on legal or logical grounds do I see any distinction between a voluntary settlement and a will. Counsel have told me they cannot find, and I certainly do not know of any case in which the doctrine has been applied to the case of a settlement, but on the other hand no one can refer me to any statement in any case whatever, indicating grounds for a decision which would prevent it applying to a voluntary settlement—a settlement by a voluntary deed instead of a settlement by will, and I do not see any distinction between the two. It was suggested there might have been a distinction if, instead of being a voluntary settlement, it had been a settlement for value. I do not quite see what that distinction is, but that is not the case that I have to deal with, and therefore about that I say nothing.

Then the other ground suggested why the ruling in *Andrews* v. *Partington* should not apply was this: this was a settlement by the settlor upon the children of M. G. S. Knapp, who already were entitled under a previous settlement, and they were entitled to certain portions of fixed amounts. Then in this settlement which I have to deal with the trust as to the £14,000 is "in trust to divide the same equally among all the children of the said M. G. S. Knapp who being a son or sons shall attain the age of twenty-one years or being a daugher or daughters shall attain that age or marry, other than and except the said John Matthew Knapp, his eldest son." It is said that that clearly points to all the children, and no doubt it does. It is as clear here as the Master of the Rolls said it was in *In re Emmet*, but then the rule of law comes in here, and although the intention might be to provide for all, this rule of convenience prevents that intention from having effect given to it. But then it was said that there are these further words: "To the intent that the said sum of £14,000 may be in addition to the portions provided for the younger children," and it is said that that makes a difference, because under the original settlement all the children whenever born (other than a first) would take who attained twenty-one, because there was a life estate that must last until the children had all been ascertained by birth, and as all the children therefore were to take under the original settlement, if the £14,000 is to be added to their shares it must be the intention that all the children should take the £14,000. That does not make it any clearer, and the reason why they cannot take is not because it was not the intention that they should take, but because in spite of the intention the property has to be divided, inasmuch as the persons who are entitled to absolute shares ask for them and cannot be gainsaid. Then, further, I do not see that this clause throws any light upon the question, because the statement that those who take the £14,000 are to have it in addition to the shares they take under the first settlement only says that those who take under both are to have what they take under the second in addition to what they take under the first, and not by way of substitution or satisfaction or anything of that sort of the amounts which they take under the first. That phrase therefore does, in my opinion, in any way tend to show that it was the intention that more should take because the intention already was that all should take; and even if it was the intention to carry the gift to a larger number of persons it is inconsistent with what those who have attained twenty-one are entitled to now, namely, to have their shares ascertained and paid to them.

Solicitors, *Roopers & Whately; Torr & Co.*

Chan. Div. }
Romer, J. } Feb. 4.

In re NEW TRAVELLERS' CHAMBERS (LIMITED) (*a.*)

Company—Winding up—Public examination—Official receiver—Further report of—Grounds for discharge of order for public examination—Evidence explaining or contradicting report—Application to remove from file—Facts showing fraud—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sections* (2) (3).

The further report made by the official receiver under section 8, *sub-section* (2), *of the Companies (Winding-up) Act,* 1890, *after making various allegations as to the promotion and formation of the company and its affairs generally, concluded as follows:—"The official receiver is of opinion that the facts hereinbefore set out show a* primâ facie *case of fraud on the part of some persons, being directors or officers of the company, in relation to its affairs since its formation, and that it is desirable that a public examination should be held of the persons named in the schedule hereto." An order having been made thereupon for the examination of certain persons, officers of the company, under sub-section* (3) *of the same section, these persons moved that the further report might be ordered to be amended or taken off the file, on the ground that it was not in accordance with the said Act and materially misstated or misrepresented the effect of the evidence on which it purported to be founded, and that the order for public examination might also be discharged. There was no suggestion that the official receiver had acted in bad faith. On the hearing of the motion the applicants asked to be allowed to adduce further evidence as to matters referred to in the further report.*

Held, that such further evidence ought not to be allowed, and that the application should be dismissed.

Motion.

This was a motion by Mr. Arthur Green, Sir W. Guyer Hunter, K.C.M.G., Sir G. S. Meade Thomas, and Commander Edward Wickham, R.N., late directors and secretary of the above-named company, asking that the report made by the official receiver, and filed the 11th of January, 1895 (on which an order for public examination had been made), might be ordered to be amended or taken off the file on the ground that the same was not in accordance with the Winding-up Act, 1890, and that the same materially misstated or misrepresented the effect of the affidavits and documents on which it purported to be founded (particulars of the alleged misstatements being contained in a schedule to the summons), and was otherwise inaccurate, and that the order made on the 16th of January, 1895, on such report, for the public examination of the applicants might be discharged for the reasons aforesaid, and also because (1) the report did not show that the official receiver was of opinion that any fraud had been committed by any person in the promotion or formation of the company or by any officer or director of the company in relation to the company since the formation thereof; (2) the facts stated in the report did not show that any fraud had been committed by any person, and did not even raise a *primâ facie* case of fraud against any person; and (3) if such facts were considered as making out a *primâ facie* case of fraud, the fraud was not that of any person in the promotion or formation of the company or of any officer or director thereof.

The company was incorporated in May, 1891, for the purpose of establishing and conducting a club, and to acquire the benefits of certain agreements under which the company became entitled, upon terms, to a lease of certain premises. The company was ordered to be wound up in July, 1894. The official receiver, in pursuance of section 8 of the Companies (Winding-up) Act, 1890, made a report dated the 17th of November, 1894, and made a further report dated the 22nd of December, 1894, upon which an order for public examination was made, dated the 16th of January, 1895. The further report alleged various facts relating to the promotion and management of the company, and the conduct of the officers thereof, and concluded as follows:—"The official receiver is of opinion that the facts hereinbefore set out show a *primâ facie* case of fraud on the part of some persons being directors or officers of the company in relation to its affairs since its formation, and that it is desirable that a public examination should be held of the persons named in the schedule hereto." The schedule named five persons, four of whom had been directors and one secretary of the company, and it was by these persons (except one of the directors) that the present application was made.

The schedule referred to in the notice of motion stated the particulars of the misstatements or misrepresentations to be, that the report represented that the evidence as to the value of the company's furniture and effects on obtaining the sanction of the court to a sale to a new company was given by the secretary, whereas it was given by a firm of valuers who were not directors or officers of the company. That the report did not state that there was evidence that the valuers had valued the furniture and effects. That the report did not state that the affidavit of the secretary showed that the lease of the premises contained a covenant by the company that they would not make or allow any sale or auction on the premises, and that the report did not state that in the balance-sheets no value was put on the lease of the premises.

In the course of the argument the applicants proposed to read evidence to explain certain matters in the report, but the court refused to give leave.

Swinfen Eady, Q.C., and *George Henderson*, for the applicants.—The report, on the face of it, does not show the facts which suggest fraud, and therefore we ask to discharge the order, which was made *ex parte*. The court has jurisdiction to order the official receiver to make another report when the report does not comply with the statutory requirements. [ROMER, J.—I can understand your attempting to set aside the order for examination, but how can you succeed in an objection to the report?] The report only suggests a case of fraud. No facts are alleged constituting the fraud. There should be a *primâ facie* case of fraud on the reports, but there is none here. There being no statement of fraud, the order for examination was not justified.

Sir R. T. Reid, A.G., and *Ingle Joyce*, for the official receiver.—The official receiver has only to express an opinion that the facts of which he has knowledge, or information which he believes to be true, and which he sets forth in his report, constitute a *primâ facie* case that fraud has been committed in the promotion or formation of the company, or in relation to the company since the formation thereof. The official receiver here almost adopts the language used by the court in *In re The General Phosphorus Corporation (Limited)*, *ante*, p. 34, [1895] 1 Ch. The application to amend the report and take it off the file is entirely novel. The official receiver does not even state that in his opinion a fraud has been committed, so long as it appears on the face of the report that such is his opinion.

They also referred to *In re Great Kruger*

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Mining Co., Ex parte Barnard, 40 W. R. 625, 641, [1892] 3 Ch. 307.

Swinfen Eady, Q.C., replied.

ROMER, J.—This application raises two questions. In the first place, it is said, on behalf of the applicants, that there are other facts, not appearing upon the report, upon which the applicants rely, and which, they say, would, if formulated upon the report, tend to show that even a *primâ facie* case of fraud could not be made out, and in fact the applicants ask the court, to be allowed to go into evidence to see whether the *primâ facie* case of fraud shown by the report cannot be rebutted or answered. I decline to go into such further evidence at all. I think that a practice of allowing a sort of half trial in the kind of way sought for by the applicants, and a conflict of evidence on affidavit, would not only be inconvenient, but most prejudicial to the proper working of the provisions of the Act, and I will certainly not be a party to it. In my opinion it was not contemplated by the Act that there should be a preliminary contest of this kind; and I may add that in this case there is no suggestion that the official receiver has not acted in good faith.

The motion, therefore, so far as it is based upon the ground that the applicants are to be allowed to go into evidence to supplement the report, and that the report should for this purpose be sent back or taken off the file, is wholly misconceived. I think that the court ought not to, and should not, listen to any such application. So much for the application so far as it seeks to have the report sent back or amended, or to incorporate other facts which do not appear on the face of it.

But then it is said that this report shows no case of fraud within the meaning of sub-section 2 of section 8 of the Act. But this report fulfils in terms the provisions of the Act which give the court jurisdiction to make an order for the examination or examinations, if it thinks fit so to do. This report does state the opinion of the official receiver that fraud has been committed in relation to the company since its formation, and, so far as the report itself is concerned, it gives the court jurisdiction to make an order for examination if it thinks fit.

That being so, I think the case was one in which the court, having jurisdiction, ought to have exercised it by granting the order for examination asked for. There is not only the opinion of the official receiver, but I think that the facts stated in that report show that that opinion of the official receiver had a substantial basis, and I think that the facts shown in that report do render it advisable that an order should be made by the court for the examination as provided by sub-section 3 of section 8 of the Act. The court, therefore, has jurisdiction to make the order, and in the exercise of its discretion has made the order for examination.

Now, under the circumstances, is a person at liberty to raise, as it were, a preliminary discussion and move to discharge the order made by the court on the ground that no fraud strictly speaking is proved by the statements in that report, and to raise a preliminary argument, as it were, upon the wording of the report, or as to the precise fraud shown by the report, and so forth? I think not. I think that would be a most inconvenient course to be allowed, and one, I think, that was not contemplated by the Legislature. In my opinion, if the report states a case which, in the opinion of the official receiver, acting honestly and in good faith, shows fraud, and he states that opinion, and the court then, on consideration of the report, thinks there is ground on the report for the official receiver's opinion, there is jurisdiction in the court to make the order for the examination, and then, if the court in exercising its discretion, having jurisdiction to make the order, does make the order, I think that ends the matter; and I think the persons affected by that report ought not to be allowed to apply to the court and argue the case whether the court has exercised its jurisdiction rightly. No doubt, if the court has gone beyond its jurisdiction, then a person aggrieved can apply; but that is not the present case.

For these reasons I think the application fails, and that it must be dismissed with costs.

Solicitors, *Hunters & Haynes; Solicitor to Board of Trade.*

Q. B. Div.
(Wills and Wright, JJ.) Feb. 13.

ATTENBOROUGH v. HENSCHEL. (*a.*)

County court—Jurisdiction—Stay of execution—Judgments for over £20—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 105, 153.

A county court judge has no power to grant a stay of execution beyond fourteen days after the date of the judgment in cases of judgments for over £20, on the ground of mere inability to pay the amount of the debt.

Appeal from the order of his Honour Judge Lumley Smith in the Westminster County Court.

Section 105 of the County Courts Act, 1888, gives the judge power to order payment of judgments under £20 by means of instalments, but provides that in all other cases the full amount for which judgment has been obtained shall be ordered to be paid forthwith or within fourteen days of the date of the judgment, unless the plaintiff consent to be paid by instalments; and section 153 provides that, if it shall at any time appear to the satisfaction of the judge that the defendant is unable, "from sickness or other sufficient cause," to pay the debt, he may order a stay of execution on such terms as he shall think fit. The same section further empowers the judge "to order the discharge of any debtor confined in prison by order of a court who, on account of sickness, insanity, or other sufficient cause, ought, in the opinion of the judge, to be discharged."

In December, 1894, the plaintiff obtained judgment against the defendant for £50 in respect of damages for the breach of a covenant to repair. On the 6th of December the defendant applied to the court to be allowed to pay off the debt by weekly instalments of £4, on the ground that he was unable to make immediate payment of the whole amount, and gave evidence of his circumstances. The judge decided that he had no power to do this, but ordered that there should be a stay of execution for two months, with liberty for the plaintiff to apply to take off the stay, the officers of the court to receive any moneys paid by the defendant. He gave as the sole reason for making that order, that he was convinced the defendant had not the means to pay.

C. L. Attenborough, for the appellant.—"Other sufficient cause" in section 153 is *noscitur a sociis*, and refers at least to some physical cause, and not to mere inability to pay. The county court judge has, therefore, exceeded his jurisdiction, and, in doing so, has deprived the judgment creditor for the time of the right to follow up his judgment by execution. The order was also wrong in that it compelled the appellant to receive money on account of his debt.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

W. M. Thompson, for the respondent—The words in section 153 include any reasonable cause.

WILLS, J.—I regret to come to the conclusion that the order of the county court judge is not supportable. Section 153 gives the judge a wide discretion to suspend the operation of an execution, but it never was intended that mere inability to pay should be considered as a sufficient cause. The expression "other sufficient cause" must mean something which can account for the inability to pay in the nature of an external cause preventing the man from meeting his obligations, something which tends to excuse payment and makes it reasonable that he shall not be called upon to pay at that time. Mere impecuniosity will not do. I am much drawn to this conclusion by the words "sickness, insanity, or other sufficient cause" occurring in the latter part of the same section, which shed some light on the meaning of the words under discussion. For by far the larger number of persons who are committed on judgment summons are imprisoned by way of punishment for dishonesty, in attempting to evade payment of their debts, and it cannot be intended that the judge may set them free before the period of their imprisonment has expired merely on the ground of their inability to pay. The power given to the judge to order payment by instalments was designedly excluded in cases where judgment exceeded £20, because it was presumed that persons incurring debts of that magnitude were likely to be in a more substantial position. What the judge has done in this case is in effect to say that the debtor may pay when he pleases. The case must be remitted to the judge to ascertain the cause of the defendant's inability to pay.

WRIGHT, J.—I agree. My impression is that we have decided this point before. I do not attempt to lay down any limits within which the discretion of the judge is to be exercised, but it must, at any rate, be decided on something more than mere insufficiency of means.

Appeal allowed.

Solicitors for the appellant, *Attenborough & Tyer.*

Solicitor for the respondent, *J. S. Merton.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Wills and Wright, JJ.) } Jan. 24; Feb. 9.

BARNETT v. HICKMOTT AND THE TOWN CLERK OF READING. (a.)

Election law—Parliament—Franchise—Registration—Borough vote—Occupancy by virtue of service—Part of a house—Separate dwelling—Cubicle—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-section* 2—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.

A police constable occupied exclusively, by virtue of his employment, a cubicle, which consisted of a portion of a large room, separated off by a partition seven feet high but not reaching to the ceiling. The room contained eleven other similar cubicles, with a common passage. The cubicle was used for the purpose of a bedroom. It was not stated whether there were other rooms used in common for the purpose of meals, recreation, &c., nor whether the cubicles were separately warmed and lighted at night. It did not appear that the house was occupied by any superior officer of the constable.

Held, that the cubicle was not separately occupied by the police constable as a dwelling within section 5 *of the Parliamentary and Municipal Registration Act*, 1878.

Stribling *v.* Halse, 16 *Q. B. D.* 246, 34 *W. R. Dig.* 68, *commented on.*

Case stated by the revising barrister for the borough of Reading, for the opinion of the High Court.

The Representation of the People Act, 1884, s. 3, provides that, "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant-occupier of such dwelling-house as tenant"; and the Parliamentary and Municipal Registration Act, 1878, s. 5, defines the term "dwelling-house," and enacts that "it shall include any part of a house where that part is separately occupied as a dwelling."

An objection was raised before the revising barrister for the borough of Reading to the retention of the name of George Barnett, a police constable, on the list of parliamentary voters, on the ground that (1) he was not an inhabitant-occupier of the premises described in the list from the 15th of July, 1893, to the 15th of July, 1894; and (2) he had not been the inhabitant-occupier of a dwelling-house between those dates.

The revising barrister decided in favour of the objection, holding that the cubicle occupied by the police constable was not a part of a house separately occupied as a dwelling, and stated a case, in which he found the following facts:—

George Barnett occupied during the qualifying period a cubicle in the police station by virtue of his service. In this cubicle was his bed and other furniture. The room in which the cubicle was, contained twelve similar cubicles, each of them occupied by a police constable. The cubicle was about twelve feet long by eight feet broad, and enclosed on three sides by a wooden partition about seven feet high, leaving a space of five feet between the top of the partition and the ceiling. The fourth side was an outside wall, and in it was a window. Each cubicle had a door entering into a passage which passed down the main room. The door had a lock, and the constable was entitled to lock up his cubicle at any time.

The case having come on for hearing in the High Court, it was referred back to the revising barrister who re-stated the case and found the following further facts.

The passage, ventilation, and the atmosphere of the dormitory was common to all the cubicles. It was assumed that the dwelling was not inhabited by any person under whom Barnett served in his "office, service, or employment," and it was not proved that any superior officer resided there.

The revising barrister, in reiterating his decision said: "I decided, and so far as the question is one of fact I so find, that the cubicle is not sufficiently separated from the rest of the dormitory as to be part of a house separately occupied as a dwelling."

Germaine, for the appellant.—The term "dwelling-house" in the Registration Acts may include the place where a person customarily sleeps, even though he occupies other rooms in the house in common with other tenants: *Stribling* v. *Halse*, 16 Q. B. D. 246, 34 W. R. Dig. 68. The use of the cubicle for sleeping, and sleeping only, is sufficient if the occupier have the exclusive use of it. [LORD RUSSELL OF KILLOWEN, C.J.—We may take it that *Stribling* v. *Halse* is a distinct

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

authority on that point.] A simple sleeping barrack would be sufficient. Erle, C.J., in *Powell* v. *Guest*, 13 W. R. 274, 18 C. B. N. S. 72, uses the term "dwelling" as synonymous with sleeping apartment, and Rogers in his book on Elections, 15th ed., p. 93, citing a passage from Coke, says, "In the language of Coke, a man can only be said to be inhabitant where his bed is." The police constable must be said to dwell somewhere, if not in this cubicle, where does he dwell? [WILLS, J.—A tramp has no dwelling. Here he had no right to stay. He was at the beck and call of his superiors.] That is an incident attendant on all kinds of service, but if he has for the qualifying period escaped that incident, he is entitled to vote. The only circumstance which prevents this case coming absolutely within *Stribling* v. *Halse* is the aperture at the top of the cubicle. The aperture is merely for the purpose of securing ventilation, and the cubicle is none the less inaccessible except by means of force or climbing. Instead of being left open, it might have been filled in by trellis-work.

Scrutton, for the respondents.—There are two points in the case—(1) whether this cubicle is a separate part of a house which is a tenement, and (2) whether it is separately occupied as a dwelling. *Stribling* v. *Halse* does not deal with the first point, and here the revising barrister has found as a fact that the cubicle is not a sufficiently separate part of a house. It is really a question of fact. For you may have an infinite gradation of separations, beginning with a simple chalk line, going on to a curtain, and then a wooden partition one foot high, two feet, and so on. Each case must be decided according to the sufficiency of the separation. Whether a question of fact or not, this cubicle was not structurally separated from the rest of the room so that it could be said that it was separately occupied as a dwelling. The Legislature originally contemplated a structural severance, and subsequent legislation and the decisions on it have not altered this. The Reform Act (2 Will. 4, c. 45, s. 27) gave the borough franchise to "any person who shall occupy as owner or tenant any house, warehouse, counting-house, shop, or other building of the yearly value of not less than £10," that is to say, in the words of Erle, L.C.J., in *Cook* v. *Humber*, 10 W. R. 427, 11 C. B. N. S. 33, the qualifications were "tenement, value, occupation, and rate." The case of *Cook* v. *Humber* raised the question whether a part of a house was within the meaning of the statute. So 30 & 31 Vict. c. 102, s. 61, with a view to remove the doubt, enacted that a dwelling-house, the occupancy of which under that Act was to confer the franchise, "shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." In two cases under that statute, *Thompson* v. *Ward*, 40 L. J. C. P. 169, and *Ellis* v. *Burch*, L. R. 6 C. P. 19 W. R. C. L. Dig. 54, though the court was divided as to what was "a part of a house separately occupied as a dwelling," all the judges recognized the principal of structural severance. Brett, L.J., said: "Although there need not be a structural separation, there must be a practical separation of the part occupied from the rest of the house." In *Boon* v. *Howard*, 22 W. R. 535, L. R. 9 C. P. 277, the judges were again equally divided, and Brett, L.J., was again strongly of opinion that the 61st section had not altered the law from what it was at the time of *Cook* v. *Humber*, that is to say, that a part of a house, to come within the meaning of the Acts, must be a part which is structurally separated from the rest of the house and used as a dwelling, and that it must be a separate tenement. Then comes the Act of 1878, which enacts, section 5, that "where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." That does not do away with the necessity for the part occupied being a tenement; and an undefined portion of a room separated off only by a partition which does not reach to the ceiling cannot be a tenement. The fact that under the Act of 1867 the part of a house has to be one capable of being separately rated points to some definite interest: *Bradley* v. *Baylis*, 30 W. R. 823, 8 Q. B. D. 195.

Germaine, in reply.—It is not a question of fact. Cave, J., in *Stribling* v. *Halse*, said that it was not for the revising barrister to define what was a part of a house, but only to find the circumstances of the occupancy. The capability of being rated would not exclude a case like this. A chalk line on the floor is sufficient for that purpose: *Hall* v. *Metcalfe*, 8 T. L. R. 46, 40 W. R. Dig. 164. The doctrine of structural severance in rating cases is exploded: *Allchurch* v. *The Assessment Committee and Guardians of Hendon Union*, 40 W. R. 86, [1891] 2 Q. B. 436.

Cur. adv. vult.

Lord RUSSELL OF KILLOWEN, C.J.—This is an appeal from the revising barrister for the borough of Reading who expunged the appellant's name from the list of parliamentary voters on the ground that he had not occupied during the qualifying period "a part of a house separately occupied as a dwelling" within the meaning of section 5 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26). [His lordship stated the facts, and proceeded:—]

It will be observed that it is not stated how these cubicles were warmed or how they were lighted at night — whether or not there was a separate lighting and warming for each; nor is it stated whether or not there was or were some other room or rooms in the police station shared in common for the purposes of meals, for the purposes of recreation, or for other purposes. Upon the facts stated, the question we have to decide is simply this, Whether the revising barrister was wrong in holding that the appellant's cubicle is not a "part of a house separately occupied as a dwelling" within the meaning of section 5 of 41 & 42 Vict. c. 26, the franchise claimed being the joint result of that Act and of 30 & 31 Vict. c. 102, s. 3, sub-section 2, and 48 Vict. c. 3, s. 3. In my opinion the appellant was occupying a part of a room in a house; but such part of a room was not separately occupied by him as a dwelling-house. The ventilation and atmosphere of the dormitory are stated in the case to be common to all the cubicles; and the window of each cubicle necessarily helps the natural lighting of the adjoining cubicle or cubicles. These are, it appears to me, matters essential to consider when the question is whether each cubicle can be regarded as part of a house capable of being separately occupied as a dwelling-house. As here stated, we are not informed whether there are any, and what, arrangements for the artificial lighting and heating of the room in which the cubicles are situate; but, even assuming (against probabilities) that each cubicle had a separate arrangement for warming and lighting, it follows from the fact that the cubicles were open at the top that each of the occupants would, to some extent, share the warmth and light of the dormitory as a whole. Again, the arrangement of the cubicles precludes the idea of that complete or secure privacy, implied in the separate occupation of a dwelling, and is probably

adopted partly with a view to supervision and the maintenance of discipline generally in the room. It seems to me, therefore, that these men, sharing, as they do, so many things in the occupation of these cubicles, cannot be said to be separately occupying them as dwellings.

It was argued on behalf of the appellant that this case was concluded by the case of *Stribling* v. *Halse*. I cannot assent to that view, while recognizing that we ought to be bound by that case so far as it extends. In that case each shop assistant had a separate furnished bedroom, structurally completely separate as a room, and no one person in the occupation of his particular bedroom shared light, air, warmth, or ventilation with any other room. I have, therefore, come to the conclusion that the revising barrister was right in the view he took. The appeal will therefore be dismissed, with costs. I wish to add that this judgment can have no general application; it is confined to the special facts of the case.

As to *Stribling* v. *Halse*, I wish to say a word. It is stated in the judgment in *Stribling* v. *Halse* that a doubt, which had been expressed (in *Bradley* v. *Baylis*, 8 Q. B. D., at p. 233) by the present Master of the Rolls when Lord Justice, was removed by a decision of the Court of Appeal; but there is no reported case to this effect, and a rigorous search made at my instance has failed to discover any record of such a case. The doubt there referred to was whether a person could be said to separately occupy a bedroom as a dwelling-house, where he dwelt partly in the bedroom and partly in other rooms. I share this doubt, especially in a case in which other rooms, for recreation, for meals, and other purposes, are shared in common. I should not here have referred to this doubt but for the facts (1) that the case which is said to have removed the doubt cannot be found, and (2) because in the Irish case of *Hasson* v. *Chambers*, 18 Ir. L. R. 68, 34 W. R. Dig. 68, two of the five learned judges expressly dissented from *Stribling* v. *Halse*, and the majority, while acquiescing in it, can hardly be said to have approved of it. Nor, in my opinion, is the doubt referred to removed by the 5th section of the 41 & 42 Vict. c. 26.

WILLS, J.—I concur. I only wish to add that I think the case of *Stribling* v. *Halse* has gone the extreme length; and considering that it professes to be decided on a case no record of which can be found, and considering that the Irish case adds the weight of its authority in the other direction, I do not think the case can be looked on as satisfactory or as governing anything beyond its own facts.

WRIGHT, J., concurred.

Solicitors for the appellant, *Torr, Janeway, & Gribble.*

Solicitors for the respondents, *Rooke & Sons*, for *Brain & Brain*, Reading.

Q. B. Div.
(Lawrance and Kennedy, JJ.) } Jan. 23.

DEER *v.* LICENSING JUSTICES FOR THE WIRRALL DIVISION OF CHESTER. (*a.*)

Licensing Acts—Licence—Renewal—Beerhouse licensed since 1st of May, 1869, pulled down and, in rebuilding, house enlarged and material improvements made—Wine and Beerhouse Act, 1869 (32 *&* 33 *Vict. c.* 27), *s.* 19.

Where a beerhouse licensed prior to the passing of the Wine and Beerhouse Act, 1869, *is pulled down, and, in rebuilding, is enlarged and considerably improved, a new licence is not required, unless one of the four grounds of objection set out in section* 19 *of that Act can be supported.*

Special case.

Appeal from the decision of the licensing justices at quarter sessions, who refused to recognize a beer licence which had been granted in May, 1869, and renewed from that time down to the present, on the ground that the old house had ceased to exist, having been pulled down and so altered in rebuilding as to be in fact a new house, and, therefore, not entitled to the privileges of the Wine and Beerhouse Act, 1869.

In 1893 the Ship Inn at Seacombe, in Cheshire, which was in a very dilapidated condition, was pulled down and in rebuilding various improvements became necessary. The local authorities had raised the road in front of the house about four feet, and in that way put it into a hole, and rebuilding became almost compulsory. In rebuilding, the house was made into line with the other buildings in the street, which gave the house some five feet more space than it possessed originally, and this space was added to the old bar, and a partition erected so as to enable the servants of the occupier to come for beer without having to mix with the general customers. That, and an increase in the height of the old rooms left standing, the addition of cellars and two attic bedrooms were the chief changes effected in the premises, all of which were found by the justices to be "improvements," but such as left the house not the same. Everything was done in rebuilding in compliance with the requirements of the local authorities. None of the four statutory grounds of objection applied.

The police took proceedings by charging the tenant with selling beer on "unlicensed premises," by which was meant the additional space added to the bar. They also opposed the renewal of the licence. The magistrates convicted, and refused to renew the licence. The tenant appealed to quarter sessions, where the previous conviction and refusal of the licence by the magistrates were upheld. The conviction was, however, quashed on a special case by Cave and Wright, JJ., and the grounds of their decision appear in the case of *Deer* (*Appellant*) v. *Bell* (*Respondent*), 58 J. P. 513. A *mandamus* was applied for and granted, on the ground that the application to renew the old licence had not been properly heard. The matter came on in July last year at the court of quarter sessions, and again by a small majority the justices refused to renew the licence, but stated the present special case.

Marshall, Q.C., and *E. H. Lloyd*, for the occupier the appellant.—The grounds upon which the justices refused the licence were: (1) that the premises previously licensed had been pulled down, and were no longer in existence; (2) that the premises now standing upon its site were new premises, and were not the subject of the licence formerly existing; that part of those premises occupied land which formed no part of the old premises; (4) that the occupier sold liquor on such unlicensed premises; that the licence was not required for the wants of the neighbourhood. As to the last objection, that could not be maintained under any Act of Parliament. As to the conviction, that was quashed and gone. As to the third reason, the Divisional Court had found that it was not supported on evidence, and the first and second objections were the only questions left to be dealt with in the present appeal. The mere rebuilding with alterations and improvements did not disentitle the occupier to a renewal of the licence: *Reg.* v. *Raffles*, 24 W. R. 536, 1 Q. B.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

207, 34 L. T. N. S. 180. As to the strip of land taken in when rebuilding, that was really part of the "old" premises, and was covered by the old licence: *Cross* v. *Watts*, 11 W. R. 210, 22 J. P. 7; *Tott* v. *Self*, 9 W. R. 663; see also *Reg.* v. *Tott*, 25 J. P. 327. As to the question of whether the new bar could be treated as such an alteration as would render the house substantially a different house from the old house, that was a matter of fact as well as of law. In the present case that question had been decided already in the appellant's favour by the court, when the former case on the conviction was dealt with. Then the charge was for "selling beer on unlicensed premises, to wit, a new place, room, or bar recently built, being an addition or extension of the house, which did not form part of the house or premises known as the Ship Inn," and it was held that the addition to the bar was a mere extension of the old house, not constituting a new building.

Pickford, Q.C., and *Colt Williams*, against the renewal of the licence, submitted that whether a house that had been pulled down and rebuilt on the same site was substantially the same or a different house must depend upon the particular circumstances of each case. He did not contend that a small addition or necessary improvements to a house in rebuilding disentitle an occupier to the renewal of his licence. In the present case the new house was in fact double the size of the old one. How, then, could it be said to be the same house? [He cited *Ballam* v. *The Justices of Wiltshire*, 44 J. P. 72.] If there was any evidence upon which the justices could act, then it became a question of fact for the justices to decide whether the house was the same or a different one. In the present case the justices had determined that question of fact against the appellant. The decision of the Divisional Court on the former appeal was whether the conviction for selling beer on unlicensed premises was right or wrong; here the question was as to the occupier's right to the renewal of an old licence. It could not, therefore, be maintained that the question now raised was a *res judicata*.

Marshall, Q.C., replied.

LAWRANCE, J.—The question here is whether the licensing magistrates were entitled to treat the premises in question as new premises, so as to require the tenant to take out a new licence. We have come to the conclusion that the magistrates were wrong in deciding that the house was not the same house, and, therefore, that a new licence was required, and judgment must be entered in favour of the appellant. It was submitted by the counsel who argued the case for the justices that there were no authorities upon which we could hold that a man might claim as of right the renewal of an old licence for a house he had rebuilt, and that the question in every case was one of fact whether or not the house, after rebuilding, was substantially "such a house" as the old house. Nor was it contended by him that the court would interfere with the renewal of an old licence where only small alterations or reasonable improvements had been made. In the present case what happened? Certain alterations and improvements were made in the house, and the tenant was summoned and convicted for selling beer in a new bar without a licence; but a divisional court set aside that conviction, and decided that the premises were substantially the same, so that the old licence covered the recent alterations, and a new licence was not required. The facts were really the same in that case as in this, and the question for the decision of the court was the same then as now. All the circumstances were considered, and it was held that the magistrates were wrong in holding that the premises were new and required a new licence. Then comes the question, Does that decision govern this case? I think it does. I will most willingly agree that we are bound by that decision, for I have no hesitation in adopting the views then expressed, for I think they are right.

KENNEDY, J.—I am of the same opinion. I only wish to say that it seems to me that we are bound by the decision given by Cave and Wright, JJ., which covers, in fact, the question we have now to decide. I think that decision was a right and a just one, and that we are bound by it.

Appeal allowed; separate application to be made as to costs.

Solicitors for the appellant, *Keen, Rogers, & Co.*, for *Francis & Pierce*, Birkenhead.

Solicitors for the justices, *Robbins, Billing, & Co.*, for *Solly*, Birkenhead.

Q. B. Div. (Divisional Court). (Pollock, B., and Grantham, J.) — Dec. 5, 6.

REG. v. JUSTICES OF LONDON. (a.)

Justices — Mandamus — *Licensing appeal — Quarter sessions — Costs — Discretion of justices — Ministerial act* — 9 *Geo.* 4, *c.* 61, *s.* 29 — 11 *&* 12 *Vict. c.* 43, *s.* 27 — *Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 31 — *Summary Jurisdiction Act*, 1884 (47 *&* 48 *Vict. c.* 43), *s.* 6.

A licensing appeal having been heard and dismissed at quarter sessions, the justices refused to make an order under 9 *Geo.* 4, *c.* 61, *s.* 29, *that the unsuccessful appellant should pay the costs of the respondent justices. The question of costs was fully argued before the court.*

Held, that a mandamus *could not be granted ordering the justices to "hear and determine" the question of costs, as they had decided the matter judicially.*

Order *nisi* calling upon the justices for the administrative county of London to show cause why a writ of *mandamus* should not issue commanding them to enter the appeal of one F. J. Magerkorth, and to hear and determine the application of the justices for the Tower Division of the county of London, the respondents in Magerkorth's appeal, for an order adjudging that Magerkorth should pay the costs of the respondents in the appeal.

At the general annual licensing meeting for the Tower Division of the county of London held on the 30th of March, 1894, one Tant applied for a renewal of the existing licence to sell liquors to be consumed on the premises known as the Cannon Stores public-house. The application was refused.

On the 3rd of April, 1894, the freeholder of the premises (F. J. Magerkorth) gave notice of appeal. The appeal was heard and dismissed at the general quarter sessions held before Sir Peter Edlin, Q.C., and justices at Clerkenwell on the 21st of July, 1894. Application was made to the court to order that the appellant should pay to the respondent justices, by way of costs, such sum as should indemnify them from all cost and charge whatsoever to which they had been put in consequence of the appeal. The application was made under 9 Geo. 4, c. 61, s. 29. The question of costs was argued fully, more recent statutes were referred to, and the court refused to

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

order the appellant to pay the costs of the respondents on the ground that they were given a discretion in the matter by the later statutes.

By 9 Geo. 4, c. 61 (an Act to regulate the granting of licences to keepers of inns, alehouses, and victualling houses in England), section 29: "In every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given and such appeal shall have been dismissed or the judgment so appealed against shall have been confirmed or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made and such court is hereby required, to adjudge and order that the party so having appealed or given notice of his intention to appeal shall pay to the justice to whom such notice shall have been given . . . such sum by way of costs as shall in the opinion of such court be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal."

By 11 & 12 Vict. c. 43, s. 27, "if upon . . . appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace. . . ."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-section (5), the court of quarter sessions hearing an appeal "may make such . . . order in the matter as the court of appeal may think just . . ."; and the provisions of 42 & 43 Vict. c. 49, respecting appeals, are applied to appeals under prior Acts by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6.

The above order *nisi* was obtained.

Poland, Q.C., and *Danckwerts*, showed cause.—It will be argued on the other side that by section 29 of 9 Geo. 4, c. 61 the justices at quarter sessions were bound to order the unsuccessful appellant to pay the costs of the respondent justices. Section 29 of that Act has been impliedly repealed by later statutes, and the justices now have a discretion as to costs. But whether that is so or not there can be no *mandamus*, for the justices have heard and determined the question, and the court will not now inquire into the question whether they were right or wrong: *Reg.* v. *Justices of Middlesex*, 25 W. R. 510, 2 Q. B. D. 516.

Jelf, Q.C., and *D'Eyncourt* (*Horace Avory* with them), in support of the rule.—The question of costs must be distinguished from the merits of the appeal from the refusal to renew the licence. If section 29 of 9 Geo. 4, c. 61 gives the justices no discretion as to costs, they cannot avoid the *mandamus* merely by saying that they have heard and determined the matter. Their duty in connection with costs is purely ministerial.

They referred to *Reg.* v. *Bolton*, 1 Q. B. 66; *Reg.* v. *Justices of Yorkshire*, 10 W. R. 757, 2 B. & S. 811; *Reg.* v. *Justices of Monmouthshire*, 1 D. & L. 145.

Poland, Q.C., in reply.—We admit that 9 Geo. 4, c. 61, s. 29, gave the justices no discretion; but that section has been repealed by implication. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6, and 11 & 12 Vict. c. 43, s. 27, have given the "Court of Appeal" a discretionary power. If section 29 of the Act of Geo. 4 remains in force the justices may order the costs to be paid forthwith, and may send the appellant to prison. This is inconsistent with the Summary Jurisdiction Acts, 1879 and 1884.

He cited also *Reg.* v. *Justices of Glamorganshire*, 40 W. R. 436, [1892] 1 Q. B. 621; *Reg.* v. *Hellier*, 17 Q. B. 229; and *Reg.* v. *Justices of Glamorganshire*, 37 W. R. 493, 22 Q. B. D. 628.

Marshall Hall and *R. E. Moore*, appeared for the freeholder, the original appellant.

POLLOCK, B.—The question before the court seems to involve one of very general importance. So far from treating the matter lightly, I have looked, as far as I can, at all the cases of *mandamus* in other courts to find the governing principle. In the first place Mr. Jelf disowns any desire to bring this case before the court as an application for a *mandamus*, with the real intention of obtaining a decision by way of appeal from the justices at quarter sessions.

It may be clearly laid down that where justices and other inferior tribunals decline to deal with a case on the ground that there is no jurisdiction in *limine*, the court, if they considered that there was jurisdiction, will grant a *mandamus*. It is equally clear that where a preliminary objection is taken before an inferior tribunal, and the inferior tribunal declines to hear the case because of the preliminary objection (as where notice has not been given), the court will also order a *mandamus* to go.

On the other hand, in all cases where a court has sat as a judicial tribunal, has heard counsel on both sides, and has come to a conclusion, right or wrong, this court will not interfere by way of *mandamus*. This is so even where the conclusion to which the court below comes involves a decision that it had no jurisdiction to make the order which it had been called upon to make. There are a great many cases where a special condition precedent is required for the making of a particular order. If the inferior court comes to the conclusion that the condition precedent does not exist as required by the Act in question, then, again, this court will not interfere by *mandamus* with that conclusion.

Let us look at one or two of the cases on *mandamus*. If the judge below is a purely ministerial officer, he must do the ministerial act which is required of him, and if he refuses a *mandamus* will be granted.

This is illustrated by *Rex* v. *Justices of York*, 1 A. & E. 828. In that case a local Act empowered trustees to purchase lands, and provided that if the owners disagreed with the trustees as to the terms of purchase a jury should be summoned by the sheriff to assess compensation. The Act further said that, if the jury gave a verdict for a greater sum than the trustees had offered, the costs of the inquiry should be settled by a justice and borne by the trustees. A justice having refused an application to allow certain costs, it was held that a *mandamus* ought to be granted. In one sense, every judicial office involves a ministerial office; but when it comes to awarding costs judges have to follow and consider Acts of Parliament. Would anyone say that a judge was doing that in a ministerial capacity?

I will refer to one or two other cases which show that this view is supported. In 1860 the case of *Ex parte Cook, In re Dyson*, 29 L. J. Q. B. 68, 8 W. R. Dig. 34, was decided. There the Court of Queen's Bench was asked to grant a *mandamus* to the judge of the Insolvent Debtors' Court ordering him to pay over a sum of money to the applicant under section 92 of 1 & 2 Vict. c. 110, which made it lawful for the court, where a surplus remained after the payment of an insolvent prisoner's debts, to order that such property should be vested in the person whose debts had been discharged and satisfied. The argument that the duty was ministerial was treated as conclusive in favour of a *mandamus*. Wightman, J. says: "The only question is whether the functions of the commissioner are judicial or ministerial.

held in the former case that they were judicial, . . . the commissioner is still entitled to act upon his own authority and exercise his own discretion." It was held that the duty was judicial, and a *mandamus* was refused. There were two cases, also, in the early days of county courts which bear upon the question. In *Reg.* v. *Richards*, 15 Jur. 358, the question was whether a *mandamus* should be ordered where the county court judge had refused to adjudicate upon a claim under section 118 of 9 & 10 Vict. c. 95. The ground of his refusal was that a notice, required by a rule of practice, was imperfect. The court granted a *and amus*. In the subsequent case of *Ex parte Milner, In re Milner* v. *Rhoden*, 15 Jur. 1037, it was sought to obtain a *mandamus* to order the county court judge to hear and determine a plaint, the judge having decided that he had no jurisdiction to adjudicate between the parties. The court held that he had jurisdiction, and Erle, J., said: "Where a question within the jurisdiction of a county court judge is brought before the judge and decided by him, I have no jurisdiction to interfere upon the ground that he was wrong in point of law. It seems to me that the judge in this case had a full understanding of the facts, and even assuming he was wrong in point of law, the court will not issue a *mandamus* to compel him to rehear them."

Now, what are the facts in this case? The statute 9 Geo. 4, c. 61, s. 29, says that the justices shall order the unsuccessful appellant to pay the respondent's costs. Subsequent statutes, however, have been passed, and I do not see that the Act of George IV. now applies to justices at quarter sessions any more than to judges of the High Court. The question of costs has become one of the most material questions in every case. If the justices here had refused to consider the statutes bearing upon the question of costs, and the statutes clearly imposed upon them the duty of giving costs against the appellant, there is no doubt that we ought to order a *mandamus* commanding them to hear and determine the matter. But they have heard the parties, considered the statutes, and come to a decision upon them; and I am clearly of opinion that, the justices having acted judicially, we ought not to grant a *mandamus*.

GRANTHAM, J.—I am of the same opinion. It has been contended that if a statute, however old, orders justices to do a particular act, a *mandamus* ought to be granted, notwithstanding the existence of a new statute which orders them to do something else. I hold that such a view is entirely wrong.

There are statutes as to licensing subsequent to the Act of George IV. In the opinion of the magistrates these statutes affected the question of costs, and they came to the conclusion that costs were left to the discretion of magistrates and judges. How can they now be told to "hear and determine" the question? The application fails, and the rule for a *mandamus* must be discharged.

Order discharged.

Solicitors for the justices, *Nicholson & Patterson.*

Solicitor for the Crown, *E. W. Beal.*

Solicitors for the appellant, *King & Burrell.*

Court of Appeal.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lindley and Rigby, L.JJ.) — Feb. 1.

"THE BONA." (*a.*)

Insurance — Marine insurance — General average — Damage to engines in getting ship off ground—Coal consumed in working engines.

A steamship, while on a voyage, stranded (without any negligence on the part of those on board), and remained aground for three days. Owing to the bad weather she and her cargo were in imminent danger of being lost, and, in order to reflout her and to save both ship and cargo, her engines were kept working until she came off. The engines were thereby put to unusual strain, and were considerably damaged.

Held, that the damage to the engines and the cost of the coal consumed in working them were the subject of a general average contribution.

Appeal from the judgment of Sir Francis Jeune, P., in favour of the plaintiffs.

The action was tried upon an agreed statement of facts.

By a policy of insurance effected by the plaintiffs, the owners of the steamship *Bona*, with the defendants, the Indemnity Mutual Marine Insurance Co. (Limited), the defendants insured the hull and machinery, &c., of the ship against ordinary marine risks for one year from the 9th of March, 1892.

On the 11th of January, 1893, the ship, while on a voyage from Galveston to Liverpool with a cargo, stranded upon Galveston Bar about mid-day (without any negligence on the part of those on board) and remained on the Bar until the 14th of January, she and her cargo being in imminent danger owing to the state of the wind and sea. While she lay stranded she was lightened and her engines were from time to time worked in the attempt to get her off the Bar, and in consequence thereof they were put to unusual strain and suffered considerable damage. By means of the engines and the lightening of the ship she came off the Bar about mid-day on the 14th of January.

In consequence of the reference in the policy of insurance and the bill of lading under which the cargo was shipped to the York-Antwerp Rules, 1890, the cost of the repairs to the engines rendered necessary by their being strained were allowed in the general average statement (the above rules expressly authorizing such damage to be allowed in general average), and the defendants paid their proportion thereof, but they did not admit that the working of the engines under the above circumstances was a general average act. Fifty-two tons of coal were burnt in working the engines in the attempt to get the ship off the ground, and the question was whether the defendants were liable to contribute *pro ratâ* in general average in respect of the value of this coal.

Sir Francis Jeune, P., held that the working of the engines was a general average act, and that, therefore, the coal used in working them was the subject of general average contribution. He accordingly gave judgment for the plaintiffs. The defendants appealed.

Joseph Walton, Q.C., and *T. G. Carver*, for the defendants.—The working of the engines and the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

consumption of the coals for that purpose were not general average acts. This was an ordinary use of the ship's materials upon an extraordinary occasion, and is not the subject of general average. There must be an intentional and extraordinary sacrifice or expense incurred for the preservation of ship and cargo: *per* Lawrence, J., in *Birkley* v. *Presgrave*, 1 East, 220. This case is like that of a ship sustaining damage through carrying an unusual press of sail in order to escape from a privateer (*Covington* v. *Roberts*, 2 B. & P. N. R. 378) or to avoid being driven on shore in a gale (*Power* v. *Whitmore*, 4 M. & S. 141), which damage was held not to be the subject of general average contribution. A cargo owner has a right to expect the ordinary use of the ship's appliances, and the engines and coal here were used in their ordinary way to work the screw.

They also referred to Arnould on Insurance, 2nd ed., p. 901; Benecke on Indemnity, pp. 183-189; Phillips on Insurance, ss. 1297, 1298; *Hallett* v. *Wigram*, 9 C. B. 580; *Wilson* v. *Bank of Victoria*, 15 W. R. 693, L. R. 2 Q. B. 203; *Harrison* v. *Bank of Australasia*, 20 W. R. 385, L. R. 7 Ex. 39; *Robinson* v. *Price*, 25 W. R. 112, 2 Q. B. D. 91.

Sir R. E. Webster, Q.C. (*Holman* with him), for the plaintiffs.—The use of the coal in working the engines was a general average act. The engines were worked to turn the screw, not in the ordinary course of the voyage, but to get the ship off the ground. That is not an ordinary user of the engines, and it was done to extricate the whole adventure from the common danger. Rule 7 of the York-Antwerp Rules, 1890, and the Rules of the Average Adjusters and Customs of Lloyd's, set out in Abbott on Shipping, 13th ed., pp. 1249, 1253, show that the use of the engines in such circumstances is not considered by persons who are familiar with these claims as an ordinary use. In *Covington* v. *Roberts* and *Power* v. *Whitmore* there was no voluntary sacrifice at all, but only a common sea risk.

He also referred to 2 Parsons on Insurance, 254.

Joseph Walton, Q.C., replied.

Lord ESHER, M.R.—The question submitted to us is confined to the coals, but I agree that, in order to determine whether the coals were used under circumstances which entitle the shipowners to demand a general average contribution, we must consider whether the working of the engines was a general average act. If the engines were used in such a way and under such circumstances that any damage to them would be the subject of general average contribution, then the cost of the coals used as part of the manœuvre would also be the subject of general average contribution.

Therefore the question is whether this was an unusual and abnormal use of the engines for the preservation of the ship and cargo. It was admitted that the ship and cargo were in imminent danger. It was not like the case of a ship touching for a short time on a sandbank. The ship was hard aground, and remained so for three days. The master had to do the best for the safety of the whole adventure, and he could not get the ship off without making some extraordinary effort. It is clear that, in working the engines as he did, he was intentionally running the risk of straining them for the purpose of saving the ship and cargo. It was argued that he was only using the ship's powers in the ordinary way, and that therefore the doctrine of general average contribution did not apply. But in this case the ship was not afloat; she was hard aground. That is not the normal condition of a ship. The manœuvre which the master determined upon was to work the engines so as to force the ship off the ground. That was not the normal use for which the engines were designed. It was putting the engines to an excessive and abnormal use intentionally, and at great risk to them, in order to save both ship and cargo from imminent danger. The engines were in consequence strained. That entitles the shipowners to claim a general average contribution. That being so, the cost of the coals which were used for the purpose of moving the engines in that abnormal way formed the subject of a general average contribution. The appeal must therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion. This case is somewhat difficult, and is on the line. I look upon the question of the coals as accessory to that of the engines. We must see whether this case comes within the well-known rule laid down by Lawrence, J., in *Birkley* v. *Presgrave*: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average." It is said that there cannot be a sacrifice if the thing is merely used for its ordinary purpose. We must remember the circumstances here. The ship was hard aground. By working the engines as was done in this case there was a great risk of injury to them, intentionally incurred for the purpose of assisting the ship off the ground. In my opinion that was an extraordinary sacrifice. It was not an ordinary, but an extraordinary, use of the engines, entailing considerable risk to them. The cases of *Covington* v. *Roberts* and *Power* v. *Whitmore* were different from the present case. In those cases the ship was at sea, and put on an unusual press of sail to escape from a privateer in the one case and from being driven ashore in the other. That was not like this case, where the ship was not at sea, but was hard and fast aground. If we look at the view taken by business men upon the subject, we see from the Rules of the Average Adjusters and Lloyd's Customs, and the York-Antwerp Rules, 1890, that they consider that damage to a ship's engines in such a case as this is the subject of general average contribution.

RIGBY, L.J.—I am of the same opinion. The engines were intentionally used in a way they were never intended for, and for the purpose of saving both ship and cargo. It was, therefore, a general average act, and the expenditure of the coals consumed in working them was also the subject of general average contribution.

Appeal dismissed.

Solicitors for the plaintiffs, *Downing, Holman, & Co.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 13.

"THE KATY." (*a*.)

Ship — Charter-party — Demurrage — Lay days — "Days."

A charter-party provided that fourteen running days, Sundays excepted, were to be allowed for loading and unloading, and ten days on demurrage beyond the lay days, at a certain rate per day. Seven days were occupied in loading, and the ship arrived at the port of discharge on Saturday, the 31st of March, and was ready

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

to commence the discharge at 10.30 *a.m. The consignees, however, refused to commence the discharge at once, and the discharge only commenced at* 1 *p.m. on Saturday, March* 31, *and finished at* 9 *a.m. on Monday, the* 9*th of April. In an action by the shipowners to recover two days' demurrage,*

Held, first, that, though the consignees were entitled to seven whole days for unloading, and were therefore not bound to commence the discharge on Saturday, the 31*st of March, yet the true inference from the facts was that the consignees had agreed to treat the Saturday as a lay day; secondly, that the lay days meant days from midnight to midnight, and not periods of twenty-four hours commencing at any hour of the day; and that, therefore, the lay days expired on Saturday, the* 7*th of April, and two days' demurrage was due.*

Appeal from the judgment of Sir Francis Jeune, P., in an action to recover £71 18s. 8d., being two days' demurrage of the plaintiffs' steamship.

By a charter-party, dated the 1st of February, 1894, the plaintiffs' steamship was to go to Sulina, and there load a cargo of wheat and proceed to a safe port, as ordered, in the United Kingdom, fourteen running days, Sundays excepted, to be allowed (if the steamer was not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days at 4d. per ton on the steamer's gross register tonnage per running day. Seven days were occupied in loading, and the bill of lading (by which freight was to be paid and all other conditions as per charter-party) was indorsed with that fact. The vessel was ordered to Barrow, where she arrived on Saturday morning, the 31st of March, and upon the opening of the Custom House at 10 a.m. the captain made his entries (until this was done the discharge could not commence), and at about 10.30 a.m. gave notice to the defendants, the consignees of the cargo and indorsees of the bill of lading, that the ship was ready to discharge, at the same time requesting that the discharge should be commenced at once. The defendants declined to commence the discharge at once, and it was commenced at about 1 p.m. on that day and finished at 9 a.m. on Monday, the 9th of April. The usual working hours at Barrow were from 6.30 a.m. to 5 p.m., except Saturdays, when work ceased at 4 p.m.

The plaintiffs contended that the lay days expired on Saturday, the 7th of April, in which case two days' demurrage would be due.

The defendants contended (1) that the word "days" meant, as appeared from other parts of the charter-party, days of twenty-four hours beginning at the hour when the discharge commenced, and not days commencing at midnight; and (2) that the part of Saturday, March 31, occupied in unloading did not count as a lay day; and that in either view the lay days did not expire until Monday, April 9.

Sir Francis Jeune, P., held that the word "days" meant days commencing at midnight, but that the part of Saturday, March 31, occupied in unloading, did not count as a lay day, and that therefore the lay days did not expire until Monday, April 9. He accordingly gave judgment for the defendants.

The plaintiffs appealed.

T. E. Scrutton and *H. Parker Lowe*, for the plaintiffs.

T. G. Carver, for the defendants.

Lord ESHER, M.R.—The charter-party does not specifically fix any time when the unloading is to commence; for instance, it does not say that the unloading is to commence as soon as the ship arrives at her berth. Therefore the unloading was to commence within a reasonable time after the arrival of the ship. In considering what is a reasonable time after the ship's arrival, the observation of Quain, J., in *Commercial Steamship Co.* v. *Boulton*, 23 W. R. 854, 3 Asp. Mar. Cas. N. S. 111, that the charterers are entitled to a fair working day, must be applied. The consignees here had seven days for unloading, and, applying the observation of Quain, J., that meant seven whole days. Therefore the consignees were not bound to commence taking delivery on Saturday, March 31, when the captain requested them to do so. They might have refused to do so, on the ground that the lay days commenced on the following Monday, and if they had done that, the lay days would not have expired until Monday, April 9. But how did the consignees, though not obliged to treat the Saturday as a lay day, treat it? When the captain requested on the Saturday that the discharge should commence at once, the true inference of fact seems to me to be that the captain invited the consignees to treat that day as a lay day, and the consignees, after refusing at first, subsequently agreed to it. I have no doubt that, when once a day is treated as a lay day, no matter at what hour the work commences, it is a day in the ordinary sense—namely, from midnight to midnight. And there is nothing in this charter-party to alter that ordinary meaning. Therefore the true inference from the facts is that both parties agreed to treat the first Saturday as a lay day, and accordingly the lay days expired on Saturday, April 7, and two days' demurrage became due. When one considers that this was a cargo of wheat, probably in bulk, one sees at once how desirable it would be on the part of the consignees to get it out of the ship as soon as possible. The appeal must, therefore, be allowed.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Botterell & Roche.*

Solicitors for the defendants, *T. Cooper & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Jan. 21, 22.

In re HUME.
FORBES *v.* HUME. (*a.*)

Charity—Will—Gift of residuary real and personal estate to charity subject to life interests—Mortmain and Charitable Uses Act, 1888 (51 *&* 52 *Vict. c.* 42), *s.* 4 (1) (2) (3) (6)—*Mortmain and Charitable Uses Act*, 1891 (54 *&* 55 *Vict. c.* 73), *s.* 5.

A gift by will of land to a charity is valid, notwithstanding that the interest so given is reversionary, dispositions by will under section 5 *of the Mortmain and Charitable Uses Act*, 1891, *not being subject to the restrictions imposed by section* 4 *of the Mortmain and Charitable Uses Act*, 1888.

Decision of Stirling, J. (ante, *p.* 188), *affirmed.*

Section 4 *of the Act of* 1888 *has not been repealed by section* 5 *of the Act of* 1891, *but the restrictions thereby imposed are still applicable to a gift by deed of land to a charity.*

Appeal by the plaintiff from a decision of Stirling, J. (reported *ante*, p. 188, where the facts are set forth).

Graham Hastings, Q.C., and *Alexander Young*, for

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

the appellant.—The present gift does not take effect in possession as required by section 4 of the Mortmain and Charitable Uses Act, 1888, but is subject to prior life interests. It is therefore void. Section 5 of the Mortmain and Charitable Uses Act, 1891, implies that a gift of land by will in favour of a charity must be immediate and not reversionary. The restrictions imposed by sub-sections 2 and 3 of section 4 of the Act of 1888 are not removed by the Act of 1891. In *In re Bridger*, 41 W. R. 104, 42 W. R. 179; [1893] 1 Ch. 44, [1894] 1 Ch. 297, the present point was not raised. The fact of the gift there being reversionary was not brought to the notice of the court. Stirling, J., therefore, was wrong in treating *In re Bridger* as an authority for his decision.

Mulligan, for the first tenant for life and the trustees of the will.

Dibdin, for the Croydon Hospital.—First, "land" in section 5 of the Act of 1891 must be construed in its ordinary legal sense, and be taken to include every estate in land, whether in possession or in reversion: Theobald on Wills, 3rd ed., p. 156, citing *Chester* v. *Chester*, 3 P. W. 56, and other cases; Burton's Comp. R. P., 7th ed., p. 1. Secondly, section 4 of the Act of 1888 cannot be read into section 5 of the Act of 1891. To do so would be to say that, in order to render a gift by will of land to a charity valid, the testator must either live for twelve months after his own death, or his will must be held to take effect from its date, and not from the date of his death.

Buckley, *Q.C.* (*Eve* with him), for the Croydon Rescue, &c., Association.—The Act of 1891 is a wholly new enactment entirely independent of section 4 of the Act of 1888. It provides an independent remedy for the evils aimed at by the Mortmain Acts. Land may therefore be assured by the will without any of the restrictions imposed by the Act of 1888. Consequently a gift by will of a reversionary interest in land is valid.

Lord HALSBURY.—This is an appeal from a decision of Stirling, J. It is an appeal from a part of an order in which the court in substance declared that a devise of a reversionary interest in real estate to a charity was a valid devise. That being the part of my brother Stirling's order against which this appeal is directed, it appears to me, after a full consideration of the question, that we must practically come to the same construction of the Mortmain and Charitable Uses Act, 1891, as he did, which involves a consideration of section 5 of that Act.

Now the state of the law in 1888 was this: Practically that which the Legislature dealt with then, was the inalienability of land, and one knows historically that from the earliest period when the Mortmain Acts were passed various ingenious devices by learned persons were invented for the purpose of evading them. Money was left for the purpose of building a school, for example. The gift was money, but the object was that of building a school. It was a very wholesome object and a very proper one. Nevertheless the courts saw through the object, and, as the donees could not build a school without land, the courts held that gift to be within the Mortmain Acts. I need not go through the long series of cases on the point, with which one is familiar, and the various ingenious devices that have been introduced from time to time to turn money—which it was always lawful to leave—into land. But in the year 1888 the Legislature consolidated the law on that subject, and dealt with the only mode by which land could be alienated for charitable purposes—namely, by deed. In the second part of the statute they made certain exceptions as to pieces of land which might be disposed of, and to which, therefore, speaking broadly, the Mortmain Acts did not apply. One was for the purpose of public parks and the other was for the purpose of schoolhouses. The law was put in that condition of things that the Mortmain Acts did not apply to those excepted cases. Accordingly, for the purpose of those excepted cases, it was necessary to introduce the word "will" into the definition clause of the statute, and to make the definition of an "assurance" to include "will." That is the reason why, in the statute of 1888, are found the words "will" and "codicil." Otherwise it would have no relation to a will at all; but in no respect could the question of a "will" have arisen except with regard to those excepted cases. The object was to say that those excepted cases should not be within the Mortmain Acts at all. So stood the law in 1888; and, accompanying the power of making land applicable to charitable purposes, there was a great variety of restrictions not necessary to enumerate now.

But then came the Act of 1891. The Act of 1891 seems to me to have altered the whole condition of things. The previous state of the statute law, and the current of decisions, practically said this: "Do what you like, adopt whatever ingenious device you choose; but if the money you are going to leave is to be turned into land, it shall be within the Mortmain Acts." In 1891, however, the Legislature appear to have said this: "We will get rid of all these difficulties, and we will allow you to devise land by will as much as you please for charitable purposes. But we will more effectively get rid of the real objection—namely, the inalienability of land being so created—by providing that you may make such a disposition as you please, so that when you have done it it shall, within twelve months after the testator's death, be turned into personalty." By that alteration of the whole state of affairs, the Legislature attempted to provide against the difficulty which the idea of the inalienability of land had presented to the mind of the Legislature in former times. Whether they have effectually done it or not seems to me to be perfectly immaterial to inquire into. That that is what they intended to do one sees from looking at the statutes themselves. When I look with that view at section 5 of the Act of 1891, it seems to me that section 5 is as perfectly independent of the Act of 1888 as anything could be. All the restrictions which were applied to deal by the Act of 1888 (assuming, for the purpose of the statute that the land was to continue inalienable) are all inapplicable to the policy of the law as exhibited by the Act of 1891, because land is no longer to be inalienable. On the contrary, it is one of the conditions of the existence of the validity of the disposition that the land shall be turned into personalty within a year after the testator's death, subject to the power of someone to apply to have the sale put off if the facts should render it desirable. But the gist of the enactment is that the land is not to continue inalienable, it is to be turned into money. When I look at section 5 of the Act of 1891, I find that land may be assured by will to or for the benefit of any charitable use, but subject to the provision that I have referred to—namely, that such land shall, notwithstanding anything contained in the will to the contrary, be sold within one year from the death of the testator. The moment that that law is enacted it seems to me that all the argument directed against holding land in mortmain is gone. If that provision is properly administered, then there is no holding of the land in a dead hand at all. The whole scheme of the law has been altered. Of course it is hardly necessary, if that is the true view of what is the meaning of the 5th section of the Act of 1891, to

through the different requirements of the Act of 1888, to show that they are inapplicable. I think myself that they are absolutely inapplicable. The whole tenor of the legislation is different. I would add to that that there is nothing in the Act of 1891 which in the smallest degree appears to suggest the reading of the two statutes together as making one enactment, or making the disposition by will subject to the restrictions of the Act of 1888. It is, therefore, very difficult indeed to say that by any process this court or the court below should fasten on section 5 the restrictions of the Act of 1888. The two statutes are dealing with different subject-matters, and are pointing to a different state of the law altogether. I am, therefore, of opinion that with the substance of Stirling, J.'s judgment I must concur.

There is only one point on which I venture to differ from him. He appeared to suggest, in giving judgment, that the restrictions contained in sub-sections 1, 2, 3, and 6 of section 4 of the Act of 1888 are repealed so far as they are applicable to deeds. I do not think that that is accurate. It seems to me that the legislation as to deeds remains exactly where it was. I do not think that there has been any repeal of that enactment at all. I think that if you were dealing with a deed now, you would be bound by those restrictions just as much as you were before 1891. Therefore, although I affirm the judgment of Stirling, J., in other respects, I differ from him as regards that point. I cannot say that he decided the point directly, but it is implied in his reasoning that sub-sections 1, 2, 3, and 6 of section 4 are repealed. I think that that is erroneous. Subject to that observation, I think that his judgment is right, and that this appeal should be dismissed with costs, which I understand all the parties have agreed shall come out of the residuary estate.

LINDLEY, L.J.—I am entirely of the same opinion, and I do not think when the Acts are carefully looked at that there is much difficulty. There is no doubt that up to 1891 land could not be left by will for charitable purposes except in certain specified cases. There were many exceptions introduced by statute at various times, but leaving those out and speaking generally as to the tenor of the law, you could not devise land for any charitable purpose, or for the benefit of any charity. It was absolutely void under the Act of Geo. II. That was so also in 1888. Although the definition clause in section 10 of the Act of 1888 says that "assurances" include a will, yet when you come to read section 4, which relates to the conditions under which assurances may be made to charitable uses, you will find that wills are expressly excluded by the language of the clause. In other words, in 1888 Parliament had not made up its mind to authorize devises of land for charitable purposes. And the whole of section 4 of the Act of 1888 is worded so as to be intelligible as applied to deeds and inaccurate as applied to wills. I agree that there are a few words in sub-section 3 which might be applied to wills. I do not think that the whole of the sub-section is applicable; but there are a few words which might possibly apply. But when you come to apply section 4 to a will it is embarrassing at every turn, and you cannot do it without straining the language. That was the state of things up to 1891. In 1891 Parliament took a totally different view of what was expedient, and it authorized persons to devise by will land to a charity or for charitable purposes. It was a total revolution of the law and a total departure from anterior legislation from the time of the Mortmain Acts from the passing of the Act of Geo. II. and down to 1888. It was a totally new line of thought, and what the Legislature did was this: They said in section 5 of the Act of 1891 that land might be assured by will to or for the benefit of any charitable use, but except as thereinafter provided—that refers to section 8, which relates to land which charities might keep for their own use and benefit—such land should be sold within a year after the death of the testator, or such extended period as might be determined by the High Court, or any judge thereof sitting at chambers, or by the Charity Commissioners. The provision that land which is given by will for charitable purposes must be sold within a year from the death of the testator affords all the protection necessary against the acquisition of land by charities. Charities cannot get the land by will, and you do not want all those provisions that are contained in section 4 of the Act of 1888, where the charities are to take the land by deed. The Legislature has adopted a totally different line of enactment. If the charities are to take the land by deed, they are to keep the land, and if they are to have the land, then certain provisions must be complied with. Those are contained in section 4 of the Act of 1888. But if they cannot take the land by will, what is the difficulty about carrying out the section? The land has to be sold. Land, I suppose, means the soil or the house, or whatever it is. But when you talk about selling land, what are you going to sell? Are you going to sell the fee simple, or are you going to sell some less interest? Section 5 leaves all that open, and you must apply your common sense to what is to be sold. Section 5 does not say that you are to sell the land for all the interest the testator had in it. Section 5, when you come to understand the context and the meaning of the Legislature, is this: You are to sell the land and all the interests which aregiven to charities. It is the interest in the land which the charities may enjoy that is to be sold. There is not the slightest violence done to the language of section 5. When you say that the land is to be sold, you ask yourself the question, "What are you going to put up for sale; are you going to sell the reversion or the estate for life, or what?" The answer is that you are to sell what the charity is to have. That is what you are to sell. That seems to me to be perfectly plain. The money arising out of the sale of land is an interest in land, and it was intended that such interest in land might be disposed of by will. Therefore section 5 of the Act of 1891 says so, and the definition of "land" contained in the Mortmain and Charitable Uses Act, 1888, was altered. That was partly necessary because of the word "interest." There would have been more or less a conflict between the two sections if one section had said that land included an estate and interest, and then the other section had said certain estates and interests shall not be included. I do not say that it could not have been drafted otherwise. But to my mind the whole object of this recasting of the definition clause was to prevent its being within the Mortmain Acts. That was the object of it. I do not doubt for a moment that Stirling, J.'s decision is perfectly right. I think he went a little too far in saying that section 4 is repealed. A gift to a charity need not be by deed now. It may be by will. But if it is by deed, then section 4 applies.

The appeal must be dismissed, with costs.

A. L. SMITH, L.J.—I think that in the result my brother Stirling's judgment is correct. It seems to me on the point that Mr. Hastings and Mr. Young raised, as to the repeal of the definition clause in the Act of 1891, that that is unarguable. As I understand it, the legislation was this: The Act of 1888 contains section 4 and a group of sub-sections relating to alienation of land by deed for charitable purposes.

In the view I take of the Act of 1888 and the Act of 1891, that section 4 and all the sub-sections with regard to the alienation of land by deed stand at the present moment exactly as there enacted in that section. And if land by deed is to be alienated for charitable purposes, and is not to be necessarily sold, the provisions of section 4 must be resorted to, and the deed must be executed and enrolled, and must be drawn in accordance with the provisions of that section, which, I repeat, stands as it was passed in the year 1888.

Then came the Act of 1891; but I may say that before the passing of the Act of 1891, save in the excepted cases with which we need not now deal, there could not be an assurance of land by will for charitable uses. In 1891 the Act of Parliament was passed. It stands by itself. It incorporates no part of the Act of 1888, but it does repeal the definition clause in the Act of 1888, and this was the peg on which Mr. Hastings' argument really hangs, as it seems to me. "Land," in the definition clause (s. 10) in the Act of 1888, is defined as including "tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest therein." As Mr. Hastings said, that definition is repealed by the Act of 1891. Then he argued that because that is repealed and a new definition clause is substituted in the Act of 1891, therefore "land" in section 5—which is the one we have to construe in this case—does not mean an estate in land, because otherwise the Legislature would not have taken the pains to omit "any estate in land" from the definition clause of the Act of 1891. That at the time struck me as an impossibility; and Mr. Buckley has now satisfied me why it was necessary to repeal section 10 of the Act of 1888, and the reason for interpolating in the definition clause—section 3—of the Act of 1891 the words "but not money secured on land or other personal estate arising from or connected with land." Unless the Legislature had done something with the definition clause of the Act of 1888 there would have been a difficulty in construction, and the Legislature therefore thought well to repeal the whole of the definition clause of the Act of 1888. Certainly it was necessary to repeal the words "and interest in land." And, as Mr. Buckley has pointed out—and I think he is well founded in the observation—the Legislature thought it was unnecessary to leave in the word "estate"; for how can a man convey land unless he can convey to the grantee any estate which he has in it? I read section 5 as including land, and that, I think, means the estate which a grantor has to convey in land, whether in fee simple, remainder, or reversion—that is to say, "an estate in land" may be assured by will to or for the benefit of any charitable use, but, except as thereinafter provided in the Act of 1891, such land shall, notwithstanding anything contained in the will to the contrary, be sold within one year from the death of the testator. I read this as a matter independent of section 4 of the Act of 1888. Therefore an estate in land may be assured by will, but if it is assured by will, within one year, from the death of the testator which is the time at which the will would operate, that land is to be sold. As has been pointed out, these sub-sections of section 4 were undoubtedly drafted with a view that the assurance was to be by deed. When they have been tried to be applied, as they have been by Mr. Hastings and Mr. Young, to an assurance by will, one and all in substance fail. They will not work when the assurance is by will: and I am of opinion that the Act of 1891 must be read by itself. I think, therefore, that my brother Stirling's judgment is correct, except that if he did hold—which I am not sure he did, and I have read his judgment once or twice—that section 5 of the Act of 1891 has repealed sub-sections 1, 2, 3, and 6 of section 4 of the Act of 1888, I do not agree with that. But I do not think that the true meaning of my brother's judgment was that section 5 did repeal those sub-sections of section 4.

Appeal dismissed.

Solicitors for the appellant, *Last & Sons.*

Solicitors for the respondents, *West, King, & Adams; S. M. & J. B. Benson; Patey & Warren.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 18.

REDDAWAY v. BANHAM. (a.)

Trade name—Unregistered trade-mark—Description of goods—Long exclusive user by plaintiff—Maker of similar goods—Right to use same name—Injunction.

The plaintiffs had for many years, without obtaining any patent, manufactured and sold a particular kind of belting for machinery. It was made of camel hair, and was sold by the plaintiffs and known in the market under the name of "camel-hair belting." The plaintiffs proved that anyone asking in the market for camel-hair belting would be understood to mean their goods. The defendants manufactured and sold a similar belting made of the same material.

Held, that the defendants could not be restrained from selling their goods under the name of "camel-hair belting."

Application by the defendants for a new trial or for judgment.

The plaintiffs were manufacturers of a particular kind of belting for machinery, which was made of camel-hair, and was known by the name of Reddaway's Camel-hair Belting. The plaintiffs had no registered trade-mark for their belting, but had advertised and sold it under that name for more than fourteen years. Camel-hair belting was made by various manufacturers besides the plaintiffs, and, among others, by the defendants, who at first called their goods by different names, such as woven-hair belting and Arabian belting, but had recently advertised and sold them as Banham's Camel-hair Belting, the words "camel-hair belting" being stamped on the belting itself.

The plaintiffs brought this action for an injunction to restrain the defendants from continuing to use the word "camel" in such a manner as to deceive purchasers into the belief that they were purchasing goods of the plaintiffs' manufacture, and from passing off their goods as and for goods of the plaintiffs' manufacture.

The action was tried before Collins, J., and a jury.

The plaintiffs' case was that the expression "camel-hair belting" was understood in the trade to mean goods of the plaintiffs' manufacture, and evidence was given with the view of showing that in India a purchaser asking for camel-hair belting would expect to get Reddaway's camel-hair belting. It appeared that the defendant Banham had formerly been a workman in the plaintiffs' employment.

The learned judge left four questions to the jury, which, with their answers, were as follows:—(1) Does camel-hair belting mean belting made by the plaintiffs as distinguished from belting made by other manufacturers? Yes. (2) Or does it mean belting of a particular kind without reference to any parti-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

cular maker? No. (3) Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? Yes. (4) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiffs so as to be likely to deceive purchasers? Yes.

On these findings the learned judge ordered judgment to be entered for the plaintiffs, and granted an injunction in the terms of the claim.

The defendants moved for a new trial or judgment.

Bigham, Q.C., and *McCall, Q.C.* (*E. Sutton* with them), for the defendants.—The learned judge asked the jury the questions which the majority of this court said ought to have been put to the jury in *Reddaway* v. *Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639, 41 W. R. Dig. 252. But this case is different from that. There it was admitted that the expression "camel-hair belting" was not an accurate description of the goods sold by the plaintiff or the defendant. It was therefore treated as a fancy name which might acquire in the trade the meaning of belting made by the plaintiffs. In this case it is admitted that the expression is an accurate description of the goods both of the plaintiffs and the defendants. A man has the right to call the thing he sells by its true name, even though people may be led thereby to think that they are buying the goods of another man: *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton* v. *Turton*, 38 W. R. 22, 42 Ch. D. 128; *Linoleum Manufacturing Co.* v. *Nairn*, 26 W. R. 463, 7 Ch. D. 834. The first three questions, therefore, were not proper questions to put to the jury in this case. As to the fourth question, there was no evidence of fraud, or of any intention to pass off the defendants' goods as the goods of the plaintiffs.

Gully, Q.C., and *J. C. Graham*, for the plaintiffs.—The question is not whether the words used are an accurate description of the goods sold by the defendants, but whether they have come to be understood in the trade as meaning the goods of the plaintiffs; that is to say, whether they have ceased to be mere description. That is a question of fact fit to be left to a jury. Here the jury have answered it in the plaintiffs' favour, and the plaintiffs are therefore entitled to be protected in their user of the words. In *Montgomery* v. *Thompson*, [1891] A. C. 217, 39 W. R. Dig. 235, the expression "Stone Ale," and in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, the expression "Glenfield Starch," were descriptive of the defendants' trades by reference to the places where those trades were carried on; nevertheless the plaintiff in each case was held entitled to an injunction.

They also cited *Croft* v. *Day*, 7 Beav. 84; *James* v. *James*, 20 W. R. 434, L. R. 13 Eq. 421; *In re Leonard & Ellis's Trade-Mark*, 32 W. R. 530, 26 Ch. D. 288; and *Waterman* v. *Ayres*, 39 Ch. D. 29, 36 W. R. Dig. 204.

Cur. adv. vult.

Dec. 18.—Lord ESHER, M.R., after stating the facts of the case, said:—In my opinion the general principle of law is well settled, that where a man in trade has carried on a business for a long time in connection with a particular name, he has a right to prevent another from coming into the market and taking away his trade by using that name. In such a case an injunction may be obtained, and it is no answer to say that there was no intention to take away the plaintiff's trade. But to that general principle there is an exception—viz., that an injunction cannot be granted to restrain a man from telling the simple truth. That was laid down in the case of *Turton* v. *Turton*. There the plaintiff had acquired a right under the general principle; but the defendant was a person of the same name as the plaintiff, and all that could be asserted against the defendant was that he had used his own name. There is no doubt that he might thereby have obtained some of the plaintiff's business, after the plaintiff had acquired the right of which I am speaking; but the court, following the case of *Burgess* v. *Burgess*, held that it was an exception to the general rule if the person who was sought to be restrained had only used his own true name. Even though the public may be deceived, a man cannot be restrained from calling himself by his own name. In *Turton* v. *Turton* the question with which the court had actually to deal was only a question with regard to the use of a name; but the principle there laid down clearly shows that an injunction cannot be granted to restrain a man from telling the exact truth. In the case of *Reddaway* v. *Bentham Hemp-Spinning Co.* the judges did not intend to decide anything contrary to *Burgess* v. *Burgess* and *Turton* v. *Turton*. There the subject-matter of the dispute was the same belting as we have to deal with in this case. There, however, it was stated in evidence, and it was taken to be a fact, that the belting was not really made of camel's hair, but, on the contrary, contained very little camel's hair. Therefore it was not an accurate description of the thing made to call it camel-hair belting. It was, in short, taken to be a fancy name. If a man calls that which he makes by a fancy name he is not giving a description of it, and therefore he does not come within the exception to the general rule. It is well settled that if a man has adopted the use of a fancy name to denote his goods, although he has not taken out any patent or registered any trade-mark, he can restrain any other person from using that fancy name in the same market. But in this case the plaintiffs have admitted that the belting is substantially made of camel's hair, and that, therefore, "camel hair" is a correct description of it. They did not make that admission at the trial, and Collins, J., assumed that the evidence as to the nature of the belting was the same as in the former case. But they have admitted it here, and in my opinion that admission puts them out of court.

I think that a man may call the goods which he is selling by the name by which anyone wanting them would call them in the market, although in so doing he may use an expression which has been used by others under such circumstances that it has been taken in the market to denote their goods alone. Suppose that a man manufactures shovels wholly of iron, and calls them "iron shovels," but does not take out any patent for them, and that they come to be well known in the market, so that anyone asking for iron shovels would be taken to mean his iron shovels. In such a case if another man begins to make iron shovels and to sell them in the same market, as he would of course have a perfect right to do, he is entitled to call them "iron shovels," because that is the name by which anyone who wanted them would call them. Many other illustrations of the same thing might be given. If a man sells lozenges made of soda or of liquorice, he cannot be restrained from saying, I sell soda lozenges, or liquorice lozenges. All such cases are within the exception. It may be that people will be thereby deceived, but that is a misfortune which must be put up with. If, in the other hand, a fancy name is used, that is not a description of goods and the case is not within the exception. Of if a person, who was not of the same name as the plaintiff, were to call himself by that name, that would not be the truth, and there again the exception would not apply. The only evidence against the defendants here is that they say that what they make and sell is camel-hair

belting. That is a true description of what they make and sell, for no one could go into the market and ask for their goods without asking for camel-hair belting.

I am of opinion that the first three questions which Collins, J., put to the jury were put on an incorrect view of the facts. If this had been a case of a fancy name, then those questions would have been right. But in my view the learned judge ought not to have asked the jury any questions at all; he ought to have entered judgment for the defendants. As to the fourth question, I am of opinion that it could not rightly be put, unless it was alleged that the defendants had acted fraudulently. But what was the evidence? The evidence was that the defendants made goods like the goods of the plaintiffs, and called their goods camel-hair belting. The plaintiffs having no patent, the defendants were entitled to imitate their goods; and even if they were trying to beat them out of the market, they were not doing anything wrong. And in calling the goods camel-hair belting they only told the truth. Therefore, the only suggested evidence of the defendants having acted wrongfully is that they did an act which was not a wrong act, but they did it with a wrong intention. Even if that were so, the law does not take notice of a wrongful intention in a man's mind, unless he does some wrong act to carry that intention into effect. I think that so far as the first three questions are concerned the plaintiffs ought to have been nonsuited, and that there was no evidence to support the fourth question. The appeal must, therefore, be allowed.

LOPES, L.J., read the following judgment:—I do not propose elaborately to cite cases, but shall shortly state the law deducible from the authorities which is, in my judgment, applicable to the subject under discussion. A man may correctly, in plain language, describe the material of which his goods are made, though the description be the same as that of a rival manufacturer, and though the one, owing to the similarity of description, be likely by customers to be mistaken for the other, and though he may have closely imitated the description of the other; but he must not, in addition to correctly describing them, dress up or garnish his goods so as to make them resemble the goods of his rival, and he must not, by words or conduct, pass them off as the goods of his rival, or endeavour to do so. Should he so dress or garnish them, or so pass them off, an injunction will be granted restraining him. The leading case on this subject is *Burgess* v. *Burgess*. Knight-Bruce, L.J., there said:—"If any circumstance of fraud had accompanied, and were continuing to accompany, the case, it would stand very differently, but the whole case lies in what I have stated. The whole ground of complaint is the great celebrity which, during many years, has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege as to prevent any man from making essence of anchovies and selling it under his own name." Turner, L.J., concurred. He said that "no man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." The effect of that case is that, where a man is telling the truth with regard to his name or the description of his goods, there must be something in addition in the nature of fraud or misrepresentation to justify the interference of the court. The principle is as applicable to a truthful description of goods as to a truthful description of a name. *Turton* v. *Turton* proceeds on the same grounds, and supports the principle of law which I have enunciated. There are many other cases, but I think it unnecessary to pursue them, for, so far as I know, the principle embodied in *Burgess* v. *Burgess* and *Turton* v. *Turton* has never been impeached.

Applying that principle to this case, two questions arise. First, have the defendants correctly, in plain language, described the material of which their goods are made? Have they correctly described their goods? And, secondly, have they acted fraudulently or misrepresented their goods as the goods of the plaintiffs? It was admitted by Mr. Gully that substantially they had correctly described their goods. The belting was not exclusively composed of camel's hair; it could not be; there must be some foundation; but the main part was camel's hair, and, in popular language, the correct description of it was camel-hair belting. No doubt that was the name by which the plaintiffs called their beltings, but they had acquired no monopoly of that name, and the defendants were entitled to apply it to their goods, according to the authorities I have cited, if it correctly described them. To entitle the plaintiffs, therefore, to relief they must make out either that the defendants, in addition to correctly describing their goods, had dressed them up or garnished them so as to make them resemble the plaintiffs' goods, or by words or conduct passed them off as the plaintiffs' goods, or endeavoured so to do. It is to such a state of things that, as I understand, this fourth question put to the jury by Collins, J., applied. I can find no evidence of this. All I find is that they called their belting by the same name as the plaintiffs', and, probably, as far as they could, imitated it; but this they are entitled to do. The case of *Montgomery* v. *Thompson* was relied upon, but it does not affect this case, because it proceeded on fraud. This case is distinguishable from *Reddaway* v. *Bentham Hemp-Spinning Co.* In that case it was assumed that "camel-hair belting" was not a correct description of the article, but was rather a fancy name; at p. 646 ([1892] 2 Q. B.) I find that I said that the evidence was that the plaintiffs' belting contained little, if any, camel's hair, and was chiefly composed of hair of goats and sheep, the name of "camel-hair belting" being given to it as a distinctive name. On page 647 I said that the defendants might have called their belting "goat-hair belting," "sheep-hair belting," "buffalo-hair belting," or many other names that might be suggested. This makes it clear that in that case it was never suggested that camel-hair belting was a true description of the article. The plaintiffs, in my opinion, made out no case, and ought to have been nonsuited. The appeal must, therefore, be allowed.

RIGBY, L.J., concurred.

Judgment for the defendants.

Solicitors for the plaintiffs, *W. J. & E. H. Tremellen*, for *A. Macdonald Blair*, Manchester.

Solicitors for the defendants, *Chester & Co.*, for *Chew, Sons, & Hilditch*, Manchester.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) [and Chan. Div.] — July 13, 1894; Aug. 7, 1894; Nov. 13.

McILQUHAM *v.* TAYLOR. (*a.*)

Contract—Construction—"£1,000 worth" of shares—Covenant to pay £1,000 or to transfer £1,000 worth of shares in company to be formed by covenantor—Company formed with preference and ordinary shares—Transfer of ordinary shares of no market value—Right to enforce payment of £1,000.

The defendant by deed covenanted within twelve months to pay the sum of £1,000 to or to transfer into the names of the plaintiffs "£1,000 worth of fully paid-up shares" in a company to be formed by him. The company was formed and registered with capital divided into preference and ordinary shares of £10 each. The defendant transferred to the plaintiffs 100 ordinary shares expressed to be fully paid up, but no contract in respect of them was registered till after the expiration of twelve months from the date of the deed. Neither class of shares had any value in the market.

The plaintiffs refused to accept the shares, and brought an action for payment of £1,000.

Held, by Stirling, J., *that the defendant, by forming the company with preference and ordinary shares, had put it out of his power to perform his covenant to transfer shares, and that therefore the plaintiffs were entitled to £1,000 in cash.*

Studholme *v.* Mandell, 1 *Ld. Raym.* 279, *followed.*

Held, by the Court of Appeal, *that the decision of* Stirling, J., *should be affirmed, on the ground that the covenant to transfer "£1,000 worth" of shares was a covenant to transfer shares to the value of £1,000.*

By a deed dated the 2nd of December, 1892, it was recited that the defendant H. E. Taylor had agreed with the plaintiff J. McIlquham and W. Mitchell for the transfer to him of the lease of a mine, "for the sum of £2,000, the sum of £1,000 to be paid on the day of the date of these presents, and the sum of £1,000, being the balance thereof, in fully paid-up shares in a company to be formed by the said H. E. Taylor for the working of the said mine"; and the defendant thereby covenanted in the following terms: "The said H. E. Taylor will within twelve calendar months from the date hereof pay the sum of £1,000 to or hand over to or otherwise transfer into the names of the said James McIlquham and William Mitchell £1,000 worth of fully paid-up shares in a company to be formed by the said H. E. Taylor within the said twelve months as aforesaid, for the working of the said mine and premises, the capital of such company not to exceed £12,000."

A company was formed and registered on the 20th of May, 1893, with a capital of £12,000, divided into 1,200 shares of £10 each, of which 600 were A shares, with £10 per cent. per annum preference, and 600 were B or ordinary shares.

On the 23rd of November, 1893, the defendant executed a transfer to the plaintiffs of 100 B shares. At the time of such transfer no contract in respect of these shares had been registered in accordance with section 25 of the Companies Act, 1867; but on the 16th of June, 1894, such contract was filed with the Registrar of Joint Stock Companies. The shares of the company had never had any marketable value, and the plaintiffs refused to accept the transfer of 100 B shares. They accordingly brought an action claiming £1,000 in cash.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Grosvener Woods, Q.C., and *Griffith Jones*, for the plaintiffs.—The defendant, by forming the company with preference and ordinary shares, has put it out of his power to perform his covenant to transfer shares: *Hutton* v. *Scarborough Cliff Hotel Co.*, 13 W. R. 574, 631, 2 Dr. & Sm. 521. The defendant did not comply with the requirements of section 25 of the Companies Act, 1867. Having regard to the case of *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125, it is doubtful whether, even after the registration of the contract, the plaintiffs could take these shares as fully paid up. The defendant cannot perform his covenant to transfer shares, and the plaintiffs are, therefore, entitled to £1,000 in cash.

They also referred to *Deverill* v. *Burnell*, L. R. 8 C. P. 475, 21 W. R. Dig. 74, and *Barkworth* v. *Young*, 5 W. R. 156, 4 Drew. 1.

Graham Hastings, Q.C., and *Bramwell Davis*, for the defendant.—The defendant is only liable in damages in repect of that branch of the alternative which is least burdensome to him: *Cockburn* v. *Alexander*, 6 C. B. 791; and inasmuch as the shares had no market value, the damages are nominal.

Grosvenor Woods, Q.C., in reply, referred to *In re Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9, and *In re Westmoreland Green and Blue Slate Co.*, [1893] 2 Ch. 612. [STIRLING, J., referred to *Robinson* v. *Robinson*, 1 De G. M. & G. 247.]

Cur. adv. vult.

STIRLING, J., stated the facts, and continued:—The plaintiffs say that the defendant has put it out of his power to perform the one branch of the covenant, by forming the company with its capital divided into preference and ordinary shares, and that, even if the covenant be alternative, he must, under the circumstances, perform that branch of it which provides for payment in cash. I have come to the conclusion that the plaintiffs are right in that contention, and, therefore, it is unnecessary to say what is the strict construction of the covenant. I think that the shares which the defendant undertook to hand over were to be shares in a company in which the shareholders all stood on a footing of equality. If the case had been one of partnership it would have come within the Partnership Act, 1890, which provides, in section 24, sub-section 1, in accordance with the law as it was before the Act, that, subject to any agreement expressed or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. Therefore, in the absence of express stipulation, partners stand on an equal footing. Upon an agreement for a partnership, if the shares are not defined, I apprehend the same rule would apply, and the partners would come in on equal terms. As regards the position of shareholders in a company in which nothing is said as to their rights *inter se*, the law may not be absolutely settled. The matter was recently referred to in the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399. [His lordship read the judgment of Lord Macnaghten.]

The law, then, is that under an ordinary memorandum of association, according to which the capital of a company is divided into shares of equal amount, the interests of the shareholders are equal in all respects. Whether, in a company so constituted preference shares can be issued is a question the final decision of which has not yet been given, although, perhaps, in the present state of the authorities, it

may be concluded in the courts of first instance by *Hutton* v. *Scarborough Cliff Hotel Co.* However this may be, if preference shares were to be issued, a resolution of the company would be necessary to sanction the issue, and every shareholder would have an opportunity of voting on the question.

In the present case the shares were to be shares in a company to be formed by the defendant, the capital of which was not to exceed £12,000. In the absence of express stipulation, that means, in my judgment, a company having its capital divided into shares, all of which were to stand on the same footing. If a company with preference or priority as regards part of its capital had been contemplated, I can hardly doubt that the agreement would have contained a stipulation as to the proportion of preference capital and ordinary capital, and as to whether the shares which were to be taken in payment were to be of one class or the other, or, if both, in what proportions. It seems to me that it could not have been intended that the defendant should say whether all the shares, except 100 shares, should be issued as preference shares, carrying any preference or interest which he might think fit to determine. In my judgment, therefore, the company which was formed by the defendant was not one in which the plaintiffs could be compelled to accept shares, and, that being so, I think that the defendant is bound to perform the other alternative of the covenant. As to that I may refer to the case of *Studholm* v. *Mandell*, 1 Ld. Raym. 279. [His lordship referred to the facts and the judgments in that case, and continued:—] It seems to me that this is an authority for such a case as the present, that when the default in the performance of the alternative is due to the act of the defendant, who might have formed the company in a different way, he is bound to perform the alternative. Consequently there must be judgment for the plaintiff for £1,000.

The defendant appealed.

Graham Hastings, Q.C., and *Bramwell Davis*, for the appellant.—There was no implied stipulation that the company should be formed with one class of share. The plaintiffs might have made such a stipulation, but they did not do so. The recitals favour our construction.

Grosvenor Woods, Q.C., and *Griffith Jones*, for the plaintiffs, were not called upon.

Lord HALSBURY.—I confess, in this case, I have not been able to entertain any doubt from the first time the covenant has been read to me. I should construe it as I should construe any ordinary language. I think, if the covenant itself is not ambiguous, I have no right to refer either to the recitals or to the statement of the consideration; and it seems to me, without at all going into the reasons of the learned judge in the court below, that it would not be proper to contend that those words have not, in their ordinary natural meaning, an intelligible meaning—viz., that there is to be £1,000 worth of shares. It is vain to contend that if you take any other construction of it you do not strike out the word "worth" altogether. Therefore, upon the ordinary principles of construction, if there is nothing cutting down the natural meaning of the word, I must construe it to be the natural meaning of the word. You cannot construe an instrument of this sort by striking out a word and asking us to read the document in such a way as to make that word inoperative. I am of opinion that the court below was right, that the true construction of the language is that it was to be £1,000 worth of shares, and it is admitted that these shares were not worth £1,000. The appeal must be dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. The covenant is by Taylor, that he will, within twelve calendar months of the date of the document, pay £1,000, or hand over to or otherwise transfer to the names of the plaintiffs £1,000 worth of fully paid-up shares in a company to be formed by Taylor, the capital of which was not to exceed £12,000. Now what does that mean? Mr. Graham Hastings has invited us to construe it that he will pay £1,000 in cash or in shares, meaning that he will transfer shares to the nominal value of £1,000. I do not think that that is the fair meaning of the language used. I put to Mr. Graham Hastings another aspect of the case: Supposing these shares had gone up, and Taylor had offered and tendered a smaller number than £1,000 in nominal value, but £1,000 worth in the market, what would have been the answer? Of course, it is the same question from another point of view, but it strikes me it would be unanswerable. No one could have accused him of breaking his contract. He would have done exactly what he said he would do—paid £1,000 worth of shares. Reliance has been placed on the recitals, and the recitals no doubt express the intention of the parties in language somewhat different; but I do not think it is right to construe the plain words of this covenant with reference to the language of the recitals, more especially as the draftsman has departed from the view which he entertained when he drew the recital.

There is no covenant here to form a particular company with this, that, or the other capital, or anything of the sort; it is all put in a different shape. He is to pay the money or £1,000 worth of shares in a company to be formed, and although, of course, the recitals from one point of view helped Mr. Graham Hastings, the recital that he is to pay £1,000 worth is against him. I think the only safe way is to adhere to the language of the covenant, which to my mind is perfectly plain.

RIGBY, L.J.—I am of the same opinion. The word "worth" is not only an important word, but it appears to me to be the important word in the covenant. What does "worth" mean? It means worth in the sense of the real value, somehow to be ascertained. There can be no difficulty in ascertaining it; it does not mean nominal value. A thing may be of the nominal value of £100,000, or as in this case £1,000, and yet not be worth a farthing. I do not consider that the covenant is in any way ambiguous. If it had been I do not see that we should have got any light from the recitals or from the consideration, because I consider they are very ambiguous, and that they do not exclude the meaning which is given in the covenant. The better way to put it, undoubtedly, is that unless we see that there is something ambiguous in the covenant itself we ought not to care about the consideration.

Appeal dismissed.

Solicitors for the plaintiffs, *R. Jenkins*, for *Smith, Owen, & Davies*, Aberystwith.

Solicitors for the defendants, *D. Jones*, for *A. J. Hughes*, Aberystwith.

High Court of Justice.

Chan. Div. Vaughan Williams, J. } April 25; July 18; Aug. 9; Dec. 5, 6, 1894.

In re BANK OF SOUTH AUSTRALIA (LIMITED). (a.

Company—Winding up—Supervision order—Debt incurred subsequently to voluntary winding up—Compulsory order—Agreement with voluntary liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133 (7), 145, 147, 161.

Persons not entitled to a dividend out of the estate of a company in voluntary liquidation, but entitled, if entitled to anything, to be paid by the liquidator or out of the estate of the company in full, have no locus standi *to apply in the voluntary liquidation for a supervision order. But a debt arising under an agreement with the liquidator of a company in voluntary liquidation, though not a debt provable in the voluntary liquidation, is sufficient to support a petition for compulsory winding up presented after the commencement of the voluntary winding up.*

Under an agreement entered into between the liquidator of the A. Co., in voluntary liquidation, with the U. Co., the last-named company undertook to discharge certain debts and liabilities of the A. Co., the amount, so far as it was not covered by proceeds of realization of the assets, to be treated as a debt due by the A. Co. to the U. Co. If the assets should not be sufficient to pay the debt, the liquidators were, "so far as they legally can or may," to make such calls as should be necessary to raise the amount.

Held, that there was power under sections 95 *and* 133 *of the Companies Act*, 1862, *to sell on the terms of the agreement, and nothing to prevent the liquidator from undertaking to make the call in order to carry out the agreement, and that the debt was sufficient to support a petition for winding up by the court.*

Petition.

On the 11th of April, 1894, the Union Bank of Australia (Limited) presented a petition for the continuance of the voluntary winding up of the Bank of South Australia (Limited) under supervision, the object of the petition being to determine whether a call ought to be made. Prior to 1884 the Bank of South Australia (Limited) had carried on business under royal charters. In 1884 it was registered as a limited company under the Companies Acts, 1862 to 1880, in pursuance of powers in that behalf given by the Bank of South Australia Act, 1884.

A special resolution was passed and confirmed in April, 1892, that the Bank of South Australia should be wound up voluntarily, and liquidators were appointed for the purpose of entering into an agreement for transferring the business of the Bank of South Australia to the Union Bank of Australia. The agreement was dated the 11th of April, 1894, and provided that the Union Bank should take over the property and assets, with certain exceptions, of the Bank of South Australia, and the undertaking, business, and goodwill thereof, subject to the charges and incumbrances affecting the same, and should discharge all the debts, liabilities, and obligations of the Bank of South Australia, perform its contracts and indemnify the bank, its liquidators, and contributories. Clause 8 of the agreement provided that if the aggregate amount of the value of the assets ascertained should exceed the aggregate amount of the debts and liabilities of the Bank of South Australia and the moneys paid by the Union Bank in respect of the liquidation, then the Union Bank should pay to the liquidators the difference, with interest at £5 per cent. per annum from the date of the agreement, but if the aggregate amount of the value of the assets should be less than the aggregate amount of the debts and liabilities and the moneys paid by the Union Bank in respect of the liquidation, then the Union Bank should, out of the proceeds of the realization of the assets specified in the schedule, retain the amount of such deficiency, with interest thereon from the date of the agreement, and in the event of such proceeds being insufficient to pay the amount of such deficiency and interest, the amount thereof should be treated as being a debt due by the Bank of South Australia to the Union Bank.

Clause 14 provided that if the assets in the hands of the liquidators were not sufficient to discharge any debt due and payable to the Union Bank under the agreement, the liquidators were, so far as they legally could, to make such calls upon the shareholders of the Bank of South Australia as might be necessary to raise the amount required to pay and discharge such debt or liability. The excepted assets above referred to, consisting of debts owing to the Bank of South Australia, were to be realized by the Union Bank and the liquidators, and applied for the benefit of the shareholders of the Bank of South Australia.

The Union Bank on the 11th of April, 1894, petitioned as creditors for the voluntary winding up of the Bank of South Australia being continued under the supervision of the court, alleging that they had paid large sums in respect of the debts of the Bank of South Australia, and that there was due to them a sum of about £400,000 in respect of payments, interest, and moneys advanced to the liquidators for the purposes of the liquidation. That the Union Bank had requested the liquidators to make calls on the shareholders to enable them to pay the amount, but that the liquidators had declined, on the ground that no liability on the part of the shareholders remained, and that the agreement could not be relied on as justifying the making of a call for any debt newly created by the agreement.

The petition for a supervision order came on first for argument.

Findlay, Q.C., Beale, Q.C., and *S. Dickinson*, for the petition, asked for a supervision order.—[VAUGHAN WILLIAMS, J.—The case presents a difficulty. The Union Bank of Australia could only petition if they were creditors at the date of the voluntary winding up.] We are creditors if only regarded as persons with the right to have these calls made.

Ingle Joyce, for the voluntary liquidator.

VAUGHAN WILLIAMS, J., said that the petitioner should have all the qualifications required of a petitioner for a compulsory order. That seemed to have been decided in *In re The Pen-y-van Colliery Co. of South Australia*, 6 Ch. D. 477, 25 W. R. Dig. 70. Whether the bank were treated as a solvent company, and the petitioners as creditors who claimed the benefit of section 158 of the Companies Act, 1862, or as an insolvent company, in which case section 10 of the Judicature Act, 1875, applied, no debt arose under the agreement—which was an agreement made with the liquidator, and, therefore, *ex facie* an agreement entered into after the commencement of the winding up—sufficient to support the petition. The petitioners had, therefore, no *locus standi* to petition. The petition would be dismissed, but without costs.

Dec. 5, 6.—The Union Bank now presented a petition that the Bank of South Australia might be compulsorily wound up by the court.

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Finlay, Q.C., Beale, Q.C., and *S. Dickinson*, for the petition.

Buckley, Q.C., and *G. P. C. Lawrence*, for the liquidator.

Ingle Joyce (*Cozens Hardy, Q.C.*, with him), for contributories.—This is practically a petition under section 145 of the Act of 1862 by a creditor alleging that he is prejudiced by a voluntary winding up. There is no power under the Act for the liquidator to contract a new debt like this. The petitioners have no debt at all, and even if they had a debt no call could be made. The liquidator could not sell with a term in the agreement imposing on the company a liability to a person not a creditor at the date of the winding up. So to agree was *ultrà vires*.

He referred to *Clinch* v. *The Financial Corporation*, 17 W. R. 84, L. R. 4 Ch. App. 117.

Finlay, Q.C., replied.

VAUGHAN WILLIAMS, J.—The Union Bank has, since the date of the agreement, paid sums exceeding the amount of the assets collected in value under the agreement, and they claim that the excess is a debt due from the Bank of South Australia to the Union Bank. Plainly it is a debt. It is said that if it is a debt there would be no object in making an order for winding up, as under clause 14 of the agreement the means of paying the debt is to be by calling up the reserve liability on the shares, and the liquidators ought not to be allowed to make such a call. [His lordship read clause 14.] It is said that there was no power to make such a provision, and if absolute it would have been *ultrà vires*, and that the words "so far as they legally can or may" were inserted because the parties knew that. I do not agree with that contention. The words were necessary, because without them the clause might be read as purporting to oblige the liquidators to call up sufficient to pay the whole of the debt, though it might far exceed the amount of the reserve liability. A debt has arisen under the agreement, and there is nothing in the agreement inconsistent with the view that it is the right and duty of the liquidators, if a compulsory order is made, to call up the amount of the reserve liability.

It is also said that the whole agreement is *ultrà vires*, but I do not think so. It does not come within section 161 of the Companies Act, 1862. When sections 95 and 133 of the Act of 1862 are looked at, it is plain that the liquidators had a right to make the agreement for sale to the Union Bank upon the terms contained in the agreement. If the Bank of South Australia and its liquidators came to the conclusion that this was the best way of realizing the assets of the company, there is nothing either in principle or in the Companies Acts which makes it wrong for the liquidators to undertake that they would, if necessary for the purpose of the agreement and the carrying out what the company had undertaken, call up the reserve liability. Then it is said that this is not a debt of the company sufficient to support a petition because it was incurred after the company had gone into voluntary liquidation. I cannot agree with that. In my opinion the debt, though contracted subsequently to the voluntary winding up, is a debt of the company; and, that being so, I cannot see anything, either in principle or in the express provision of the Acts, to prevent it from being a sufficient debt to support a petition to wind up the company. I shall, therefore, make the order.

Solicitors, *Murray, Hutchins, Stirling, & Murray; Hollams, Sons, Coward, & Hawksley.*

Q. B. Div.
(Wills and Wright, JJ.) Jan. 25.

SELF (*Respondent*) *v.* HOVE COMMISSIONERS (*Appellants*). (*a.*)

Local government—"Sewer"—Pipe receiving drainage of two adjoining houses—Nuisance—Liability to repair—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 15, 41—*Adoption of Act of* 1890 *by public authority—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *ss.* 3, 19.

The defendants, the local authority, served a notice on the plaintiff, the occupier of a semi-detached house in the defendants' district, to abate a nuisance arising from a defect in a drain. The plaintiff had the ground opened, and it was then found that the drain was connected with that of the adjoining house, and that it, in fact, served both houses. Plaintiff, however, completed the necessary repairs under the supervision and to the satisfaction of the district surveyor, paid the expenses, and sought to recover the cost so incurred from the defendants.

Held, that the defendants, having adopted Part III. of the Public Health Acts Amendment Act, 1890, *were not liable to execute the repairs, as they might, under section* 19 *of that Act, have compelled the plaintiff to have done so; and also that the notice could not be assumed to imply a request, express or implied, from the defendants to the plaintiff to do the work on their behalf.*

Travis *v.* Uttley, 42 *W. R.* 461, [1894] 1 *Q. B.* 233, *explained and distinguished.*

Appeal by the defendants from the decision of his Honour Judge Martineau, sitting at the county court of Sussex.

The plaintiff was the occupier of a semi-detached house, No. 1, Ivy-place, Hove. The defendants were the local board of health. On the 20th of April, 1894, the sanitary inspector to the board served the plaintiff with a notice in the common form to abate a nuisance. The notice set out that the drain leading from the w.c. in the yard and the paving in scullery were defective, so as to be a nuisance or injury to health, and required that the plaintiff should open and thoroughly examine the drain and make good all defects therein and cleanse and repair the scullery, or in default the defendants would take the necessary steps to have the work done under the powers given them by the Public Health Act, 1875, and the plaintiff would be held liable for costs and penalties. At that time it was supposed that there was a defect in the drain in the rear of the plaintiff's house, and the defendants' inspector served the notice on the footing that the plaintiff was liable to make good the defects in the drain under the Act of 1875. In consequence of the notice a builder or plumber employed by the plaintiff opened the ground in the presence of the sanitary inspector, and it was then found that the drain in question was connected with one at the rear of the adjoining house, which was not in the possession of the plaintiff or part of her holding, and that the drain, in fact, was a continuous drain serving both houses. The sanitary inspector did not withdraw the notice, and on the 18th of May served a fresh notice, this time on the occupiers of both houses.

The builder employed by the plaintiff proceeded to execute the work necessary to abate the nuisance to the satisfaction and under the supervision of the sanitary inspector. Before connecting the work with the "long common drain" he applied to the local authority for leave to do so; this was given, and the sum of 4s. 6d. was paid them by the plaintiff for the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

cost of forming that connection. On the work being completed, the plaintiff paid her builder the sum of £26 17s. 6d. Subsequently the plaintiff consulted her solicitor, who, relying on the case of *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233, advised his client that the "drain" was a "sewer" within the meaning of the 4th section of the Public Health Act, 1875, and that the liability to repair such a "drain" vested in the local authority.

The plaintiff thereupon applied to the sanitary authority for repayment of the sum of £26 17s. 6d., which she had just paid. This was refused, and an action was then brought.

The learned county court judge, in a considered judgment, found (1) that the two houses in fact formed two separate buildings, each with a separate curtilage or court-yard; (2) that the drain, serving as it did the two houses, was a "sewer." Upon these facts he held that the plaintiff was not originally liable, and could not have been compelled to execute the works; and that the burden of executing the repairs should have fallen on, and been discharged by, the defendants, for the reasons set out in *Travis* v. *Uttley*. On the second question, whether the plaintiff, having paid the costs of the repairs, was to be treated as a "volunteer," or whether she could be held to have executed the work at the express or implied request of the defendants, the learned judge decided that as the plaintiff could not have been legally compelled to do the work at her own expense, the money so paid by her must be assumed to have been paid under the defendants' request, express or implied by the surveyor's notice, and, therefore, the plaintiff was entitled to recover the sum so paid from the defendants. For these reasons the learned judge gave judgment for the plaintiff.

Boxall, for the appellants.—There was no request implied in the notice. In any case the plaintiff could not recover money paid under the compulsion of legal process or money paid under a mistake of law. In the present case the plaintiff had voluntarily done the work: *Moule* v. *Garrett*, 20 W. R. 416, L. R. 7 Ex. 101, 26 L. T. N. S. 367. [He cited also the third rule laid down in Smith's Leading Cases in *Lampleight* v. *Blathwait*, 7th ed., p. 148, "Where the plaintiff voluntarily does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises."] [WRIGHT, J.—When my brother Wills, J., and myself heard the case of *Travis* v. *Uttley*, was section 19 of the Act of 1890 cited to us?]

[*Macmorran*, as *amicus curiæ*, informed the court that Part III. of the Public Health Act, 1890, had not been adopted in Halifax, which was the local authority in the case of *Travis* v. *Uttley*, and although from the report of the case it appeared that reference had been made to section 19 of that Act during the argument, it was clear that the provisions of the Act of 1890 could have had no effect upon their lordships' decision. It was not expressly stated in the report that the Halifax local authority had not adopted that part of the Act of 1890.]

Boxall.—The present appellants, having adopted Part III. of the Amendment Act of 1890, could have compelled the plaintiff to do this work under section 19 of that Act, which, by sub-section (1), provides "that where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction." And sub-section 3 provides: "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building." [He was stopped.]

Channell, Q.C., and *Fooks*, for the respondent—The plaintiff was compelled to execute work which the defendants were under a statutory liability to do, and they are legally bound to repay her money so paid on their behalf. The commissioners gave the plaintiff notice to make a "new long drain in place of present defective one." This "long drain" must be held to be a "sewer" since it falls within the definition of a "sewer" and not a "drain" given in section 4 of the Public Health Act, 1875. The Amendment Act of 1890 must not be presumed to apply to any subject-matter already vested in the local authority as a "sewer" by the Public Health Act of 1875, and therefore section 19 of the Amendment Act, 1890, not being applicable to the present case, the decision given in *Travis* v. *Uttley* ought to be followed. The single drain from the house to the "common long drain" or "sewer" was treated by both parties as a private drain, and notice to connect this private drain pipe with the common sewer was properly given by the plaintiff, and a charge for doing so of 4s. 6d. was made by the local authority. If, at that time, the local authority considered that the "long drain" was a private drain, why did they themselves make this connection?

WILLS, J.—I am of opinion that the judgment of the learned county court judge cannot be supported. The ground of his decision appears to be that this notice to do the work in respect of which the claim is made was an express request to do it. I think that is a fallacy. I think it wants every element of request in the ordinary acceptation of that word; on the contrary, it is not asking the plaintiff to do it, but it is calling upon her to do it as a matter of right, and saying "If you do not do it legal proceedings will be taken against you, because we claim that it is your duty to do it." That does not, however, get rid of Mr. Channell's other point—namely, that the local board were liable to do it themselves; and as the plaintiff has done it being herself under no liability to do it, therefore, the request being implied, legal liability under those circumstances arises. There are several difficulties in the way of that proposition. In the first place, I do not think that the local board are under legal liability to do this particular work. The local board is under a legal liability to have an effective sewage system, but there is no section in the Act which says that they shall be obliged to do any particular work, and I am inclined to think that is a matter within their discretion. Actions have been attempted against local boards for not doing a specific thing, but I do not think that they have ever been successful.

But there is a higher ground than that, because I cannot help thinking that under section 19 of the Public Health Act, 1890, this liability fell upon the plaintiff. Now what is said by that section? [The learned judge then read the section.] That section applies when premises are occupied by different owners, and they are connected with the public sewer by a single drain under the interpretation clause (sub-section (3)) applicable to that particular section. Under those circumstances the Hove Commissioners would have been entitled to give a written notice under section 41 of the Act of 1875, and could have compelled the plaintiff to do, substantially, all that she has done. I regret that in the report of the case

of *Travis* v. *Uttley* the fact that in the borough of Halifax the Public Health Act of 1890 had not been adopted is not clearly stated, because it is a most important element in the facts to prevent that case from being misleading. I was puzzled, when section 19 was first read to us, to think how *Travis* v. *Uttley* could mean what it did. Fortunately the learned counsel on both sides who argued that case are in court to-day, and have given us a most satisfactory assurance that what I have stated was the fact; otherwise we should have lost the key-note to that report in this very important matter.

It seems to me, therefore, that the real liability was upon the plaintiff.

Suppose, however, it had been otherwise. In that case could the plaintiff have recovered? I think it is doubtful, and the question raises an exceedingly nice point. If a summons had actually been taken out and the plaintiff had submitted to it, then I have no doubt that she could not have recovered, for as they say, it would be allowing the same matter to be dealt with twice over in different sets of proceedings between the same parties. Here there was but a mere threat of legal proceedings, which was acquiesced in, and I am by no means sure how such a case should be dealt with. There seems no doubt that, if a legal right is put forward by a person in authority—a person having a special standing ground which enables him to exert anything like undue influence or compulsion—so that the transaction bears anything like the stamp of oppression, an action will lie, but I do not think that is the case here. The learned judge has found nothing of the kind here, and the position taken by the local board is assumed to have been quite *bonâ fide*. If there were a liability to pay the money back again by the local board, that liability could not have arisen on a mistake of fact, because there has been no mistake of fact, for the drain was opened and examined, and it is an action really founded upon a mistake as to legal liability common to both the plaintiff and the defendants. My strong impression is that under such circumstances no such action can be maintained, although the present plaintiff acted upon a threat of legal proceedings without waiting for a summons to be taken out by the other party.

For these reasons, I think that there is no legal liability, and that the decision of the county court judge was wrong, and his judgment must be reversed.

WRIGHT, J.—I am of the same opinion. I wish, however, to expand what seems to me to be one of the cardinal points of what my brother has said. It is an utter mistake to suppose that the sanitary authority here were under any legal liability whatever of the kind suggested. Their liability is governed by section 15 of the Public Health Act, 1875, and their liability is to repair existing sewers, which, of course, does not mean that everybody is discharged from all liability if there was any small sewer and it was inadequate. The local authority's liability is to repair any existing sewers and to sewer their district. Now they could perfectly well perform all their obligations under that section if they had ordered the owners of these two houses to put two single drains, one from each house, into the common adjoining sewer, nobody thinking, whatever they ordered, that the owners would not have acquiesced in it. The work which was done under the commissioners' orders was done by the plaintiff herself and paid for; and therefore there is no ground for saying that the plaintiff, having done it, can recover the money from the defendants.

I should like to say that if the case of *Travis* v. *Uttley* could be carried to the Court of Appeal so that that court might express an opinion upon the subject we were compelled to express an opinion upon, I should be very glad, in the interest of local authorities; but, in the meantime, I see no difficulty in local authorities getting out of their troubles, either, as they did here, by telling people they must put in a separate drain for each house unless they were content to acquiesce in the view of the local authority, or by adopting the Public Health Act, 1890, and seeing that written applications are made to the owners or occupiers under section 41 of the Act of 1875 whenever there is a real nuisance which ought be abated.

Appeal allowed.

Solicitor for the appellants, *J. Harwood*, for *C. A. Woolley*, Brighton.

Solicitors for the respondent, *Stokes, Saunders, & Stokes.*

Q. B. Div.
(Lawrance and Kennedy, JJ.) } Jan. 19, 21.

WILKINSON v. PEEL AND OTHERS. (a.)

Landlord and tenant—Distress for rent—End of tenancy—Occupation under agreement of part of premises—Landlord's right to distrain on part for rent due for whole—8 Anne, c, 14, ss. 6, 7.

The tenant of a farm gave, and the landlord accepted, notice to quit with regard to the farm. Before the expiration of such notice the tenant agreed to continue to occupy, and the landlord agreed to let to the tenant, a part of the farm, and, after the expiration of the old tenancy and the giving up of possession of the remainder, the tenant continued to occupy such part under the agreement. Arrears of rent being due in respect of the whole farm,

Held, that there was no right to distrain upon the part of the farm retained and occupied by the tenant for the rent due for the whole farm, inasmuch as, with regard to such part, a new tenancy had been created, and there was no holding over by the tenant.

Case stated under ord. 34, r. 1.

At the time of the distress hereinafter mentioned the plaintiff was administratrix of the estate of her deceased husband, who died on the 16th of May, 1893.

The defendants were, as trustees under a will, owners of a farm known as Brickkiln Farm, in the county of Bucks.

The deceased had been for many years tenant of the Brickkiln Farm, consisting of a house, buildings and 412 acres of land, under a yearly tenancy by parol agreement at a rent of £350, payable half-yearly at Michaelmas and Lady-day.

On the 5th of April, 1892, the deceased gave, and the defendants accepted, notice to quit the Brickkiln Farm on the 5th of April, 1893. Prior to the expiration of this notice the deceased agreed with the defendants to continue to occupy, and the defendants agreed to let to the deceased, four fields, containing forty-eight acres, being part of the Brickkiln Farm, after such expiration, and the deceased continued to occupy these four fields until his death, the rent payable for these four fields being payable half-yearly.

The deceased on the 5th of April, 1893, gave up possession of Brickkiln Farm (less the four fields which he continued to occupy under the circumstances above mentioned) under and in accordance with

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

notice to quit, and the plaintiff after the death of the deceased continued to occupy the four fields in the same manner as they had been occupied by the deceased between the 5th of April, 1893, and his death.

The deceased was at the time of his death, and the plaintiff as his administratrix was at the date of the distress, indebted to the defendants in respect of rent which had accrued due in respect of the whole farm.

The defendants claimed the right to distrain for the rent due for the whole Brickkiln Farm upon the distrainable goods belonging to the deceased's estate which were upon the four fields at the date of his death, and which had remained therein, and they issued a distress warrant for one year's rent due at Michaelmas, 1892, for Brickkiln Farm, and distrained the goods on the four fields. By agreement the goods were sold, and the proceeds amounted to £145.

The plaintiff then brought the present action for wrongful distress, and contended that, the tenancy of the Brickkiln Farm having determined by notice to quit on the 5th of April, 1893, the defendants had no right to distrain upon the goods on the four fields for the rent due in respect of the whole farm.

The defendants contended that they were entitled to distrain for rent due in respect of the whole farm under the Act 8 Anne, c. 14, s. 6.

The question for the opinion of the court was whether the defendants had the right to distrain for the rent of the whole farm upon the four fields.

J. C. Earle, for the plaintiff.—The question is whether the defendants had a right to distrain for the rent previously due for the whole Brickkiln Farm upon the four fields, and I submit they had no right to do so. What took place between the deceased tenant and the defendants created a new tenancy in these four fields. The notice to quit given by the tenant and accepted by the landlords put an end to the tenancy in the whole farm at the expiration of the notice: *Tayleur* v. *Wildin*, 16 W. R. 1018, L. R. 3 Ex. 303. That being so, the agreement between the deceased and the defendants created a new tenancy in the four fields, and the defendants are precluded from distraining for the old rent upon the four fields by their implied covenant for quiet enjoyment. The statute 8 Anne, c. 14, ss. 6 and 7, was aimed at "holding over," and does not apply to a case of this kind, where a new tenancy has been created. *Nuttall* v. *Staunton*, 4 B. & C. 51, may be distinguished, as in that case there was a holding over of a part of the farm by permission of the landlord. That was really a holding over, and the statute was held to apply. Here there was no holding over. By section 7 of the statute the distress must be made during the possession of the tenant—that is, the continuance of the possession by the tenant under the same tenancy, which was not so here.

He referred to *Turner* v. *Barnes*, 10 W. R. 561, 31 L. J. Q. B. 170.

E. F. V. Knox, for the defendants.—The distress may be made here upon the plaintiff as executrix in the same way as if the tenant had been living: *Braithwaite* v. *Cooksey*, 1 H. Bl. 465. This case is absolutely concluded by *Nuttall* v. *Staunton*, upon which I rely. The statute of Anne applies to a new tenancy, and can apply only to a new tenancy, as the holding over amounts to a new tenancy, and if there were not a new tenancy, but a continuance of the old tenancy, distress could be made apart from the statute, and the statute would not be necessary: 2 Smith's L. C., 9th ed., p. 115; *Taylerson* v. *Peters*, 7 A. & E. 110.

LAWRANCE, J.—The question is whether the defendants had the right to distrain upon the four fields. They distrained upon the goods in these four fields, and they contended that they had a right so to distrain, as these four fields formed a part of the Brickkiln Farm, and therefore they had a right to distrain under the statute of Anne. Whether or not they had the right to do so depends entirely on the question whether there was a new tenancy between the parties; whether the tenant was holding over under the old tenancy or was holding under a new tenancy. For the defendants the case of *Nuttall* v. *Staunton* was cited as an authority for showing that there was the right to distrain under the statute. That case, however, may be distinguished from this case, as there the tenant, by permission of the landlord, held over a part of the farm after the termination of the tenancy, and the question was whether such holding over by permission gave the landlord a right to distrain, and it was held that it did. There the tenant held over by the permission of the landlord, but no case has been brought to our notice that, where a tenancy has come to an end and a new tenancy has been created, a right to distrain still exists. Here the old tenancy was gone and a new tenancy in these four fields was created, and the fact that these four fields formed a part of the Brickkiln Farm does not, in my judgment, give the landlord a right to distrain upon them for the rent due for the whole farm. I think, therefore, there must be judgment for the plaintiff.

KENNEDY, J.—I agree. When we look at the statute of Anne, and the cases decided upon it—and none of these cases is exactly in point here—it seems to me that the statute applies to the case of a continuance of possession by the tenant, and not to a case where the old tenancy has come to an end, and before its determination a new tenancy has been created. The words "during the possession of the tenant," in section 7 of the statute, seem to me to mean during the continuance of the possession of the tenant. Although there was in one sense a continuance of possession here, it was a possession under a new tenancy, and that was not such a continuance of possession as was contemplated by the statute.

I think, therefore, that the statute does not apply to this case, and our judgment must be for the plaintiff.

Judgment for the plaintiff.

Solicitor for the plaintiff, *William Sturt*, for *W. R. Parrott*, Stony Stratford.

Solicitors for the defendants, *Longbourne, Stevens, & Powell.*

Q. B. Div.
(Mathew and Charles, JJ.) Oct. 31.

SWEET (*Respondent*) v. SWEET (*Appellant*). (*a.*)

Married woman—Husband and wife—Separation agreement—Wife's power to sue—Intervention of trustee—Adultery of wife—Public policy—Covenant against molestation and annoyance—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

In a separation deed a covenant, by which the husband undertakes to pay an annuity to the wife without restricting her right by a dum casta *clause, is good and not against public policy, although the wife afterwards commits adultery, and although the deed is made without the intervention of a trustee.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

A married woman is not debarred from suing under section 1, sub-section 2, of the Married Women's Property Act of 1882 on a contract not made in respect of her separate estate.

In a separation deed the word "annoy" in a covenant not to molest, annoy, or interfere with the husband does not extend the meaning of the covenant so as to cover the adultery of the wife.

Appeal from the Brompton County Court.

In the action the respondent sued for and recovered a sum of £4 6s. 2d., the amount of a monthly instalment of an allowance due to her under a separation deed. The deed was dated the 9th of November, 1883, and was made between the husband and wife without the intervention of a trustee, and it contained, among others, a covenant on the part of the wife not to "molest, annoy, or interfere with" the husband, but did not contain any *dum casta* provision.

It was admitted at the trial that the wife had been guilty of adultery subsequently to the execution of the deed, and had had children, the fruits of adultery.

Oswald, Q.C., and *Stanley Lambert*, for the appellant, the husband.—When a separation deed is made without the intervention of a trustee the subsequent adultery of the wife is a bar to the recovery by her of an allowance under the deed, notwithstanding the absence of a *dum casta* clause, because she must come into court with clean hands. The separation deed is bad because before the Married Women's Property Act of 1882 a woman could only make a contract with her husband in two cases: (1) with the intervention of her trustee; (2) by way of settlement of some matrimonial dispute: *Macgregor* v. *Macgregor*, 36 W. R. 470, 20 Q. B. D 529, on app. 37 W. R. 45, 21 Q. B. D. 424. All that the Married Women's Property Act did was to enable a married woman to contract in respect of her separate property: *Palliser* v. *Gurney*, 35 W. R. 760, 19 Q. B. D. 519. Further, the adultery was a breach of the covenant not to "molest, annoy, or interfere" with the appellant, and *Fearon* v. *Lord Aylesford*, 32 W. R. 718, 12 Q. B. D. 539, is distinguishable on the ground that in that case the deed only contained the word "molest"; but the word "annoy" is sufficient to cover the adultery.

Montague Lush, for the respondent, the wife, was not called on.

MATHEW, J.—The appeal must be dismissed. Section 1, sub-section 2, of the Act of 1882 is as follows:—"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing or being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*." Obviously, the meaning of the section is that she is only liable to the amount of her separate property. It is said that where there is no trustee, misconduct is an answer, to an action by the wife on the deed, even though there is no *dum casta* clause, on the ground of public policy. And it is pointed out that the cases where the husband was held liable in spite of the adultery of the wife were all cases in which a trustee intervened in the separation deed. But the Master of the Rolls in *Fearon* v. *Lord Aylesford*, 33 W. R. 331, 14 Q. B. D. 792, does not refer to the presence of a trustee; and I hold that the presence or absence of a trustee is immaterial. The Master of the Rolls, at p. 799, says: "If this point were now for the first time to be decided, I myself absolutely refuse to say that, owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, or after any effluxion of time, public policy requires that—whatever may have been the temptation under which the woman has succumbed—the husband shall not be obliged to pay her the annuity, which he has undertaken to pay her without any such condition being expressed. But there is more than that. It seems to me that the point has been decided in England for many years, for if ever there was such a doctrine in law, it must have existed during the whole of that time, and yet it has been again and again overlooked."

I further hold that there is no distinction between the words "molest" and "annoy" in a separation agreement.

CHARLES, J.—The main argument is the absence of a trustee. On reference to authorities it is quite plain that it was competent for the wife to enter on such a contract. It is quite true that in all the cases a trustee actually did intervene. The question is whether it is essential now. I think not, for the Act of 1882 has conferred on the wife the right to sue without the intervention of a trustee. Again, it is said that there has been a molestation and annoyance, but I am clearly of opinion that *Fearon* v. *Lord Aylesford* applies. The word "annoy" is no extension of the meaning of "molest."

Appeal dismissed.

Solicitors for the appellant, *Windybank, Samuels, & Bearens.*

Solicitor for the respondent, *Churchill.*

Prob. Div. & Adm. Div. Divorce. } Dec. 17, 21.

MEREDYTH v. MEREDYTH AND LEIGH. (a.)

Divorce—Variation of settlement—Extinguishment of rights of children of subsequent marriage—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

Where the only remaining interests under a marriage settlement of freehold property brought in by the husband, who had obtained a decree for dissolution of the marriage on the ground of his wife's adultery, other than those of the husband and wife, were trusts in favour of children of the husband's second marriage, the court, in the exercise of the powers given to it by section 5 of the Matrimonial Causes Act, 1859, *ordered the trustees of the settlement to reconvey the property to the husband for his own use.*

Motion on behalf of Sir Henry Bayly Meredyth, the petitioner, for a variation of the settlement made upon his marriage, which had been dissolved on the ground of the adultery of his wife with the co-respondent.

It appeared from the registrar's report that the settlement was of freehold lands in Ireland in trust—subject to an annuity to the respondent—for the petitioner for life, with remainder to the eldest or other son of the marriage, with remainder to the sons of any other marriage of the petitioner, with remainder to his brother and his brother's sons, with remainder to the daughters of the marriage of the petitioner and respondent, with remainder to the petitioner. There was no surviving child of the marriage, and petitioner's brother had died a bachelor.

Dec. 17.—*Inderwick, Q.C.*, and *Priestley*, for the petitioner, asked, under section 5 of the Matrimonial Causes Act, 1859, that the respondent's interest might be extinguished and the trusts administered as though

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

she were dead, and that the settlement might be varied by ordering the trustees to reconvey the property to the petitioner for his own use. The registrar recommended the first part of the order asked for, but referred the last point to the court, having regard to the decision of the Court of Appeal in *Paul* v. *Paul*, 30 W. R. 801, 20 Ch. D. 743.

Cur. adv. vult.

Dec. 21.—JEUNE, P., after stating the facts, said: I am asked, under section 5 of the Matrimonial Causes Act, 1859, to make an order which will have the effect of putting an end to the settlement and restoring the property affected by it to the petitioner. It is clear that recourse must be had to the powers conferred by that section if the wish of the petitioner is to be effected. The decision of Lord Ellenborough in *Clayton* v. *Earl of Winton*, 3 Madd. 302 note (*a*), explained by Fry, J., in *Gale* v. *Gale*, 25 W. R. 772, 6 Ch. D. 144, 150, shows that a conveyance by the petitioner to a purchaser for valuable consideration would not, even if the respondent were dead, confer a good title. Nor could the petitioner, as the law now stands, according to the decision of the Court of Appeal in *Paul* v. *Paul*, claim to set aside the settlement on the ground of the children of a second or subsequent marriage being volunteers. In the case of *Hastings* v. *Orde*, 11 Sim. 205, in which, after a divorce by the House of Lords, Shadwell, V.C., held that the divorced wife was not bound by an ante-nuptial settlement made by her, the decision appears to have turned on the fact that the wife at the time of the marriage was an infant.

I am not aware of any case similar to the present, in which the court has been asked to deal with a settlement. There is undoubted power to deal with the capital of a settled fund for the benefit of a party to a disolved marriage in such manner as the alteration of circumstances by the dissolution renders proper: *Ponsonby* v. *Ponsonby*, 32 W. R. 746, 9 P. D. 122. At the same time, the court will not disturb settlements further than the alteration of circumstances warrants, and will respect the interests of those whose conduct has not been impugned. The case of *Noel* v. *Noel*, 33 W. R. 552, 10 P. D. 179, is an illustration of the care exercised in carrying out these principles. But in this case, the effect of the dissolution of the marriage has been, in the circumstances which have occurred, to render the rights of the children of a future marriage of the petitioner the sole limitation upon his absolute enjoyment of the property which he brought into settlement. Is it not, therefore, reasonable that the power of the court should be exercised in the way the petitioner asks? I think that it is. There is no living person whose interests can be prejudiced, and the only persons who, if they come into existence, will be affected are children for whom the petitioner may naturally be expected to provide. As the main objects of the settlement have been frustrated by the divorce, I think it would be unfortunate that the petitioner should remain unable to deal with the property in question by way of resettlement, or otherwise, solely on account of provisions of the settlement which can only be regarded as subordinate and speculative. It appears to me that this is a case in which the power conferred by the Legislature may properly be exercised. I think, therefore, that there should be an order upon the trustees to reconvey the property to the petitioner for his own use.

Motion allowed.

Solicitors, *Hargrove & Co.*

Court of Appeal.

From Q. B. Div. (Bank.) (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 22.

Ex parte OFFICIAL RECEIVER. (*a*.)

Bankruptcy—Bankruptcy notice—"Final judgment"—Order of Bankruptcy Court setting aside deed—Order for payment of costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52, *s.* 4, *sub-section* 1 (g).

A "final judgment," so as to support a bankruptcy notice within section 4, *sub-section* 1 (g), *of the Bankruptcy Act,* 1883, *means a final judgment in an action.*

Therefore, an order made by the Court of Bankruptcy upon motion under section 102 *of the Bankruptcy Act,* 1883, *setting aside a deed of assignment of certain of the bankrupt's property and directing the assignee to pay the costs of the motion, is not a "final judgment" within the meaning of section* 4, *sub-section* 1 (g), *of the Bankruptcy Act,* 1883, *so as to support a bankruptcy notice against the assignee by reason of his non-payment of the costs.*

Appeal from the refusal by Mr. Registrar Brougham to issue a bankruptcy notice.

The official receiver, as the trustee of a bankrupt moved under section 102 of the Bankruptcy Act, 1883, before Vaughan Williams, J., to set aside a deed of assignment of a patent, executed by the bankrupt before his bankruptcy, as being fraudulent and void as against creditors, and the learned judge made an order setting aside the deed and directing the assignee to pay the taxed costs of the motion. The assignee not having paid the costs, the official receiver applied for the issue of a bankruptcy notice in respect thereof, under section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, but the registrar refused, upon the ground that the order for the payment of costs was not a final judgment in an action, and was not, therefore, within the sub-section.

The official receiver appealed.

Muir Mackenzie, for the official receiver.—The registrar was wrong. It is not necessary that there should be a final judgment in an action. It is sufficient if there is an order in a proceeding which finally determines the dispute between the parties on the merits: *per* Lord Selborne in *In re Faithfull, Ex parte Moore*, 33 W. R. 438, 14 Q. B. D. 627. The notice of motion is equivalent to a writ in an action: *per* Cave, J., in *In re Ruthbone, Ex parte Paterson*, 35 W. R. 735.

He also referred to *In re Chinery, Ex parte Chinery*, 32 W. R. 469, 12 Q. B. D. 342; *In re Sanders, Ex parte Whinney*, 13 Q. B. D. 476, 32 W. R. Dig. 11; *In re Binstead, Ex parte Dale*, 41 W. R. 452, [1893] 1 Q. B. 199.

Lord ESHER, M.R.—In my opinion the authorities are too strong against the appellant, and the learned registrar's judgment is right.

LOPES, L.J.—The order here was not a judgment in an action. The authorities clearly show that section 4, sub-section 1 (*g*), being in the nature of a penal action, is to be construed strictly, and we should be contradicting our former decisions if we held this to be a "final judgment" within the meaning of that sub-section.

RIGBY, L.J.—This is a final order, and is very like a judgment, but it is not a judgment in an action, and the authorities show that the words "final judg-

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

ment" in section 4, sub-section 1 (*g*), mean a final judgment in an action.

Appeal dismissed.

Solicitor for the appellant, *S. R. Pollard.*

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) } Nov. 30; Dec. 7.

In re HAWKINS.
Ex parte TROUP. (*a.*)

Bankruptcy—Judgment debt—Power of court to inquire into consideration for debt—Application for receiving order—Compromise, reasonableness of—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

The doctrine laid down in Ex parte Lennox, In re Lennox, 34 *W. R.* 51, 16 *Q. B. D.* 315, *that the Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, even though the judgment was the result of a compromise, is not confined to cases in which the judgment was obtained by fraud on the part of the judgment creditor. Apart from fraud, if the court is of opinion that the compromise was not a fair and reasonable compromise between the parties, the court will refuse to make a receiving order on a bankruptcy petition founded upon the judgment.*

So held by Lord Esher, M.R., *and* Lopes, L.J. (Rigby, L.J., *dissenting*).

Appeal from the refusal of Mr. Registrar Hope to make a receiving order.

The petitioning creditor, Troup, presented a bankruptcy petition against the debtor founded upon a judgment and upon a bill of exchange of which the debtor was the acceptor.

On the hearing of the petition, evidence was given from which it appeared that an action had been brought upon the bill of exchange by Troup against the debtor. The action had been compromised by consent upon the terms that judgment should be entered against the debtor for an agreed amount. The registrar came to the conclusion on the evidence before him that the agent of Troup when he took the bill of exchange had notice that the debtor's acceptance of the bill had been obtained by fraud. The registrar refused to make a receiving order against the debtor.

The petitioning creditor appealed.

Lawson Walton, Q.C., and *Gregson Ellis*, for the appellant.—Admitting that the Court of Bankruptcy has power to go behind a judgment debt and ascertain whether there was any consideration for the debt, nevertheless the judgment in this case, being founded upon a compromise of a doubtful claim, is binding on the court, as the evidence does not show that the compromise had been brought about by a fraud upon the debtor or by collusion between the parties.

Sir Henry James, Q.C., H. Reed, Q.C., and *Carrington*, for the respondent.

In the course of the arguments the following cases were referred to:—*Ex parte Lennox*, 34 W. R. 51, 16 Q. B. D. 315; *Ex parte Kibble*, 23 W. R. 433, L. R. 10 Ch. App. 373; *Ex parte Banner, In re Blythe*, 30 W. R. 24, 17 Ch. D. 480; *In re Fraser, Ex parte Central Bank of London*, [1892] 2 Q. B. 633, 41 W. R. Dig. 16.

Cur. adv. vult.

Dec. 7.—Lord ESHER, M.R.—In this case an application was made to the registrar on behalf of Troup to make Hawkins, the debtor, a bankrupt by making a receiving order against him. The registrar refused that application, and from that refusal this appeal is brought. The receiving order was asked for on the ground that Hawkins was the judgment debtor of Troup, Troup having obtained a judgment against him for £500 on a bill of exchange accepted by Hawkins. No doubt that judgment, as between the parties, is a final and binding judgment; but the registrar thought that he was bound, certain allegations having been made before him, to go behind that judgment and see how it had been obtained, and whether it was, according to the rules that have been laid down in bankruptcy, a judgment upon which a receiving order should be made.

Before the registrar, evidence was given as to all the circumstances which led up to the judgment, and the registrar, on that evidence, came to certain conclusions of fact, and then, in exercise of his judicial discretion, he refused to make the receiving order asked for. It does not follow that the debtor cannot be made a bankrupt on some other bankruptcy petition. If he were to be, the question might then arise whether or not this judgment creditor has such a debt as is properly provable in bankruptcy. But the question in this case is whether this judgment creditor has a good petitioning creditor's debt.

It has been argued that this case is not one of the ordinary type in which the Court of Bankruptcy goes behind a judgment and finds that it cannot be supported, and that there is, therefore, no debt provable in bankruptcy.

It is said that in this case the judgment was founded upon a compromise of a doubtful claim, and that, when once it has been shown that a judgment is the result of a compromise, the court has no power to inquire into the circumstances under which the compromise was arrived at. In my opinion the cases show that, even although a judgment may be by consent or the result of a compromise, the judgment does not of itself bind this court when administering the law in bankruptcy. The court will inquire into the whole circumstances of the case, because in bankruptcy the question is not merely a dispute between two parties, but the proceedings affect the rights of all the other creditors. The Court of Bankruptcy, therefore, has to go into the whole matter, and see, not only whether it is, upon the whole, right between the parties, but also whether it is fair to the other creditors that the debtor, on that transaction between himself and the petitioning creditor, shall be made a bankrupt; and, in the same way, when once a man has been made a bankrupt, the court will, when considering the question of admitting a debt to proof in the bankruptcy, inquire into all the circumstances under which the judgment has been obtained, and will say whether or not it is right to admit the particular debt to proof, the result of doing which is to materially affect the position of the other creditors. The court has gone so far as this, even supposing that all the creditors are agreed on the matter, nevertheless, as the court has to take on itself all the responsibility of administering the debtor's estate, the court will interfere and set the matter aside unless it is satisfied that the whole transaction is satisfactory and fair as between all the parties.

Therefore, in my opinion, it is the duty of this court to inquire into all the facts of this transaction which led up to the signing of the judgment. The court has then to say whether, having regard to everything which has taken place, the court is of opinion that the compromise was just and proper. If, when all the facts are laid before the court, the

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

court, when it comes to consider the matter, has a reasonable doubt whether the compromise is one with which, knowing what it now does, it can agree, then the court will not uphold it; that is so even if all the facts are present to the minds of both parties to the compromise at the time when it is made, and still more so if one party entered into the compromise in ignorance of the real circumstances of the case, although it is not necessary that that ignorance should have been brought about by the fraud of the other party. Quite apart from any question of fraud, the court is, in my opinion, not bound by a compromise if, on a consideration of all the circumstances, it comes to the conclusion that the compromise is not a fair and reasonable compromise between the parties. [His lordship then dealt with the evidence in the case, and proceeded:—] Under these circumstances I have no doubt myself that the compromise was an unfair one, and if it was unfair—I do not say fraudulent—the Court of Bankruptcy will not allow the judgment founded upon it to be used for the purpose of making the debtor bankrupt.

I am therefore of opinion that this appeal ought to be dismissed.

LOPES, L.J.—I am of the same opinion. There are two questions that arise in this case. The first is, Had the registrar discretion to go behind this judgment, which was founded on a compromise? Secondly, if he had, did he rightfully exercise that discretion?

Now, that the registrar has a discretion to go behind a judgment and refuse to make a receiving order is clear. The rule of conduct is defined in section 7, sub-section 3, of the Bankruptcy Act of 1883, which says: "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other or sufficient cause no order ought to be made, the court may dismiss the petition." It therefore is clear that the registrar is entitled to go behind the judgment and inquire, notwithstanding the judgment, whether there is a good debt, and this at the instance of the debtor himself, and though the judgment itself cannot be set aside. I am quite clear that I cannot state the law on that subject so ably and so happily as it has been stated by the Master of the Rolls in a case of *Ex parte Lennox, In re Lennox*, and I am going to read part of the Master of the Rolls' judgment at p. 321 (16 Q. B. D.), where he says this: "It seems to me that the question is not so much what is the right of the debtor, or what the conduct of the debtor or of the creditor has been, but rather whether the court ought to exercise this great power, which deals not only with the particular debt of the petitioning creditor, but with the whole class of the creditors of the debtor, including the petitioning creditor; whether the court of bankruptcy ought to exercise its power and authority when there are the strongest grounds for believing that there is no petitioning creditor's debt upon which it can be put in motion, and the whole foundation upon which the court is authorized and empowered to do such a thing as to make a receiving order or to declare a man a bankrupt is that a petitioning creditor's debt exists. It is not denied that at a subsequent stage of the proceedings, upon the suggestion of another creditor, this very petitioning creditor's debt, if the allegations now made were then made, must be inquired into, and that, if what is now stated were then proved, the debt would no longer be considered a debt in the Court of Bankruptcy, although judgment had been obtained for it. The petitioning creditor's debt on which the bankruptcy proceedings had been founded would be struck out altogether, and he would have no claim to interfere in the proceedings, and the court would find itself in this position: that it had used its authority to declare a man a bankrupt upon a debt alleged to exist when there was really never any such debt at all. I cannot help thinking that this goes a long way to show that the court would be placed in an entirely false position. So far as the debtor is concerned it might well be said that it was his own fault; why did he consent to the judgment? But I do not think that the power of the Court of Bankruptcy is to be exercised merely by way of punishment against the debtor. The court ought not to be forced to act when, according to its own rules, the very foundation of its action is cut away. I think it ought in such a case to hold its hand at the very earliest stage of the proceedings and to decline to exercise its jurisdiction."

Now, it is impossible to express my views more clearly than they are expressed in that portion of the judgment which I have read. It is therefore, I say, clear that the Court of Bankruptcy is not bound by a judgment at law, but is entitled to investigate all the facts of the case whenever, but not before, a *primâ facie* case implicating the judgment is made out, otherwise a man might defeat all his first creditors by allowing judgment to be given by default or consent. The principle appears to me to be this: that it would be unjust or impolitic to allow a man to be subject to the pains and penalties of bankruptcy unless it was established that there were grounds for so doing by the existence of a good petitioning creditor's debt, and unjust to the general body of creditors to permit one creditor, by means of a judgment which had no solid foundation, to obtain an undue advantage over them and obtain payment of his alleged debt in full to their prejudice. So much generally. But this point is taken here. It is said that although that may be true with regard to an ordinary judgment, a judgment founded on a compromise by the parties stands in a different position, and ought not to be subject to the same investigation as may be applied to a judgment not so circumstanced. Now I see no distinction. In my judgment both may be inquired into, whether it be an ordinary judgment obtained by compromise or by consent, directly, and not before, it is made out that either one or the other has been improperly or unfairly obtained. I do not go the length of saying that it need be made out that it is fraudulent; it is sufficient, in my judgment, if it is made out that it was improperly or unfairly obtained.

But then comes the other question, Has the registrar rightly exercised that discretion? I am of opinion that he has. In my opinion, the compromise here was not fairly obtained. I mean by that that there was an amount of knowledge of the circumstances belonging to the case on the one side which was not shared in by the other side—which was not communicated to the other side—and that that made it 'an unfair compromise, and one which it seems to me might be described as *impar congressus*. [His lordship then dealt with the evidence in the case, and stated that in his opinion the evidence showed that the compromise had not been fairly obtained.]

In these circumstances, I think we are entitled to hold that the judgment obtained by that compromise was an unfair one, and one upon which we are fully entitled to go into that judgment, and, having ascertained the circumstances, to say that this application for a receiving order ought to be dismissed.

RIGBY, L.J.—This case is one of great importance, both as regards the administration of the bankruptcy law, and also in the way in which it affects the

position of the parties to this case. It is therefore my duty, as I have the misfortune to differ from the majority of this court in the view I take of the facts of this case, and also to a small extent as to the law to be applied to these facts, to state my conclusions at some length. I agree that the registrar has power under certain circumstances in the exercise of his judicial discretion, to refuse to make a receiving order.

With reference to the bankruptcy law, the Court of Bankruptcy has always been considered as a court not only of law, but of equity. The law of bankruptcy is founded either upon the common law or upon the equity of the old Court of Chancery, subject to any statutory additions which have been made.

The origin of the doctrine that the circumstances of a judgment debt may be inquired into is that in the Court of Chancery it was well established that voluntary creditors were not allowed to compete with creditors who had given valuable consideration for their debts. The doctrine was that you might go behind a judgment debt in order to ascertain whether any consideration had been given for the debt. If it appeared that no consideration had been given, then the debt was always treated as any other voluntary debt, as not entitling the judgment creditor to enter into competition in the bankruptcy with other creditors for valuable consideration. With reference to that part of the jurisdiction, it will have to be considered when the case arises whether that doctrine has not been altogether displaced by an enactment contained in the Bankruptcy Act, 1869, which was held by this court in *Ex parte Pottinger, In re Stewart*, 26 W. R. 648, 8 Ch. D. 621, to have altogether done away with and abrogated the old doctrine as to voluntary debts. It would therefore have to be considered whether that part of the jurisdiction —namely, to inquire into the consideration—has not been done away with by the statute law applicable under the Act of 1869 and subsequent Acts as interpreted in *Ex parte Pottinger*. But, apart from the question of consideration, there was another doctrine which formed the whole doctrine of the Court of Bankruptcy on the subject, that is, that under no circumstances will a debt obtained by fraud be treated as a valid debt in competition with the debts of other creditors. The fraud in this connection may be of two kinds. There may be a fraud on the other creditors brought about by the collusive signing of a judgment where there is no debt due at all. Formerly the creditor had to make an affidavit as to the truth and reality of his debt, and it was laid down in *Ex parte Bryant*, 1 Ves. & B. 211, and it is still the law, that the debt must really be owing in order to entitle the creditor to proof in bankruptcy. So much for that part of the acknowledged doctrine of the courts of bankruptcy which depend upon the principle that no one should by collusion create debts which were not real debts or act in any way to pretend a debt when it did not really exist. That is equally the law now, it never has been changed. The principle is a true and equitable one, and will, I hope, always be maintained to the utmost extent. In the present case, however, that is out of the question, because, whatever else may be said of the proceedings which led up to this judgment, they were in no sense collusive proceedings; it was not the intention of the parties to create a fictitious debt for the purpose of altering the administration of the assets in bankruptcy. There is no suggestion that the parties were acting in collusion—as a matter of fact, they were at arm's length. But there is another point which still remains, and that is where the creditor obtains his debt by fraud upon the debtor. In such a case there is not in truth and reality any debt at all. But according to my reading of the decisions the doctrine stops there. I do not find that the court has any jurisdiction to inquire into the fairness or reasonableness of a compromise, provided that the compromise is not tainted by fraud. To say otherwise would, to my mind, be to introduce into the law of bankruptcy an exception which does not run through the law of bankruptcy. As I understand the law, if a debt has been created honestly, although it may be voluntary and entirely without consideration, then the creditor is entitled to come in and prove for his debt in bankruptcy. Many cases might be instanced in which debts are admitted to proof which will undoubtedly prejudice the claims of the other creditors by diminishing the dividend, but in my opinion you cannot in the absence of fraud go behind a debt which is binding, simply because it is improvident.

I am not now dealing with debts which are against the law, but only with those which are improvident, and my view is that, unless fraud can be proved, the transaction, however improvident it may be, is perfectly good. I cannot accept the test of fairness or reasonableness. Fraud must be shown. It is true that in *Ex parte Banner, In re Blythe*, 40 W. R. 24, 17 Ch. D. 480, the court did go behind a compromise and judgment, and refused to admit a proof founded upon it, but if ever there was a case of fraud which entirely disabled the creditor from sustaining his debt, that case was one, and that case is, therefore, not an authority against my view. [His lordship proceeded to comment on the facts of the case, as to which he came to the conclusion that a case of fraud had not been made out, that the compromise was a fair compromise of a doubtful claim, and that there was a good consideration for the judgment, and that the appeal ought, therefore, to be allowed.]

Appeal dismissed.

Solicitors for the appellant, *Cooper & Bake.*

Solicitor for the respondent, *Langlois & Biden.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 4, 18.

ROBERTS v. PLANT. (a.)

Practice—Writ—Specially-indorsed writ—Application for judgment—Amendment of indorsement after summons taken out—R. S. C., 1883, *ord.* 3, *r.* 6; *ord.* 14, *r.* 1—*Judge at chambers—"Matters of practice and procedure"—No power of reference—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (4).

On the hearing of a summons under order 14 in an action on a cheque the defendant objected that the writ was not specially indorsed, by reason of its not containing a statement that notice of dishonour had been given. The summons having been adjourned, the plaintiff without leave amended the indorsement by adding a statement that notice of dishonour had been duly given, and at the adjourned hearing the district registrar made an order for judgment.

Held, that the plaintiff had rightly amended the indorsement, and that the district registrar had jurisdiction to make the order.

Having regard to section 1, *sub-section* (4), *of the Judicature Act*, 1894, *in matters of practice and procedure, a judge at chambers has now no power of referring a summons either to the Divisional Court or the Court of Appeal; in every such case the proper practice now is*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

for the judge in chambers to adjudicate upon the summons.

Appeal by the defendant from an order of a divisional court on an application for judgment under order 14.

The action was brought to recover a sum of money due on a dishonoured cheque. The indorsement on the writ, as originally drawn, gave particulars as to the cheque, but did not state that notice of dishonour had been given to the defendant. The defendant having appeared to the writ, the plaintiff took out a summons for judgment under order 14.

On the hearing of the summons before the district registrar, the defendant objected that the writ was not a specially-indorsed writ within the meaning of ord, 3, r. 6. The hearing of the summons was adjourned, and the plaintiff without obtaining any leave amended the indorsement on the writ by adding a statement that notice of dishonour had been duly given to the defendant. At the adjourned hearing the district registrar made an order for judgment under order 14. The defendant appealed, and Lord Russell of Killowen, C.J., at chambers, referred the matter to the court.

The Divisional Court (Pollock, B., and Grantham, J.) heard the appeal, and affirmed the order of the district registrar.

The defendant appealed to the Court of Appeal.

A. T. Lawrence, for the defendant.—[LOPES, L.J.—Had the Divisional Court any power to deal with this matter at all? Is not their jurisdiction taken away by the Judicature Act, 1894, s. 1, sub-section 4, which says that "in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal"?] A judge at chambers is the representative of the High Court, and it is immaterial whether a judgment of the High Court is delivered by one judge at chambers or by two judges in court. [Lord ESHER, M.R.—We will hear this appeal now. But we will consult with the other Lords Justices as to the proper practice to be observed with regard to the reference of summonses at chambers, and we will state the opinion of the court on some future occasion.] The plaintiff has not complied with the provisions of order 14. Rule 1 requires that, before the plaintiff makes his application, the defendant shall have appeared to a writ of summons specially indorsed under ord. 3, r. 6. Here the writ was not specially indorsed when the plaintiff took out the summons. An averment that notice of dishonour has been given to the drawer is an essential part of a special indorsement in an action on a dishonoured cheque: *Frühauf* v. *Grosvenor*, 61 L. J. Q. B. 717, 41 W. R. Dig. 188. The plaintiff having made a fatal mistake at the time when he took out the summons, it was not open to him to amend the indorsement and then proceed on the same summons: *Gurney* v. *Small*, [1891] 2 Q. B. 584, 40 W. R. Dig. 192; *Paxton* v. *Baird*, 41 W. R. 88, [1893] 1 Q. B. 139. The new sub-section (*b*) to rule 1 does not provide for such an amendment as was made in this case.

T. W. Chitty, for the plaintiff.

Lord ESHER, M.R.—The objection is that, when the plaintiff took out his summons under order 14, he had not brought his case within the terms of rule 1 of that order, because the indorsement on the writ did not state that notice of dishonour had been given, and, therefore, was not a special indorsement. It is said that, when that objection was pointed out, the plaintiff could not amend the indorsement and proceed on the same summons, but that he was bound to take out a fresh summons and incur further expense. I am of opinion that the plaintiff was entitled to make the amendment, and that as, when the matter came before the district registrar for adjudication, the terms of ord. 14, r. 1, had been complied with, the registrar had power to make the order for judgment. The appeal must, therefore, be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

February 18.—On this day, during the hearing of an appeal in the case of *Hood-Barrs* v. *Cathcart*, in which Day, J., at chambers had referred a summons for the appointment of a receiver to the Court of Appeal,

Lord ESHER, M.R., said:—We have consulted with the other members of the court as to the point of practice which arose in the case of *Roberts* v. *Plant*, with regard to the power of referring summonses from chambers. We are of opinion that, under the Judicature Act of 1894, the old power of referring summonses at chambers by a judge to the Divisional Court, so far as regards cases in which the appeal now lies direct from the judge at chambers to the Court of Appeal, is gone. Neither can a summons be referred to this court. We think that the proper practice is for the judge at chambers in every such case either to make an order on the summons or to refuse to make any order, giving leave to appeal if it is necessary, and if he thinks proper so to do.

Solicitors for the plaintiff, *C. Robinson & Co.*

Solicitors for the defendant, *T. A. Dennison & Co.*, for *Plant*, Dudley.

From Q. B. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) } Nov. 28; Dec. 19.

MIDLAND RAILWAY CO. v. GUARDIANS OF THE POOR OF EDMONTON UNION. (*a*.)

Poor law—Commencement of proceedings—Prosecution with "due diligence"—Limitation of time for payment of debt—Justices—Quarter sessions—Taxation of costs out of sessions—Consent—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict. c.* 49), *ss.* 1, 4—12 & 13 *Vict. c.* 45, *s.* 8.

On an appeal at quarter sessions on the 13*th of July*, 1892, *the present defendants, the E. Union, were ordered to pay to the present plaintiffs the costs of the appeal. No application was made and no consent given to tax the costs out of sessions. In November following the clerk of the peace refused to tax the costs, and on the* 7*th of January*, 1893, *the court of quarter sessions, then sitting, made an order for taxation, and on the* 26*th of January*, 1893, *the costs were taxed. An unsuccessful attempt was made to quash that order. The present defendants then declined to pay the amount, on the ground that by section* 1 *of* 22 & 23 *Vict. c.* 49 *they were prohibited from paying any debt except within the half-year when it had been incurred, or within three months after the expiration of that half-year. The plaintiffs, on the* 2*nd of March*, 1894, *commenced this action against the defendants for a* mandamus, *asserting that they were entitled to payment under section* 4 *of the same Act, because they had, within the time limited by section* 1, *commenced proceedings before a competent authority to obtain taxation of the costs, and had prosecuted the same with due diligence to final settlement of sthe claim.*

Held, by Lord Halsbury *and* A. L. Smith, L.J.

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(Lindley, L.J., *dissenting*), *that the effort by the present plaintiffs to tax the costs in November*, 1892, *was not the commencement of proceedings within the meaning of section* 4, *but was an effort to complete other proceedings begun in July. Further, until the sum of money to be paid by the present defendants was ascertained, there was no debt, claim, or demand become due or incurred by the present defendants, and as the costs were ascertained on the* 26*th of January*, 1893, *and the action was not begun until the* 2*nd of March*, 1894, *the defendants could not lawfully pay the costs.*

Appeal by the defendants from an order of Charles, J.

The action was for a *mandamus* to enforce an order of quarter sessions, dated the 13th of July, 1892, by which the present defendants were ordered to pay the present plaintiffs' costs of a poor law appeal.

The writ in the present action was not issued until the 2nd of March, 1894, and the defendants had a good defence to it under the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), s. 1, unless the case were brought within section 4 of the same statute.

Section 1 provides that, "with respect to any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. . . . Provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made for a period not exceeding twelve months after the date of such debt, claim, or demand." On the 13th of February, 1894, the Local Government Board refused to extend the time.

Section 4 provides that "if any person claiming any debt or demand shall have commenced or shall hereafter commence proceedings before any justice or other competent authority within the time appointed, or any extension of the same, and shall, with due diligence, prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians against whom the same may be brought, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period provided, and all proceedings taken by *mandamus* or otherwise for the enforcing of such judgment without delay shall be deemed to be within the operation of this section."

The poor law half-years expire on the 25th of March and the 29th of September.

In 1892 the present plaintiffs and the present defendants were engaged in litigation with reference to a poor law matter. In the course of that litigation —viz., on the 13th of July, 1892—upon an appeal at quarter sessions, the present defendants were ordered to pay to the present plaintiffs the costs of the appeal.

In November, 1892, the present plaintiffs sent in their bill of costs to the clerk of the peace to be taxed, and they obtained an appointment for the 5th of December, 1892. The clerk of the peace, however, declined to tax them, on the ground that there was no agreement to tax out of sessions, and that he had no jurisdiction to tax them. The present plaintiffs thereupon, on the 7th of January, 1893, applied to the next quarter sessions for an order to tax the costs, and the court made an order accordingly, and on the 26th of January, 1893, in obedience to this order, the costs were taxed at a sum of £206 17s. 7d. The present defendants still refused to pay, and, after some delay —viz., on the 29th of June, 1893—the defendants removed this order into the High Court under 12 & 13 Vict. c. 45, s. 18, and on the 7th of August, 1893, they moved for and obtained an order *nisi* to quash it, on the ground that the court of quarter sessions had no jurisdiction to make it. Cause was shown by the present plaintiffs against the rule in November, 1893, and the rule was then discharged with costs. From this order of the High Court there had been no appeal. The order of the 7th of January, 1893, was made on the ground that, although there had been no express agreement to tax the costs out of sessions, there had been an implied agreement to that effect. The High Court apparently arrived at the same conclusion when it refused to quash the order of the 7th of January, 1893.

On the 2nd of March, 1894, the present action was instituted by the railway company against the guardians for a *mandamus* to enforce the order of quarter sessions for the payment of costs.

Charles, J., at the trial of the action held that the application to tax in December, 1892, was a "commencement of proceedings" within section 4 of the Poor Law (Payment of Debts) Act, 1859; that they had been prosecuted with due diligence; and therefore granted a *mandamus* to enforce the order of quarter sessions.

The defendants, the guardians, appealed.

A. Macmorran and *R. Cunningham Glen*, for the appellants.—The statute has been held to be in the nature of a statute of limitations: see *Baker* v. *Guardians of the Billericay Union*, 2 H. & C. 642, 12 W. R. C. L. Dig. 99; *West Ham Union Guardians* v. *Bath Union Guardians*, 54 J. P. 69; *Queen* v. *Long*, 1 Q. B. 740. No proceeding was taken within section 4 of the Act before the 29th of June, 1893, so as to take the case out of section 1, and therefore section 4 applies. Assume that the claim only arose when the order was drawn up, on the 23rd of February, 1893, and not when the order was made in July, 1892; then that half-year expired on the 25th of March, and the statutory period on the 25th of June, and nothing was done until the 29th of June, when the order was removed into the High Court; so that there was no commencement of proceedings in time within the Act. This being an action for a *mandamus*, a separate and independent proceeding, it is a long time after the period limited by the Act, whichever way it is read. The important date is the date of the writ in the action, and not the date of the order for taxation. Again, this being a case of prerogative *mandamus*, the court, in the exercise of its discretion, will not give relief where there is another specific remedy available. The costs could have been enforced by distress under Baines' Act (12 & 13 Vict. c. 45), or by removal into the High Court under section 18. Charles, J., refused to allow that defence to be raised, because it was not pleaded. We submit we are allowed to raise it. Before the application to tax, the claim is not liquidated, and only after the taxation can any question arise as to whether proceedings have been taken or not: *Stevens* v. *Jeacocke*, 11 Q. B. 731. [LINDLEY, L.J., referred to *Queen* v. *Guardians of Stepney Union*, L. R. 9 Q. B. 383, 22 W. R. Dig. 138.]

Balfour Browne, Q.C., and *Ernest Page*, for the plaintiffs.—We base our claim on the order of the 7th of January, 1893, which dates back to the 5th of December, 1892, which would be within the three months. After the court of quarter sessions said we were to have our money it was a "proceeding" when we went before the clerk of the peace to get the costs taxed. [Lord HALSBURY.—I doubt whether the clerk of the peace is a competent authority; I think he is merely the servant of the sessions.] In any case we

exercised "due diligence." We could not have issued execution against anybody under Baines' Act. The Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), throws on the guardians the duty of paying any costs incurred by the assessment committee at quarter sessions, and we simply ask them to perform their statutory duty. [LINDLEY, L.J., referred to *Rhodes* v. *Guardians of Pateley Bridge Union*, 51 L. T. N. S. 235, 33 W. R. Dig. 152.]

Macmorran, in reply.—The guardians have no power to get money except through the overseers of the poor. Until there has been a taxation the order cannot be drawn up, and therefore there cannot be a "proceeding" commenced. If there had been a consent to tax, as soon as the order was drawn up the plaintiffs would have enforced it instead of wasting time and money.

Cur. adv. vult.

Dec. 19.—Lord HALSBURY read the following judgment:—Upon an appeal at quarter sessions on the 13th of July, 1892, the defendants were ordered to pay the costs. No application was made to consent to tax out of sessions, and certainly no express consent was given. Mr. Poland left before the case was concluded, and noted on his brief what he thought must be the arrangement made. In the following November an application was made to the clerk of the peace to tax, and he refused to do so, on the ground that no consent to tax out of sessions had been given. If no consent had been given this was right. The ascertaining of the costs is a judicial act to be done by the court, and, unless consent is given, the clerk of the court has no jurisdiction to entertain the question. When the sessions are being held he can, of course, under the supervision and direction of the magistrates, act as their officer, but it is as their officer only. Now the necessity of consent being conceded, my brother Wills thought that that consent could be inferred. I am unable to understand from what facts. None are stated, and, if you are to infer consent from the fact that it is customary to ask for consent and to obtain it when asked, it affords no ground for saying that you can infer it when it is not asked and not given. However, in the following January, 1893, the court of quarter sessions thought itself at liberty to order the taxation, and on the 26th of that month they were taxed at £206 17s. 7d., and ordered to be paid. An attempt was made unsuccessfully to quash that order, and if that question were now before us I should say that order ought to have been quashed. My brother Wills, as I have said, inferred consent. For the reasons I have given I think it would be a dangerous precedent to infer consent from such premisses as are alone to be found here, and the quarter sessions cannot give itself jurisdiction by finding a fact of which there is no legal evidence before it. My brother Wright, however, took a different ground. He said that the court of quarter sessions is a continuing court, and that, therefore, the court in January had jurisdiction to award costs and order them to be taxed as of the previous sessions in July. I am sure the learned judge's attention cannot have been called to the 5th section of the 12 & 13 Vict. c. 45. That section provides that "upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable." The Legislature knew very well that, whatever may be the identity of the court as an abstraction, it occasionally consists of different persons, and has provided that the power to order costs shall be exercised by the court before which the appeal is tried, and that ground, therefore, fails also. I confess I should feel some hesitation myself if the case were to turn upon whether we ought to give effect to an order made, as I think, without jurisdiction, though it is now unappealable, and though an ineffectual attempt to quash it has been made. But it is, I think, open to argument, when it is sought to make it the basis of further proceedings, whether you may not inquire whether the basis is sound or not although unappealable as an order. I have thought it right to refer to these points as they were urged in the argument before us, and, if unchallenged, might seriously affect the practice at sessions, which, so far as my experience is concerned, has been uniform for a long series of years.

But, in truth, the real question in this case turns upon the proper construction of an Act which deals with boards of guardians. The Act enacts that boards of guardians shall pay any debt, claim, or demand which may be lawfully incurred or become due from them within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, and not afterwards. [His lordship read sections 1 and 4.] Now this action began on the 2nd of March, 1894. If section 1 is the section applicable the action is out of date. It has been urged, however, that section 4 of the statute preserves the continuity of the proceedings, so that the protection of that section can be invoked to make what I have described "a prosecuting with due diligence to judgment, or other final settlement of the debt, claim, or demand." I do not think the effort to tax was the commencing of proceedings. Assuming for this purpose consent to tax out of sessions, it was an effort to complete proceedings begun in July. Furthermore, until a sum of money which was susceptible of payment was ascertained, there was no debt, claim, or demand become due or incurred by the guardians. The plaintiffs would not, therefore, be able to show such proceedings as would even enable the guardians to pay without disobeying the Act of Parliament. The 1st section prohibits them, unless the 4th applies, and, I think, upon these *data*, the 4th section cannot apply. For these reasons, however reluctantly, I have come to the conclusion that the defendants are entitled to judgment. I say reluctantly, because there is no doubt a good and legitimate debt which they ought to have paid, and the payment of which, by one quibble or another, they have succeeded in postponing until the time has gone by within which, by law, it can be paid. The appeal, I think, must be allowed.

LINDLEY, L.J., read the following judgment to the contrary effect:—This is an action of *mandamus* to enforce an order of quarter sessions, dated the 13th of July, 1892, by which the defendants were ordered to pay the plaintiffs the costs of a poor law appeal. These costs have since been taxed at £206 17s. 7d. They were taxed on the 26th of January, 1893. The writ in this action was not issued until the 2nd of March, 1894, and the defendants have a defence to it under the statute 22 & 23 Vict. c. 49, s. 1, unless the case be brought within section 4 of the same statute. [His lordship read the sections, and continued:—] The poor law half-years expire on the 25th of March and the 29th of September. In November, 1892, the plaintiffs sent in their bill of costs to the clerk of the peace to be taxed, and they obtained an appointment for the 5th of December, 1892. The clerk of the peace, however, declined to tax them, on the ground that there was no agreement to tax out of sessions, and that he had no jurisdiction to tax them. The

plaintiffs thereupon, on the 7th of January, 1893 applied to the next quarter sessions for an order to tax the costs, and the court made an order accordingly, and on the 26th of January, 1893, the costs were taxed in obedience to this order. The defendants still refused to pay, and, after some delay—viz., on the 29th of June, 1893—the defendants moved this order into the High Court, and on the 7th of August, 1893, they moved for and obtained an order *nisi* to quash it, on the ground that the court of quarter sessions had no jurisdiction to make it. Cause was shown against the rule in November, 1893, and the rule was then discharged with costs (see 70 L. T. N. S. 355). From this order of the High Court there has been no appeal. The order of the 7th of January, 1893, was made on the ground that, although there had been no express agreement to tax the costs out of sessions, there had been an implied agreement to that effect. The High Court apparently arrived at the same conclusion when it refused to quash the order of the 7th of January, 1893. Be the reason good or bad, that order stands, and cannot be questioned now. The case, therefore, stands thus:—The plaintiffs' right to be paid the costs in question accrued when the order to pay them was made—viz., on the 13th of July, 1892. The plaintiffs took the proper proceedings to have them taxed in November, 1892, which was within the time mentioned in the statute. They were taxed after the expiration of that time—viz., on the 26th of January, 1893, and no further proceedings were taken to enforce payment of them until more than twelve months afterwards—viz., the 2nd of March, 1894. This delay is to be accounted for by the conduct of the defendants and by the proceedings taken by them to quash the order of the 7th of January, 1893.

It is to be observed that the statute on which this case turns is not like an ordinary statute of limitations; it does not say that no action shall be brought after a certain time. The statute is addressed to payments which the guardians have to make, and it limits a time for making them. The question, therefore, is, not whether this action is brought within a given time, but whether, when it was commenced, it was too late for the defendants lawfully to pay the costs in question. If it was, the court ought not to order the defendants to pay those costs, but, if it was not, the court ought to do so Charles, J., held that the plaintiffs' demand came within section 1 of the statute on the 13th of July, 1892, when the defendants were ordered to pay the plaintiffs their costs. He further held that the proceedings to tax, being commenced in sufficient time, brought the case within section 4 of the Act, and he, therefore, gave judgment for the plaintiffs. I think he was right on both points. A construction of section 1, which would confine it to the demands for ascertained sums, would enable persons having claims to keep them back until they were in danger of being barred by the ordinary statute of limitations. Such a construction would entirely defeat the object of the Act. A demand for an account, or for costs not yet ascertained by taxation, is, therefore, I think, within section 1 of the Act. If so, section 1 applied to this case on the 13th of July, 1892. But it is equally obvious that the plaintiffs could not compel the defendants to pay the costs until they were taxed. It was necessary for the plaintiffs to take proceedings to get them taxed. This they did in time, and the proceedings then taken were, I think, "proceedings commenced" within the meaning of section 4. This construction is, I think, aided by section 5, which relates to the payment of costs to solicitors employed by the guardians. I do not think the Act requires the costs to be taxed within the time limited by section 1, if proceedings to obtain a taxation are commenced within that time. If I am right in this, the only other question is, whether, proceedings having been commenced in time, they have been prosecuted with due diligence. The defendants would not pay, and a *mandamus* was right and proper. No doubt this action might have been commenced earlier, but, having regard to the position taken up by the defendants, and their attempts to quash the order of January, 1893, I agree with Charles, J., in thinking that there has been no undue delay on the part of the plaintiffs in prosecuting their demand. For these reasons I am of opinion that the case is brought within section 1 of the Act, and is taken out of it by section 4, and that, consequently, this appeal ought to be dismissed.

A. L. SMITH, L.J.—This is an action for a *mandamus* to compel the defendants to pay to the plaintiffs £206 17s. 7d., the taxed costs of an appeal brought by the plaintiffs against them at the Middlesex Sessions, which have been ordered by the quarter sessions to be paid by the defendants to the plaintiffs.

Many points were taken and argued upon this appeal on behalf of the guardians, and the first which arises is that expressly raised by the statement of defence—viz., that the enactments of the 22 & 23 Vict. c. 49, ss. 1, 4, which relate to the limit of time in which boards of guardians are to pay debts incurred by them applies, and, consequently, the plaintiffs' action is brought too late.

Charles, J., held that this defence was ill founded. Without entering upon the controversy which arose as to whether there had or had not been an agreement to tax these costs out of sessions, in my judgment it must be taken after the order of sessions of the 7th of January, 1893, for taxation and payment, confirmed by the order of the Divisional Court, which stands unappealed against, and is now unappealable, that the order upon the defendants to pay the taxed costs of the plaintiffs is a valid order, and binding upon them, and that it is too late for the defendants to attempt to get behind the order and to seek in these proceedings to invalidate it. The order stands unimpeached, and must be given effect to.

I entirely agree with Charles, J., that unless there was an agreement in court to tax the costs out of court they must be taxed in court, and no subsequent court of quarter sessions had jurisdiction in the matter, and I equally disagree with the novel doctrine propounded by Wright, J., when this case was before him and Wills, J., in the Queen's Bench Division, that this was not so: 70 L. T. Rep. N. S. 355.

The dates stand thus: On the 13th of July, 1892, judgment at quarter sessions was given for the plaintiffs, and the defendants were ordered to pay the taxed costs of the plaintiffs.

Upon the 5th of December, 1892, the plaintiffs carried in their bill of costs to be taxed.

Upon the 7th of January, 1893, upon refusal of the clerk of the peace to tax them, upon the ground that there had been no agreement to tax out of court, the court of quarter sessions ordered them to be taxed and paid by the defendants, and upon the 26th of January, 1893, they were accordingly taxed at the sum of £206 17s. 7d.; upon the 23rd of February, 1893, the guardians were served with an order of the quarter sessions, made as of the 13th of July, 1892, to pay the costs; and the present action was not brought by the plaintiffs until the 2nd of March, 1894.

By the 22 & 23 Vict. c. 49 it is enacted (section 1) [The Lord Justice read section 1, and continued:—

It is admitted that the half-years end upon the 25th of March and the 29th of September in each

year, and that the three months after would therefore expire upon the 25th of June and the 25th of December respectively.

I cannot doubt that, whether the order of the 13th of July, 1892, or that of the 7th of January, 1893, or the date of taxation, viz., the 26th of January, 1893, be taken as the date upon which the £206 17s. 7d. was incurred or became due, these costs —at any rate after the 26th of January, 1893—constitute a debt, claim, or demand within the meaning of section 1, and that the 2nd of March, 1894, was therefore too late to bring an action to recover them, and that the defendants, under section 1 of this Act, have an answer to this action.

But it is said on behalf of the plaintiffs that, though this may be so, section 4 of the Act has to be dealt with, and that, inasmuch as they carried in their bill of costs to be taxed upon the 5th of December, 1892, they then commenced proceedings within time so as to obtain the benefit of section 4, this being within the current half-year plus three months from the date of the order of the 13th of July, 1892, which expired on the 25th of December, 1892. [His lordship read section 4, and continued:—]

The point is, what is the meaning of a person who claims any debt or demand commencing proceedings within the time limited before any competent authority, and prosecuting the same with due diligence to judgment up to execution by *mandamus* or otherwise? Does it mean, as the plaintiffs contend, that the carrying in of a bill of costs to be taxed, in order to finish up the old proceedings long since commenced, and which were not proceedings in respect of any debt or demand against the guardians, though costs were therein incurred, is a commencement of proceedings within the meaning of the Act, or does it mean, as the defendants contend, the commencing of independent proceedings to recover what is due and prosecuting them with due diligence to judgment and execution?

I do not myself understand how it can be said that the application in a suit to have a bill of costs taxed is commencing proceedings at all. It is only the continuation of the old proceedings—a mere step therein to bring them to an end. I read sections 1 and 4 thus: If proceedings are commenced within the three months after the current half-year, as prescribed by section 1, to recover what is due from the guardians, and such proceedings are prosecuted with due diligence to judgment and execution by *mandamus* or otherwise, even though these proceedings thus commenced and prosecuted extend beyond the three months after the current half-year, the guardians are nevertheless to satisfy this judgment; but if these proceedings are not commenced within the half-year or the three months the guardians are not to do so.

This section has no application, in my judgment, to a step taken in old proceedings long since commenced, and which were not brought to recover a debt due from the guardians at all; and here it is, I think, that my brother Charles has erred.

For these reasons I have, I admit with reluctance, come to the conclusion that the plaintiffs are unable to show the commencement of any proceeding within the meaning of the 4th section so as to get out of the limit of time prescribed by the 1st section; and, this being so, the defendants can rely upon section 1, and this appeal must be allowed, and judgment entered for the defendants.

Appeal allowed.

Solicitors for the appellants, *Howard & Shelton*, for *F. Shelton*, Lower Tottenham.

Solicitors for the respondents, *Beale & Co.*

High Court of Justice.

Chan. Div. Chitty, J. } Jan. 18, 23, 24.

ROOKE v. DAWSON. (*a*.)

Charity — Administration — Scholarship — Action to obtain possession and enjoyment—Consent of Charity Commissioners — Stay of proceedings — Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.

The foundation deed of a scholarship provided for the awarding of the scholarship to the duly qualified candidate who should pass the best examination in certain subjects. The above action was against the trustees of the deed for a declaration of the plaintiff's title to the scholarship, and an order directing the plaintiff to be put in possession thereof. The plaintiff alleged that he obtained the highest number of marks at an examination of candidates, but no award of the scholarship was made. On a motion to stay all proceedings, on the ground that the certificate of the Charity Commissioners had not been obtained pursuant to the Charitable Trusts Act, 1853, *s.* 17,

Held, that the plaintiff, by submitting himself for examination, did not do anything which resulted in a contract between the plaintiff and the trustees, and that the case made by him related to and involved the partial execution or administration of the trusts of the deed, and, therefore, that the action could not be allowed to proceed without the certificate of the Charity Commissioners.

Rendall *v.* Blair, 38 *W. R.* 689, 45 *Ch. D.* 139, *considered and distinguished.*

Motion.

The above action was brought by W. S. Rooke, an infant, by his father and next friend for (1) a declaration that he was entitled to the possession and enjoyment of a scholarship called the Bousfield Scholarship subject to his performing the conditions expressed in the foundation deed; (2) an order directing the defendants, who were the present trustees of the deed, forthwith to put the plaintiff in possession accordingly; and (3) costs.

By the foundation deed the trustees for the time being were to stand possessed of a fund or endowment of £1,000 for the support of a scholarship in connection with the Protestant Dissenters' Grammar School at Mill Hill, to be called the Bousfield Scholarship, upon certain trusts and subject to certain rules. It was thereby provided that the scholarship should be tenable for three years from the scholar-elect entering at University College, London, or New College, London, at one of which colleges the holder was to study during such three years under pain of forfeiture on his ceasing to do so, and that after every avoidance thereof subsequent to a time now long past (except as thereafter mentioned) the scholarship was to be awarded to the pupil leaving the school and going to such college as aforesaid who should pass the best examination in subjects to be determined upon from time to time by the examiners for the scholarship, such examiners being chosen from time to time by the trustees, subject to the approval of the committee of the school.

It appeared that an examination was held in June, 1894, at which only the plaintiff and one other qualified candidate presented themselves, and the plaintiff alleged that he obtained most marks, but the defendants refused to award him the scholarship.

This was a motion on behalf of the defendants for a stay of proceedings, on the ground that no order or

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

certificate of the Charity Commissioners authorizing or directing the proceedings had been obtained as required by the 17th section of the Charitable Trusts Act, 1853, and the notice of motion went on to ask that, unless the same were obtained within a month from the date of the order on the motion, the action might stand dismissed with costs.

It was not disputed at the bar that the scholarship was a charity within the Act.

Farwell, Q.C., and *Micklem*, for the defendants.—The question is whether plaintiff's action can be entertained without the authority of the Charity Commissioners, and we say that it cannot: see section 17 of the Act of 1853, and the cases thereon of *Hodgson* v. *Forster*, W. N., 1877, p. 74; *Braund* v. *Earl of Devon*, 16 W. R. 1180, L. R. 3 Ch. App. 800, distinguishing *Blandford* v. *Thackerell*, 2 Ves. Jun. 238; *Benthall* v. *Earl of Kilmorey*, 32 W. R. 26, 69, 25 Ch. D. 39; and *Rendall* v. *Blair*, 38 W. R. 689, 45 Ch. D. 139. Fry, L.J.'s "word of explanation" in the last case seems inconsistent with Bowen, L.J.'s judgment, in which Fry, L.J., concurred. [CHITTY, J.—Fry, L.J., wished to guard against appearing to lay down that cases of common law rights were the only cases to which the section did not apply.] The *dictum* of Fry, L.J., at any rate, does not apply to the claim of the plaintiff here, which is simply that he is *cestui que trust*. His allegations do not show, or attempt to show, any right to the scholarship by contract, so that *Rendall* v. *Blair* does not govern this case. The plaintiff, moreover, is, as to contractual rights, in no better position than the plaintiffs in *Spencer* v. *Harding*, 19 W. R. 48, L. R. 5 C. P. 561, where an offer to sell goods by tender was held not to amount to a contract to sell to the persons who tendered highest. [*Levett, Q.C.*, referred to *Carlill* v. *Carbolic Smoke Ball Co.*, 41 W. R. 210, [1893] 1 Q. B. 256.] The only case resembling the present in its circumstances is *In re Nettle's Charity*, 20 W. R. 965, L. R. 14 Eq. 434, and that was a petition under Romilly's Act. The case was considered to be within that Act, which only dealt with administration. The fiat of the Attorney-General and the consent of the Charity Commissioners would be required: see Tudor's Charitable Trusts, 3rd ed., p. 336, and cases there referred to. *Benthall* v. *Earl of Kilmorey* is an analogous case to this. The plaintiff, therefore, cannot proceed with his action without a certificate of the Charity Commissioners under section 17, and the action ought to be stayed.

Levett, Q.C., and *Wurtzburg*, for the plaintiffs.—This is not a case where the commissioners' consent is required. It was never the intention of the Act to prevent persons litigating their private rights. The object was to protect the charity (*Holme* v. *Guy*, 25 W. R. 390, 547, 5 Ch. D. 901), and not to limit the rights of individuals. The commissioners' power was limited to preventing useless costs being incurred in administering charity affairs. *Rendall* v. *Blair* shows that neither a contractual right at law nor an individual equitable right is within the section. [CHITTY, J., referred to the undertaking imposed on the plaintiff by the court in *Rendall* v. *Blair*.] An action for specific performance against trustees who refused to carry out a contract for a lease is an example of a suit within the words, but not within the scope of the section. Trustees are not saved from carrying out their agreements by the mere fact of their being trustees. [CHITTY, J., referred to *Thomson* v. *The University of London*, 12 W. R. 733.] That case is not in point here. The last case is *Fisher* v. *Jackson*, [1891] 2 Ch. 84, 39 W. R. Dig. 83. On the question of contract we rely on *Williams* v. *Carwardine*, 4 B. & Ad. 621; *Brogden* v. *Metropolitan Railway Co.*, 2 App. Cas. 666, 26 W. R. Dig. 55; and *Carlill* v. *The Carbolic Smoke Ball Co.*

Arnold Herbert, for the governors of Mill Hill School.

CHITTY, J.—The plaintiff asks for a declaration that under the circumstances he is entitled to what is termed possession and enjoyment of the scholarship in question, and for an order directing the defendants, who are sued only as trustees, to put him in possession, as it is termed, and enjoyment of the scholarship. Possession of the scholarship is not a proper term.

Enjoyment of the scholarship means payment out of the charity estate of £50 a year, which, if the plaintiff is right, he would be entitled to as one of the objects of the charity. Possession is brought into the statement of claim for the purpose of bringing the case, if possible, within the range of such authorities as *Holme* v. *Guy*. I am referring to cases where the plaintiff is in possession of some real property and seeks to defend that possession as against trespassers and others.

The plaintiff here sets forth a deed founding a scholarship, under which examinations are to be held from time to time by examiners, not by the trustees, subject to the rules of the school, and then—passing over some allegations which are not really material to the case—alleges that the defendants announced that instead of an examination which had been held another examination for the said scholarship would be held in 1894; that the examination was accordingly held; that two candidates presented themselves for examination; and that the plaintiff obtained the highest marks; and it is on those circumstances that the plaintiff relies. For the purpose of bringing the case within the scope of those cases to which I have alluded it has been argued that the plaintiff has a case of contract against the defendants. I have already said that the defendants are sued as trustees of the charity, and it would not be right to proceed with the suit in that form if the case were one of a contract binding the defendants personally to some obligation. It is quite clear that if a trustee either of a charity or a private trust were to order a man to do repairs or to employ a servant to sweep out the house, unless there was something to the contrary, he would be liable just as any other of her Majesty's subjects, and, if he was not liable to be sued as trustee, he would be liable to be sued as a party to the contract. In fact, such an action as that would have nothing to do with the circumstance that a man was a trustee. I am speaking of a plain contract such as I have stated.

Now the point made is that there was a contract such as is found in the cases of an offer of a reward or the like. There, when a public offer is made to the world proposing that some service should be done and the service is performed, there is a contract in point of law. There may be offers not resulting when the offer is accepted, in a contract. An excellent illustration of that proposition is offered by *Spencer* v. *Harding*. In that case the defendants sent out a circular as follows: "We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade of A., amounting to so and so, and which will be sold at a discount in the lot, payment to be made in cash." It was held that this did not amount to a contract or promise to sell to the person who made the highest tender. The judgment of the court was that this was, to use Willes, J.'s words, "A mere proclamation that the defendants are ready to chaffer for the sale of the goods and to receive offers for the purchase of them." Applying the principles of that case to the present, is there a contract? In

opinion there is nothing more than a proclamation that an examination for a scholarship will be held, and there is no announcement that the scholarship will be awarded to the scholar who obtains the highest number of marks. Consequently, by coming in and submitting to the examination, the plaintiff did not do that which, in the result, had the announcement been different from what it was, would have resulted in a contract. It is plain the plaintiff could not state that the announcement included the term that the scholarship would be awarded at all events to the boy who gets the highest number of marks. That would be a most improbable announcement to be made by trustees in the position of these defendants. But, whether probable or not, according to the allegations here, which I understand are true, the announcement was simply the announcement I have stated, and it was not coupled with any statement to the effect that the boy who had the greatest number of marks should have the scholarship.

The learned counsel for the plaintiff argued that they are entitled to eke out this imperfect statement, on which alone the supposed contract is founded, by reference to the trust deed. But the trust deed is not imported into the announcement of the examination to be held. When the case is considered on its merits the meaning is that, according to the charity deed, the defendants were bound to award the scholarship to the boy who had the greatest number of marks. That is a distinct question, and that question necessarily involves the execution of the trusts of the charitable deed, or rather the administration of the charitable trusts, not the administration of all the trusts, for that was not meant by any of the judges who used the term, but, what is well known in this court, the partial administration or execution of the trusts. I am far from saying that, if the plaintiff had made out a case of contract such as would have justified his suing in an action at common law, he could have maintained this claim. But it is not necessary to press this matter, because I hold that the case presented by the statement of claim, deliberately and carefully framed, does not present a case of contract.

What is the result? It is neither more nor less than this: "I am an object of the charity, and as such I sue for the enforcement of the charitable trusts." That brings the case precisely within *Braund* v. *Earl of Devon*. There an attempt was made to present the case in favour of the plaintiff as a private trust as distinct from a charitable trust, and for that reliance was placed on *Blandford* v. *Thackerell*. But in *Blandford* v. *Thackerell* there were two distinct things. There was an attempt on the part of the testator to create a charitable trust, which failed by reason of the Statute of Mortmain; but there remained a good private trust which was capable of being enforced. As was pointed out by both the Lords Justices in *Braund* v. *Earl of Devon*, the plaintiff's case was neither more nor less than this: "I am an object of the charity." *Braund* v. *Earl of Devon* remains wholly unaffected by the judgments of Bowen and Fry, L.JJ., in *Rendall* v. *Blair*, where those two Lords Justices overruled Kay, J.'s decision, Cotton, L.J., dissenting. There the plaintiff was the master of a charity school, and he was, as is shown by Bowen, L.J.'s judgment, which was the leading judgment of the majority of the court, appointed by contract with managers whose authority was not in question to be the schoolmaster, and, as such schoolmaster, was in possession of the schoolhouse. An important point in the case was the undertaking which the Court of Appeal obtained from the plaintiff's counsel, which was that they gave up all claim to relief except on the ground that the alleged managers, who were seeking to disturb the plaintiff in the possession of the schoolhouse, had been improperly appointed. The substance of Bowen, L.J.'s judgment is that the plaintiff was suing by virtue of a common law right. The case resolved itself into this, that the plaintiff was in possession of the schoolhouse. It was immaterial whether he had a title or not as against an ordinary trespasser. He was, by virtue of his possession, entitled at common law to bring his action of trespass, and by virtue of that common law right he would be entitled to the equitable remedy by injunction to prevent a threatened trespass. Having regard to the undertaking given, the plaintiff's case, in the result as presented, was: There are trespassers, persons calling themselves managers who are not managers, who are endeavouring to interfere with my common law right which is incidental to my possession. Fry, L.J., agreed with that judgment, adding only one word of explanation, and the explanation was that he did not intend to confine the principle of the judgment to cases of common law right only, but extended it to individual equitable rights not relating to the administration of the trusts of the charity. That was, for the purposes of the decision, a *dictum*—a *dictum*, however, in which Bowen, L.J., immediately concurred. But I take Fry, L.J.'s words as they stand, and the point is this: I do not confine the principle to mere common law rights, but I say that where there is an individual equitable right (carefully guarding himself) not relating to the administration of the trusts of the charity, the sanction of the Charity Commissioners would not be required. What exact cases the Lord Justice was referring to it is not necessary for me to consider in detail—possibly the case of an equitable right to specific performance of a contract, and there may be others. The proposition was laid hold of by the plaintiff to show that wherever any person can say: "I am an object of the charity," he can maintain an action in regard to the charity without the consent of the Charity Commissioners. In other words, the proposition is forced to this extent: that by this incidental observation the two Lords Justices overruled the decision of their predecessors in *Braund* v. *Earl of Devon*. I need not add that the Lords Justices did not even mention that case, and had no intention of overruling it.

Coming back to the case before me, I find this case, though of an alleged equitable right, is of the nature I have already stated, and does relate to and does involve the partial execution or administration of the trusts of the charity deed.

The result is, in my opinion, that the suit cannot proceed without the certificate of the Charity Commissioners. I will not limit the time, but the plaintiff must proceed with due diligence.

Application allowed.

Solicitors for the plaintiff, *Rooke & Sons*.

Solicitors for the defendants, *Pennington & Son*.

Chan. Div. North, J. — Dec. 19.

In re SHAW.
TUCKETT *v.* SHAW. (*a.*)

Inland Revenue—Administration—Account duty—Will—Power of appointment—Successive appointments

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 2 (c)—*Costs.*

In exercise of a general power of appointment by deed or will certain parts of a trust fund were appointed by deed by the donee, subject to her own life interest therein. By her will the donee appointed the residue of the trust fund, and died in 1893. *On an administration action being brought,*

Held, that the account duty under the Inland Revenue Act, 1881, *and costs of the action were payable* pro rata *out of all the appointed shares.*

Further consideration.

This was an action for the execution of the trusts of the will of Charles Shaw and of deeds poll executed by Maria Smith. The question before the court was which of the parties to the action should bear the estate duty payable under the Customs and Inland Revenue Act, 1881, s. 38, sub-section 2 (c), and the costs of the action.

The facts of the case were as follows:—Under the will of Charles Shaw, dated in 1855, a sum of £10,917 8s. 11d. Consols was held in trust for Maria Smith, for her life, with remainder as she should by will or deed appoint. By deed poll, dated the 5th of June, 1879, Maria Smith appointed £2,217 8s. 11d., part thereof, to herself, and after her death for her children or remoter issue born in her lifetime as she should by deed or will appoint. By deeds poll, dated respectively the 3rd of March, 1880, the 11th of November, 1881, the 29th of June, 1882, the 21st of August, 1883, and the 27th of July, 1886, Maria Smith appointed the following sums, subject to her life interest:—£1,000 to her son, William Shaw Smith, £1,000 to the said William Shaw Smith, £2,000 to the said William Shaw Smith, and £2,000 to the said William Shaw Smith, and £500 and £1,000 respectively to her daughter, Maria Smith.

In her will, dated the 19th of February, 1887, Mrs. Smith recited the will of Charles Shaw, and the deeds poll, and that she was desirous of appointing the residue of the said sum of £8,700 Consols—viz., £3,200, appointed that the trustees of the will should after her death stand possessed of the said sum of £3,200 New Three per Cent. Annuities, or the investments for the time representing the same, on trust for her daughters, Maria Smith and Elizabeth S. Smith, share and share alike, and she declared that Maria Smith should not bring the sums previously appointed to her into hotchpot. The testatrix died in 1893, and a summons was taken out for an inquiry as to the beneficiaries entitled under the will of Charles Shaw and the deeds poll executed by Maria Smith.

Everitt, Q.C., and *A. H. Jessel*, for the plaintiffs, some of the appointees.—The account duty and the costs of the action must fall on the residue, that is, on the shares appointed by the will to the testatrix's daughters. It may be hard on them, but we submit that it is necessary, as the account duty is analogous to probate duty. If all parties entitled to beneficial interests are called upon to contribute, the duty and costs will be paid by the individuals beneficially entitled, and not out of the aggregate fund subject to the power of appointment.

S. Hall, Q.C., H. Fellows, Sir Arthur Watson, Q.C., and *Pochin*, for other parties entitled to shares and their incumbrancers in the same interest.

The following cases were cited:—*In re Croft*, 40 W. R. 425, [1892] 1 Ch. 652; *Wilson* v. *Kenrick*, 31 Ch. D. 658, 34 W. R. Dig. 188; *In re Bourne*, 41 W. R. 70, [1893] 1 Ch. 188; *Gilbert* v. *Whitfield*, 48 L. T. N. S. 383, 31 W. R. Dig. 145.

Swinfen Eady, Q.C., and *Vernon Smith, Q.C.*, for the trustees of the will and the daughters of Mrs. Smith. [NORTH, J., stated that he only wished to hear them on the costs of the administration action.] The ordinary rule in administration does not apply where it is the case of appointments. The same argument that applies to the estate duty applies also to the costs of the action.

They referred to *Warren* v. *Postlethwaite*, 2 Coll. 108; *Moore* v. *Dixon*, 29 W. R. 12, 15 Ch. D. 566; *Trollope* v. *Routledge*, 1 De G. J. & Sm. 662.

Coborn, for parties served with the order.

NORTH, J.—The question here is perfectly simple. Suppose there was no question of duty or costs, in that case the trustees of the will would only have to appropriate the sums appointed. Of course, if there were any deficiency, say, for instance, through the fund having been invested in improper securities, the persons in whose favour the last appointments were made would have to lose rather than the others. But here there is no deficiency. The fair way would be that each person entitled to a share should take it only on paying the duty, which is a charge imposed by the Government on the shares. Sub-section 2 (c) of section 38 of the Inland Revenue Act, 1881, helps to show the meaning of the scheme for making estate duty payable thereunder. Persons had been in the habit of evading legacy duty by making voluntary settlements, and it was thought necessary to make persons taking under such settlements equally liable with those who took under wills. But I do not see that it made any other difference. I therefore consider that, as the whole fund is here, the account duty must be borne by the different shares according to their amount, and they must also bear the costs of the action. The trustees must, therefore, take the account duty and costs out of the whole fund, and charge each person according to the amount of his or her share, and in respect of each share only one set of costs must be allowed. This order to be made subject to the general rule as to incumbered shares.

Solicitors, *Woodroffe; R. Chapman; Montague Corbet & Son; Lovell, Son, & Pitfield.*

Q. B. Div.
(Wills and Wright, JJ.) Feb. 1

GREAT NORTHERN RAILWAY CO. v. PALMER.

Railway company — Condition indorsed on excur ticket—Bye-law—Passenger travelling on to a sta beyond the terminal station named on ticket—Cond

The plaintiffs issued excursion tickets from P. to by a train which ran as far as H., a station beyond On the face of the ticket were the words, in small "See back"; and printed on the back was the follo condition: "If used for any other station than that tioned, the ticket will be forfeited, and the full fare be paid." The company had a bye-law against pass rebooking by the train by which they were travelling the purpose of proceeding on a longer journey. defendant, took a return excursion ticket from P. Instead of alighting at W., the defendant travell to H., and there gave up the first half of the excu ticket, and tendered as well the ordinary fare, same class, from W. to H. The excess fare the co refused. The defendant, on returning from H., the allowed time for doing so, purchased a ticket and travelled on from W. with the return half excursion ticket by the same train, tendering at

(a.) Reported by ERSKINE REID, Esq., Barr at-Law.

two tickets as the fare from H. This the company declined to accept;

Held, in an action by the company against the defendant, that, assuming the condition printed on the back of the ticket was known to the defendant, the company could enforce that condition, and that the defendant had, by travelling beyond W., forfeited the ticket, and, consequently, that the company had a right to treat the money paid for it as forfeited, just as if the defendant had abandoned the journey for which the ticket was issued and had taken an altogether different journey.

In this case the plaintiffs appealed from the decision of his Honour Judge Bagshawe, sitting at the Huntingdon County Court, who had entered judgment for the defendant in an action by the plaintiffs to recover the full ordinary return fare between Peterborough and Horncastle, or, in the alternative, the difference between the excursion and ordinary fare from Peterborough to Horncastle and back.

On the 4th of August last year the plaintiffs issued special excursion tickets from Peterborough to Woodhall Spa by a train which ran as far as Horncastle, a station beyond Woodhall Spa. The defendant, a lady, took an excursion ticket from Peterborough to Woodhall Spa, which was available for seven days, paying 4s. 6d. for it. The ordinary single fare to Horncastle was 4s. 5½d., and the ordinary return fare 8s. 11d. The ordinary single fare from Woodhall Spa to Horncastle was 5½d. The lady, instead of getting out at Woodhall Spa, went on to Horncastle, and there gave up the first half of her ticket and tendered as well the ordinary fare from Woodhall Spa; which, however, was refused, as the sum she had paid for the excursion ticket just covered the ordinary fare from Peterborough to Horncastle one way. On the 7th of August the lady returned, and before starting purchased at Horncastle a third class ticket to Woodhall Spa. On the train arriving at Woodhall Spa she did not alight, but travelled on to Peterborough, where she gave up the two tickets as her fare from Horncastle. This the company declined to accept, and claimed the difference between the 4s. 11½d. she had paid and 8s. 11d. which would have been charged for a return ticket from Peterborough to Horncastle, the difference amounting to 3s. 11½d. That being refused, the company sued the lady in the county court for the full ordinary return fare between Peterborough and Horncastle, or in the alternative for the sum of 3s. 11½d., the difference between the two fares. There was no imputation of fraud against the lady, and the company desired to press the case only as a test question.

The county court judge decided that, on the general law, the claim of the company could not be maintained, and that the printed condition on the back of the ticket was applicable to intermediate stations, and did not apply to stations beyond which the excursion terminated. The learned judge did not decide the questions of whether the condition indorsed on the ticket was known to the lady, or whether the company, when issuing the ticket, had taken reasonable steps to direct the attention of passengers to it. Leave to appeal was given on the condition that the company undertook to pay the costs of the appeal in any event.

On the appeal, the company only claimed the difference between the ordinary return fare from Peterborough to Horncastle and the sum paid by the defendant.

C. A. Russell (*W. C. Colville* with him), for the company.—This was a contract to carry a passenger on special terms—namely, at a lower rate for a certain journey. There was no contract at all that the ticket should be used in part payment of the fare for a longer journey. The ticket, by the lady proceeding beyond Woodhall Spa, was forfeited, and the defendant therefore became liable to pay the ordinary rate of fare between Woodhall Spa and Peterborough and for the whole of the journey that she actually took. Supposing the passenger by an excursion train intended, at the time of taking such a ticket, to proceed further by the next train, and did so, the same objection could be maintained. The condition printed on the back of the ticket clearly applies to all stations on the excursion journey, and not merely to the intermediate stations. The learned county court judge was wrong in holding that the condition indorsed on the ticket did not apply to the use of the ticket for a station beyond that named on it, but only to an intermediate station. The condition is a very common one, and there is no evidence, as the lady did not appear at the trial of the action, to show that the defendant was not fully aware of the condition. In fact, her conduct throughout inferentially showed that she was well acquainted with railway travelling. The decision in the *Great Northern Railway Co.* v. *Winder*, [1892] 2 Q. B. 595, 41 W. R. Dig. 204, does not apply, as it was decided on other grounds. *Reg.* v. *Frere*, 3 W. R. 210, 4 E. & B. 598, is also to be distinguished from the present case, because here, although the action is for the difference between the ordinary return fare and the sum the defendant has paid, yet the argument is that, the ticket being forfeited, the defendant has, in fact, paid nothing.

C. Fleetwood Pritchard, for the defendant.—The defendant did not intend to use her ticket as part payment of the fare to Horncastle at all; she treated it as a ticket to and from Woodhall Spa, and her contract with the company under the excursion ticket was completed when the company had taken her from Peterborough to Woodhall Spa and back. The company could only demand the fare from Woodhall Spa to Horncastle, and *vice versâ*. It was true she had no right to go to Horncastle without a ticket, and the company's servants might have prevented her proceeding by that train without first obtaining one. They did not do so, however, and all they could do was to demand the unpaid fare, and as they refused to accept the fare for the journey from Woodhall Spa to Horncastle the defendant paid that amount into court as the limit of her liability. The effect of the condition is this, that it precludes the use of the ticket for any station other than the station named—that is, for any intermediate station. The case of the *Great Western Railway Co.* v. *Pecock*, 28 W. R. 49, so far as it goes, is in my favour. On the question of notice, the company did not take proper or reasonable care to direct the attention of passengers to the words indorsed on the back of the tickets, and in fact, the defendant had no notice of that condition. It was not found by the county court judge that the defendant was aware of the condition, or of any condition, nor was there any evidence to the contrary. This condition ought, therefore, to be treated as not binding on the defendant, unless it can be shown—and in the present case it has not been shown—that the defendant not only knew that there was writing or printing on the ticket, but knew that the writing or printing contained conditions relating to the terms of the contract of carriage; and the plaintiff company must be able to satisfy the court that they had done all that was reasonably sufficient to give the defendant notice of the conditions: *Richardson, Spence, & Co.* v. *Rowntree*, [1894] A. C. 217. As to the condition with regard to re-booking contained in the company's bye-laws, to the effect that "Passengers cannot

re-book at any intermediate station by the same train in which they have been travelling with the intention of proceeding further," the county court judge's view is correct.

WILLS, J.—The main question which has been submitted to us is whether, assuming that the indorsement on the ticket is part of the conditions of the contract, it is one which can be enforced, and one which enables the railway company to treat the money which has been paid as forfeited. They have only attempted in this appeal to treat it as being in reduction of the double fare to which they claim to be entitled; but the condition gives them the right to cancel the ticket, and the case, therefore, must be regarded from that point of view. There can be no doubt that this practice of railway companies of carrying people long distances under special contracts and in special trains at reduced fares is a great boon to the public, and I cannot help thinking that any decision which might impose a real and substantial difficulty in the way of railway companies carrying on their business in that manner would be a public misfortune. There is nothing unreasonable in supposing that it would often pay a railway company well to invite the public to go to a certain place and back at a reduced fare, but the passengers must not treat that place as being on the way to somewhere else, and thus reduce the ordinary fare that the company are entitled to charge for that journey. If, for instance, every time a railway company had an excursion run from the Midland counties to some place a few miles short of London, they were bound to treat that as part of the ordinary service of carrying to London, and could only charge the extra ordinary fare from the place to which they contracted to carry the passengers from the Midlands at the excursion fare, I cannot see why it is not reasonable and proper for the company to say: "We are willing for passengers to go to such and such a place at a small fare, and because of the number that will take advantage of such an offer we can afford to carry them at that fare, and therefore the bargain we make is that if you take this excursion ticket and pay the low fare to be carried to that place and back again, that is to be the only service that we, the railway company, contract to perform for you—to take you to that place and back again and nowhere else." The passenger is not to treat this service, which may be on the way somewhere else, as part of the service of taking him to a more distant place; but he must treat it as something distinct—as a contract which the railway company will perform for a small sum—and nothing else. In substance, that is what the appellants have done here; for, in my opinion, the words at the back of the ticket seem to admit of no other interpretation. The particular service for which the company contracted has been abandoned, and instead they are expected to perform a totally different service—a service which certainly may take a passenger over the same distance and over the same line—yet a service totally different from that contracted for. That, in my view, is the contract; and I think it is one which everybody at this time of day perfectly understands. If so, the defendant, then, forfeited her ticket by continuing the journey from Woodhall Spa to Horncastle. Whether she intended to break her journey at Woodhall Spa or not, what she really did was to go on past Woodhall Spa in the same train, which shows clearly that she was, in fact, making a different journey from that for which the ticket had been taken. I am of opinion, therefore, that the demand of the company is a just one, and is enforceable.

No question having been raised at the trial or on the judge's notes as to the condition being brought home to the lady, I think it must be taken that she understood it. If there had been evidence to the contrary a very serious question might have arisen as to whether the exceedingly small print on the back of the ticket, and the particular form of words employed, really amounted to a reasonable notice of the condition. I think it right to add that I am unable to see any ground on which the learned county court judge held that the expression "used for any other station" necessarily means for an intermediate station. It is, I think, language equally applicable to stations beyond as to stations short of the terminus indicated, and there is just as good reason for applying it to the one as the other, so far as the reason and good sense are concerned.

WRIGHT, J.—In this case two questions might have arisen at the trial; one whether the contract which the company sought to establish by the conditions on the back of the ticket was binding—namely, that the ticket was available only to the station indicated. Upon that I agree with everything that my brother has said. The other question is whether the condition was really brought home to the defendant. As only the railway company appeared at the trial, the sole point of law raised was that which the company wished to raise; but I cannot pass over this other question altogether, because, if the defendant had been represented by counsel at the trial, this would have been a proper question to have been raised, and a very serious doubt would have arisen as to whether or not enough had been done by the company to bring the condition on the back of the ticket to the notice of their passengers. I should certainly have hesitated before I could have come to the conclusion that the plaintiffs in the present case had given reasonable notice to the defendant of the condition of the contract, as evidenced by the ticket they issued. We have not to decide that point, however; and we are bound to hold, therefore, that the decision of the county court judge must be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Nelson, Barr, & Nelson.*

Solicitors for the defendant, *Young & Sons.*

Q. B. Div.
(Wright and Collins, JJ.) Nov. 22, 2

SWEETMEAT AUTOMATIC DELIVERY CO. v. COMMISSIONERS OF INLAND REVENUE.

JONES v. COMMISSIONERS OF INLAND REVENUE.

Inland Revenue—Stamp duty—Agreement in consideration of fixed quarterly payments—"Bond, covenant or instrument being the only or principal or primary security"—"Lease or tack"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *schedule.*

By an agreement under seal a railway company agreed to permit an automatic machine company to place machines at certain railway stations in positions approved by the railway company, to whom power was reserved of altering those positions, and, under certain circumstances, of removing the machines entirely. The automatic company agreed to pay to the railway company for this privilege a fixed "yearly rent" by quarterly payments. The agreement was determinable by three months' notice on either side.

By an agreement under seal a telephone company agreed to supply a theatrical ticket agent with the use of telephonic communication between a head office

(*a*.) Reported by T. R. COLQUHOUN DILL, B. Barrister-at-Law.

other places, the company undertaking to erect and keep in good working order the telephonic lines and apparatus. The agreement was to continue for ten years, and thereafter from year to year, determinable by three months' notice; but the company might determine it at any time if the quarterly payments were in arrear. The ticket agent agreed to pay, quarterly in advance, an "annual sum" per line, the minimum to be calculated on the "rent" of forty-five lines.

Held, in each case, that the agreement was not chargeable with stamp duty as a "lease or tack," but was chargeable with ad valorem *stamp duty under the head "bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for a sum or sums of money at stated periods for an indefinite period."*

Cases stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891.

The cases were separately argued, the case in which the Sweetmeat Automatic Delivery Co. were appellants being argued first. The judgments in the two cases were delivered together.

In the first case the facts were as follows:—

On the 30th of May, 1894, an instrument was presented on behalf of the appellants, the Sweetmeat Automatic Delivery Co., to the commissioners, under the provisions of section 12 of the Stamp Act, 1891, for their opinion as to the duty chargeable thereon.

The instrument was dated the 28th of May, 1894, and was an agreement under seal made between the Great Western Railway Co. (hereinafter called "the company") of the one part, and the appellants of the other part.

By clause 1 the company agreed, during the continuance of the agreement, to permit the appellants to place and maintain, first, at stations (not in any case exceeding 300 stations) on the Great Western Railway from time to time agreed upon between the parties, one or more sweetmeat automatic delivery machines; and, secondly, at stations (not in any case exceeding 150 stations) on the railway from time to time agreed upon, one or more automatic weighing machines (not in any case exceeding the total number of 175 machines).

By clause 2 the appellants (who were referred to throughout the instrument as "the tenants") agreed to pay to the company, in respect of the privileges thereby granted, "the clear yearly rent of £3,000, to be paid in advance by equal quarterly payments on the four usual quarter days," the first quarterly payment to be made on the 25th of March, 1894, on which day the agreement was to come into force.

Clause 3 provided that the machines should be placed in positions approved of by the officers of the company; they were to be placed in good positions, and were not to be placed, kept, or used so as to interfere with the company's traffic or business.

Clause 5 empowered the company to remove any machine entirely for the purpose of repairing or altering their stations, or to make such change in the position of any machines as they should consider expedite.

Clause 12 contained a provision enabling either of the parties to determine the agreement by giving to the other three calendar months' notice in writing expiring at any time.

The commissioners were of opinion that the instrument was the only or principal or primary security for a sum of £3,000 payable annually for an indefinite period by four equal quarterly payments; that the sum was neither interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack; and that the instrument was chargeable under the head "Bond, covenant, or instrument of any kind whatsoever" in the 1st schedule to the Stamp Act, 1891, with the duty of £75, being the *ad valorem* duty of 2s 6d. for every £5 of the £3,000, the sum periodically payable by the appellants to the company. They assessed the duty thereon accordingly, and the instrument was stamped in conformity with the assessment.

The appellants being dissatisfied with the assessment, required the commissioners to state this case for the opinion of the court.

The questions for the opinion of the court were:—

(1) Whether the instrument was chargeable with the duty of £75 in accordance with the assessment of the commissioners.

(2) If not, with what duty the instrument was chargeable?

In the second case the facts were as follows:—

On the 16th of July, 1894, an instrument was presented on behalf of the appellant, Mrs. Jones (carrying on business as Keith, Prowse, & Co., theatrical ticket agents), to the commissioners, under section 12 of the Stamp Act, 1891, for their opinion as to the duty chargeable thereon.

The instrument was an agreement under seal, dated the 1st of July, 1894, and made between the National Telephone Co. (Limited) (hereinafter called the telephone company) of the one part and the appellant of the other part.

The instrument recited that the appellant desired to establish telephonic communication from her head office to various branch offices, theatres, hotels, and other places, such communication being by means of metallic circuits and including telephone instruments at the head office, and that the telephone company had agreed to supply the means of such communication, and to maintain the same upon the terms thereinafter contained.

By clause 1 the telephone company undertook to erect and maintain in good working order the telephonic lines and apparatus.

By clause 2 the appellant (who was referred to throughout the instrument as "the lessee") agreed to pay to the telephone company for the use of the telephonic lines and apparatus and for the telephonic communication "the annual sum of £11 5s. per line (the minimum amount to be payable being calculated on the rent of forty-five lines, that is £506 5s. per annum)," the said sum to be paid quarterly in advance.

By clause 3 it was provided that the agreement should continue for a term of ten years, and thereafter from year to year, determinable by either party giving to the other not less than three months' previous notice in writing.

Clause 8 prohibited the appellant from permitting the use of the wires and apparatus in respect of money or other consideration paid to any person other than to the telephone company, and from permitting the use of the apparatus by any person other the appellant and her servants.

By clause 11 power was given to the telephone company to determine the agreement if the quarterly payments thereunder should at any time be in arrear for one calendar month, without prejudice to their right to recover such arrears, and in such case to recover, as liquidated damages, a sum equal to the whole sum which would have become payable between such determination and the expiration of the agreement up to, but not exceeding, a maximum of £2,000; and by clause 12 the telephone company reserved the right to disconnect the appellant without notice if any payments were seven days' overdue.

The commissioners were of opinion that the instru-

ment was the only or principal or primary security for the sum of £506 5s., payable annually for an indefinite period by quarterly payments; that such sum was neither interest for any principal sum secured by a duly stamped instrument nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "Bond, covenant, or instrument of any kind whatsoever," in the 1st schedule to the Stamp Act, 1891, with the duty of £12 15s., being the *ad valorem* duty of 2s. 6d. for every £5 and any fractional part of £5 of the £506 5s., the sum annually payable by the appellant to the company, and with the duty of 10s. in respect of the uncertain sums payable, or which might become payable, over and above the £506 5s. per annum. They assessed the duty thereon accordingly, and the instrument was stamped in conformity with the assessment.

The appellant being dissatisfied with the assessment, required the commissioners to state and sign this case for the opinion of the court.

The questions for the opinion of the court were:

1. Whether the instrument was chargeable with the duties of £12 15s. in accordance with the assessment of the commissioners?

2. If not, with what duty the instrument was chargeable?

Schedule 1 of the Stamp Act, 1891, provides as follows: "Bond, covenant, or instrument of any kind whatsoever (1) being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:

For a definite and certain period so that the total amount to be ultimately payable can be ascertained	the same *ad valorem* duty on a bond or covenant for such total amount.
For the term of life or any other indefinite period: For every £5, and also for any fractional part of £5 of the annuity or sum periodically payable	2s. 6d."

R. Bankes (*J. E. Bankes* with him), for the appellants, the Sweetmeat Automatic Delivery Co.—This instrument is a lease or tack, and is chargeable only with duty as such: *Taylor* v. *Overseers of Pendleton*, 35 W. R. 762, 19 Q. B. D. 288. The appellants are treated as lessees throughout the instrument, and this distinguishes the case from that of *Smith* v. *Lambeth Assessment Committee*, 31 W. R. 31, 10 Q. B. D. 327, 31 W. R. Dig. 142. If the instrument is not a lease or tack, still it is not a bond or covenant, being a principal or primary security: it is not a security at all, and should be charged as a deed of any kind whatsoever not described in the 1st schedule of the Stamp Act, 1891, with a duty of ten shillings only: *Conservators of the River Thames* v. *Commissioners of Inland Revenue*, 35 W. R. 274, 18 Q. B. D. 279.

Sir F. Lockwood, S.G. (*Danckwerts* with him), for the commissioners.—In the *Thames Conservancy case* the instrument was was not under seal, and was a mere grant of a licence: here clause 2 of the instrument (which is under seal) contains a covenant: *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue*, 20 W. R. 610, L. R. 7 Ex. 211.

R. Bankes replied.

The COURT reserved their judgment until after the hearing of the second case.

Gore-Browne, for the appellant, Mrs. Jones.—This is a demise of a right to use the telephone company's wires, and is chargeable only as a lease or tack. An easement such as a right of way, or, as here, a right to use a chattel, may be the subject of a demise: Woodfall's Landlord and Tenant, 14th ed., pp. 83, 86; *Newmarch* v. *Brandling*, 3 Swans. 99; *Osborn* v. *Wise*, 7 C. & P. 761. [COLLINS, J.—If you can establish that a chattel easement may be demised with an easement it may be that the rent would be deemed to issue out of the chattel, and such an incident of a lease as the power to distrain might be considered as arising in relation to the chattel demised.] A chattel may be demised: Bac. Abr., Leases A, K; Shep. Touch, pp. 241, 268; Woodfall, p. 87. Paragraph (4) of the heading "Lease or tack" in the 1st schedule to the Stamp Act, 1891, refers to leases or tacks of property other than land, and so does section 77 of the Act; the preceding sections and paragraphs (1), (2), and (3) of the heading perhaps refer exclusively to leases of lands. The term "tack" is not used solely in relation to Scotch law: see Wharton's Lexicon, s. v. Even if this is not a lease or tack it is still not a bond or covenant, being a principal or primary security. This heading is intended to cover securities for money in the ordinary sense, such as debentures, and does not apply to every instrument whereby a person covenants to pay sums of money at stated periods. The whole instrument must be looked at, and it is clear that this instrument is not within the heading: *Conservators of River Thames* v. *Commissioners of Inland Revenue*; *Mounsey* v. *Stephenson*, 7 B. & C. 403. The *Limmer Asphalte case* was not decided upon this part of the schedule, and is not in point.

Danckwerts (*Sir F. Lockwood, S.G.*, with him), for the commissioners.—The assessment made by the commissioners is correct. *Mounsey* v. *Stephenson* was decided upon an Act which contained no such heading as the present, it was unnecessary to decide whether the instrument in that case was a bond or covenant or not. This instrument is not a lease or tack, both of which terms apply exclusively to instruments relating to lands, "tack" being used as a term of Scotch law only. Sections 75 to 78 of the Stamp Act, 1891, which deal with leases and tacks clearly refer to leases or tacks of lands only. There cannot be a lease of an incorporeal hereditament or of a chattel, for no right to distrain could arise in respect of either: Wharton's Lexicon s. v. Rent; Shep. Touch, 8th ed., p. 266. This is a bond or covenant securing an annual payment. If the payments were certain, so that the total amount ultimately payable were ascertainable, the duty on this instrument would be as on a mortgage. The period being uncertain, the duty is fixed by the "Bond," heading. But neither the "Bond" heading nor the "Mortgage" heading relate exclusively to instruments which are securities for the repayment of loans that is clear from the decision in the *Limmer Asphalte case*. [He was stopped by the court.]

Gore-Browne replied.

WRIGHT, J.—We will give judgment first in the case that has been last argued.

The question arises upon a document by which the telephone company agree with a firm of musical agents to establish communication by telephone between the musical agents' head office on the one hand, and a number of branch offices on the other hand. In the agreement, which is under seal, the musical agents are called "the lessees," but there does not seem

be anything else in the document, which purports expressly to treat it as a lease. The substance of it is that the company are to lay down and maintain the means of telegraphic communication between the head offices and the other offices and places, and are to receive from the lessees a sum of £11 5s. for every line laid, with a minimum of £506 per annum, and the agreement is to last for ten years certain, unless previously determined on certain events mentioned in the agreement: after the term of ten years it is to go on from year to year, subject to either party giving a special notice to determine it. I think there is no other material provision in the agreement.

That being an agreement under seal containing an undertaking by the so-called lessees to pay this sum, £506 a year, or whatever more it may be, it appears to me that that is a covenant by the lessees to pay that sum at the stated periods mentioned in the agreement.

Then the question is, What is the effect of the Stamp Act upon that? It appears to me that if, instead of being a covenant to pay the annual sum of £500 for ten years, it had been a covenant to pay one sum of £5,000, then it would have been within that part of the schedule which is found under the heading "Mortgage, bond, debenture, covenant," and it would have been a covenant "being the only or principal or primary security for the payment or repayment of money." I think that it is clearly to be inferred from the judgments in the *Limmer Asphalte case* that that would have been the opinion of the court who decided that case. But we have not in the present instance a covenant for the payment of a capital sum, but a covenant for the payment of about £500 in each year at quarterly periods. Therefore it does not fall directly within the mortgage clause to which I have referred.

Then there is a heading "Bond, covenant, or instrument," which appears to deal expressly with cases which would be within the mortgage clause if the sum payable were to be paid in one amount, but are not within it because the sum payable is to be paid in a number of instalments at stated periods. This "bond, covenant, or instrument" heading appears to lay down as a rule for the assessment of such instruments to stamp duty that if the instalments are payable "for a certain and definite period so that the total amount ultimately payable can be ascertained," then the same *ad valorem* duty is to be paid as would be payable upon a bond or covenant for such total amount under the mortgage clause of which I have already spoken—that is to say, 2s. 6d. per cent. If the payments are to extend for the term of life or any other indefinite period, then for some reason or other the Legislature appears to have assumed that the duration of that period will be twenty years, and they have fixed the duty at 2s. 6d. on every £5. I think that *primâ facie* this document requires to be stamped under that provision, as the commissioners have in fact required it to be stamped I think the *Limmer Asphalte case* is an authority that the word "security" in this bond, &c., heading is to be construed in the same way as "security" under the mortgage heading. I do not see how the court could have arrived at the conclusion at which they did arrive in that case unless that had been their view. It seems to me that we are bound by that case, but even if we are not bound by it I think that this is the proper construction of this schedule, and that the word "security" as used in these headings does not mean, as in popular language, some obligation which is auxiliary to another obligation, but means any obligation created by any instrument.

If that is so, then the only other point open to the appellants is that this is a case of rent reserved by a "lease or tack," in which case the duty will be much lower. It appears to me that that argument fails. I think myself that the instrument is not like a lease at all. There is nothing to show even that any exclusive possession of the wires is intended to be given; but even if that were so, the provision as to the payments to be made is not, in my mind, like a provision for rent properly so-called. As regards the agreement itself, it appears to me that that payment is a payment to be made, not merely for the occupation either of the wires or of the instruments, but for services to be rendered by the company and expenses to be paid for by them, first, in laying down the lines; secondly, in maintaining them; thirdly, for the use of the company's patents, and for matters of that kind; and that it would be a misnomer to say that that was rent intended to be reserved by a lease at all. Also I think that the schedules and provisions of the Stamp Act referring to a "lease or tack" if fairly read, and read in connection with the sections of the Act, ought to be considered as referring to leases or tacks of the usual kind, that is to say, of land or tenements.

For these reasons, I think that the judgment must be for the Crown.

As to the other case, *The Sweetmeat Automatic Co.* v. *The Commissioners of Inland Revenue*, that was a case where there was an agreement between the automatic company and a railway company for the maintenance of some of the automatic company's machines upon the stations of the railway company. There also we are both of opinion that the document is not properly a lease at all, and that we are bound by authority on that point. This was, in fact, conceded by counsel.

Then, with regard to the point of the instrument being a security, the case is determined by the considerations or by some of the considerations which have determined our judgment in the other case.

We think that the instrument is a security for the payment of money for an indefinite time, the only difference being, if my memory serves me right, that in this case the amount can be calculated apart from the indefiniteness of the time—it is a fixed amount, so that there is no difficulty in that at all, and there must be judgment for the Crown in both cases.

COLLINS, J.—I am of the same opinion in both cases. Dealing with the last case first, there is more colour for suggesting in that case that there was a lease. It was contended that taking the provisions in the agreement together there was a lease of the thing demised—that is, the telephonic instruments—and also a lease of the right to use certain wires, which wires were also demised. On carefully considering the different provisions of the Act it seems to me that by the words "lease or tack" the Legislature meant only to deal with leases or tacks of land, or, at all events, of hereditaments. I do not think, that, when we look at and fairly construe the sections of the Act itself dealing with the same subject-matter, beginning with section 75 and going on to section 78, that it can be suggested that the Legislature had in mind anything except a lease in the proper sense of the term, that is, a lease dealing with land, tenements, or heritable subjects. A number of instances are dealt with specifically in the sections, and none of them deal with anything except those subject-matters. Whether one can speak technically and strictly of a lease of chattels or not, I do not think that in this statute a lease of chattels is contemplated so that rent reserved by "lease or tack" of chattels can be said to embrace such an annual payment as is agreed to be paid for the hire of these chattels here in this case.

That throws one back upon the other point, upon

which I was certainly much pressed by the arguments of the counsel for the appellants in both cases, and also by the authority of the case of *Taylor* v. *The Overseers of Pendleton*, but now that the decision in the *Limmer Asphalte Co.'s case* has been explained it seems to me that it really does cover the whole point in this case as to whether this instrument is a bond, covenant, or instrument "being the only or principal or primary security for any annuity, or for any sum or sums of money at stated periods." The use of the word "security" no doubt gave rise to an argument upon the decision in *Taylor's case* was founded, and I was a good deal pressed as to whether that did not really refer to something in its nature collateral—something that secured a right already acquired under some other instrument or power. But I think, when one studies the provisions under the very next clause, where the duty is fixed with regard to a definite and certain period, so that the total amount can be ascertained, we find that we are referred to the same *ad valorem* duty as on a bond or covenant for such total amount, and that throws us on to the clause headed "mortgage, bond, debenture, covenant," and we there find that the same *ad valorem* duty is charged—in fact that that has been made the standard to ascertain what duty is to be chargeable upon, a "bond, covenant, or instrument," being "the only or principal or primary security." That at once shows that the word "security" in those two clauses must have the same meaning. Now, in the heading "mortgage, bond, debenture, covenant," it is clear that the Legislature is dealing with what we may call a primary security: it is dealing with the instrument which creates an obligation, as well as gives the right to recover the consideration; and, therefore, in that part of the Act the word "security" clearly does not appear to be used in any collateral or auxiliary sense.

Referring back again to the provision as to "bond, covenant, or instrument of any kind whatsoever," I think the very exception in that clause itself emphasizes that argument, because it begins with an instrument "being the only principal or primary security for any annuity," and then in the case of "annuity" it excepts out of that the instrument originally creating the annuity, thereby indicating that but for that exception it would have been embraced within the provision dealing with the principal or primary security for any annuity"—that is to say, that the creating the annuity, but for the exception, would be such a security as is dealt with in the section. And then, having excepted the instrument creating the annuity only, it goes on to deal with instruments being the principal or primary security "for any sum or sums of money at stated periods." That clearly must refer to the instrument which creates the obligation to pay those sums, not merely the instrument which provides a collateral security for their payment. Therefore, it seems to me, when you take these clauses together, it is clear that the instrument creating the obligation may be a security within the meaning of that part of the Act. If that be so, it seems to me that the foundation of the judgment in *Taylor's case*, so far as it applies to this case, is gone. In that case the instrument was not under seal. Mr. Gore-Browne has very pointedly called our attention to the fact that it is not essential that under the word "instrument" it should be under seal. I cannot tell how far that may have weighed with the court in that case; at all events, it seems to me that the authority of the case of the *Limmer Asphalte Co.* is distinctly in point in this particular matter. It is clear that the duty they imposed there was an *ad valorem* duty which would be reserved under "mortgage, bond, debenture, covenant," and that the only difference between that case and this one is this, that there the sum of £6,000 payable at stated intervals was a fixed sum, and therefore was capable of being ascertained, and the duty could be assessed once for all, and here we are dealing with a payment which cannot be ascertained in the same way because the period is indefinite; therefore it comes under the next provision: "For the term of life or any other indefinite period." Here we have a term of ten years, subject no doubt to determination, but still a period of ten years with a right, and with an expectation apparently, that that term will be extended by an interest from year to year after its expiration. That makes the term, it seems to me, indefinite, and therefore lets in the scale of assessment which the commissioners have adopted.

Now that determines the last of the two cases argued before us—namely, *Jones' case*.

The other case raised the two points—first, the point as to whether it is a lease, and then the argument as to whether the document is a security in the second place. In this case there can be no question whatever as to the "lease"; there was no demise or anything like it. That was clearly decided in the case of the bookstalls (*Smith* v. *Lambeth Assessment Committee*). The only remaining argument is that the "bond, covenant, or instrument" means an instrument of a collateral or auxiliary kind; and that is an argument which I have dealt with in the other case.

Therefore I think that in both these cases the appeals must be dismissed.

WRIGHT, J.—I wish to add that in *Jones's case* there is another reason why the agreement is not for a term certain: provision is made for determining it in certain events before the end of the ten years.

Solicitors for the appellants the Sweetmeat Automatic Delivery Co., *Stephens & Stephens*.

Solicitors for the appellant Jones, *Reyroux, Phillips, & Golding*.

Solicitor for the Crown, *Solicitor of Inland Revenue*.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 22.

ANDERSON *v.* ANDERSON AND OTHERS. (*a.*)

Deed — Construction—General words—"Other goods, chattels, and effects"—Doctrine of ejusdem generis.

A husband executed by deed a post-nuptial settlement by which he demised to trustees certain leasehold premises "with the messuage, tenement or dwelling-house, back-building, offices, coach-houses, stable buildings, and all other erections." By the same deed the husband assigned to the trustees the household furniture, plate, linen, china, glass, &c., "and other goods chattels and effects, in, or upon, or belonging to" the said messuage and premises. After the death of the husband, the wife, as cestui que trust *under the settlement, claimed the horses, carriages, harness, and stable furniture in the coach-houses and stable buildings at the time of the husband's death.*

Held, that the general words "other goods, chattels, and effects" were to be given their natural, and not a restricted, sense; and that the wife was entitled to the horses, carriages, harness, and stable furniture.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

The doctrine of ejusdem generis, *as explained in* Parker *v.* Marchant, 1 *Y. & C. C. C., followed and approved.*

Appeal from the judgment of Wright, J., at the trial of the action without a jury.

The plaintiff was a widow, and the defendants were the executors of her deceased husband. The action was for a declaration that the plaintiff was absolutely entitled to certain horses, carriages, harness, and stable furniture.

The husband, on the 21st of October, 1886, had by deed executed a post-nuptial settlement, by which he demised to trustees a leasehold house and premises belonging to him, described in a schedule to the deed, for the residue of the term for which it was holden, less the last day thereof, upon the trusts of the settlement.

In the first schedule the leasehold house and premises were described as No. 43, Wimpole-street, and as including the "back building, offices, coach-houses, stable buildings, and all other erections." By the same deed the husband also assigned to the trustees the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits, and other consumable stores, and other goods, chattels, and effects in or upon or belonging to, or which should or might during the joint lives of the husband and wife be brought into or upon the leasehold messuage or its appurtenances, including the pictures and statuary specified in the second schedule, to hold the same upon the trusts of the settlement. The trusts were to permit the plaintiff to have the occupation, use, and enjoyment of the trust premises during the joint lives of the husband and the plaintiff, for her sole and separate use, without power of anticipation; and after the death of either, to convey and assign the trust premises to the survivor absolutely.

The husband died on the 28th of February, 1894, having by his will appointed the defendants his executors.

The plaintiff claimed, under the post-nuptial settlement of the 21st of October, 1886, to be absolutely entitled to the horses, carriages, harness, and stable furniture in, upon, or belonging to the coach-house and stable buildings at the death of the husband. She supported her claim by the contention that the general words "other goods, chattels, and effects" covered the horses, carriages, harness, and stable furniture in question.

The defendants argued that the general words included only articles *ejusdem generis* with those previously enumerated. Wright, J., gave judgment for the plaintiff.

The defendants appealed.

Horne Payne, Q.C., and *Bremner*, for the appellants, relied on *Manton* v. *Tabois*, 33 W. R. 832, 30 Ch. D. 92.

Crackanthorpe, Q.C., and *G. Spencer Bower*, for the plaintiff, cited *Parker* v. *Marchant*, 1 Y. & C. C. C. 290, and *Gibbs* v. *Lawrence*, 9 W. R. 93.

Lord ESHER, M.R.—The appeal must be dismissed. It is said on one side that the general words "other goods, chattels, and effects," when read in their ordinary sense, must pass the horses, carriages, harness, and stable furniture. On the other side it is said that, though that is true, yet, the general words ought to be read with a limited meaning on account of the doctrine of *ejusdem generis*, and it is argued that in many cases in the books general words have been so limited. It is very likely that the doctrine was applied strictly in the old days, but I adopt the view expressed in Williams on Executors, where it is pointed out that, whatever may have been the doctrine formerly, there are cases which illustrate the modern tendency to reject a restricted construction. Lord Eldon in *Church* v. *Mundy*, 15 Ves. 396, said (at p. 406): "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary." That means that *primâ facie* the large meaning is to be given to the words, and that the limited meaning is not to be given to them unless the court can find other words which show that they were used in their restricted sense. Again, in *Parker* v. *Marchant*, Knight-Bruce, V.C., says (at p. 300): "A will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense, but when this appears the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited contruction to show that a rational interpretation of the will requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words." Nothing can be plainer than that *primâ facie* the general words are to be taken in their full and large sense unless, in the particular case, the true construction of the instrument requires the words to be read in their limited sense as applying only to the same *genus* as was enumerated before. The general words in this case are, "other goods, chattels, and effects in or upon or belonging to the said leasehold messuage." The messuage includes the coach-house and stables. Therefore the general words include goods, chattels, and effects in the house, stable, and coach-house. These words in their ordinary sense pass everything which is there. Are there any words which tend to restrict this ordinary meaning to things of the same *genus* as household furniture, plate, linen, china, glass, and other things enumerated before? So far from thinking so, I am of opinion that, when one finds a man settling everything in his house upon his wife, and also dealing with the stables and coach-house, it would be absurd to say that he intended to confine the articles in the stables to things *ejusdem generis* with household furniture, plate, linen, &c. When the settlor was dealing with the stables and coach-house he obviously intended to convey the things usually there, and intended the words to have their wide meaning. I adopt the canon of construction laid down by Knight-Bruce, V.C., in *Parker* v. *Marchant*, and dissent from the doctrine (if such a doctrine ever existed) that *primâ facie* the general words are to have a restricted meaning.

LOPES and RIGBY, L.JJ., delivered judgments to the same effect.

Appeal dismissed.

Solicitors for the appellants (defendants), *Ashurst, Morris, Crisp, & Co.*

Solicitors for the respondent (plaintiff), *Lindo & Co.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Feb. 20.

In re ABDY.

RABBETH *v.* DONALDSON. (*a.*)

Covenant—Separation deed between man and woman not

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

married—Covenant to pay during life or until molestation—Resumption of cohabitation—Validity of deed.

A. and R., having lived together as man and wife, mutually agreed to separate, and executed a deed by which A. covenanted to pay to R. during her life, or so long as she should not molest him, an annuity. After some time the parties again cohabited, and lived together until A.'s death.

Held (*affirming* North, J.), *in an action by R. for the administration of the testator's estate, that the covenant to pay during life was absolute and indefeasible, and that R. must be admitted as a creditor on the estate for the amount of her annuity. There is no analogy between such a deed and a separation deed between husband and wife.*

The plaintiff in the action was a lady who had lived with the testator, Robert Jack Abdy, as his mistress, and she claimed to be a creditor upon his estate under the following circumstances. Previously to December, 1889, Mrs. Rabbeth and the testator had lived together as man and wife. Differences arose between them, and on the 20th of December, 1889, they executed a deed in the nature of a separation deed. It was recited that differences had arisen between them and that they had mutually agreed to live separate from each other for the future. They mutually covenanted to live apart, and the testator, as a separate covenant, covenanted with the lady that he would during her life, or so long as she should in no way molest him, pay to her the sum of £366 per annum, by monthly instalments of £30 10s. each. The plaintiff covenanted in return that she would not contract or incur any debts in his name, and would keep him indemnified against all debts or liabilities thereafter contracted or incurred by her.

In November, 1892, the parties resumed cohabitation, and in June, 1893, the testator died.

The annuity was paid to the plaintiff until the death of the testator, but not afterwards. She commenced an action for the administration of the testator's estate, and claimed to be admitted as a creditor for the amount of her annuity under the deed.

The residuary legatees resisted the claim on the ground that the annuity ceased when cohabitation was resumed.

North, J., held that the claim must be admitted, and the residuary legatees appealed.

Samuel Hall, Q.C., and *Alexander Young*, for the appellants.—The consideration for the deed was that the parties should live separate; when they came together again such consideration was gone, and the deed was wholly void: *Bindley* v. *Mulloney*, 17 W. R. 510, L. R. 7 Eq. 343; *Nicol* v. *Nicol*, 34 W. R. 283, 31 Ch. D. 524; *Ex parte Naden, In re Wood*, 22 W. R. 936, L. R. 9 Ch. App. 670. There is no case in the books exactly analogous. All the surrounding circumstances shew that the arrangement was that they should live apart for ever.

Swinfen Eady, Q.C., and *C. T. Mitchell*, for the respondent.—Such a proviso as the appellants contend for cannot be imported into the deed, and if it were so imported, it would be void. The covenant was in terms to pay the lady during her life, and the fact that the parties afterwards lived together again cannot affect it. [They were stopped by the court.]

Hall, Q.C., replied.

Lord HALSBURY.—I am of opinion that this appeal must be dismissed. There is literally no portion of this deed which I can look at, and take the construction of it that Mr. Hall suggests, without doing violence to the ordinary rules of construction. I really do not know what the views of the parties were, though I can well believe that the testator's object was to make provision for the woman with whom he had been living as his wife at the time when both intended to separate finally, and this was intended to be a final provision. I have no doubt it was so. And looking at what is recited in the deed, I have no doubt that is what both parties imagined. But what then? I must see what the covenant is, and the covenant is, "and pay during her life." I decline to put into the deed what the parties have not put in themselves. A separate covenant was made to pay her so much during her life, and I cannot imply a covenant which, if it were there, would be void, because it would be *contra bonos mores*. But apart from any such question, I look within the four corners of the instrument, and I must give the ordinary construction of words and sentences according to English grammar, and I can find nothing in this instrument, beyond the reasons why the covenant has been entered into, which defeats and determines the operation of that covenant in the future. I am, therefore, obliged to construe this deed as the learned judge has construed it. It would be a very strong violence to the language if I could import into it a covenant which does not appear. The analogy of separation deeds between husband and wife absolutely fails. The very nature of a deed of that character is one which imports (although it may not be said in terms in the instrument) that while husband and wife are living together the wife is entitled to maintenance, and as that relation is about to terminate, the separate existence of the wife is to be guaranteed free from inconvenience, by the husband giving an annuity or provision, or whatever it may be. The mere statement of that shows why it is that, when the parties come together again, the deed is to be at an end, because the actual thing that is done is providing a maintenance, and by construction the court can put in "during the period of separation." No such observation applies here. It is not contended that any covenant has been broken by this lady. The result is that this appeal must be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. It does not require any consideration to support it in law; therefore the failure of that consideration cannot be said to invalidate it. We must follow the language of the deed. We should be twisting it out of its obvious meaning if we read it as Mr. Hall asks us to do. The appeal must be dismissed, with costs.

A. L. SMITH, L.J.—In this case a gentleman and lady were living together, not in matrimony. They determine to separate, and thereupon this deed is executed by the parties. By this deed the gentleman absolutely covenants to pay to the lady for her life £366 a year for so long as she does not molest him, and performs her covenant on her part. It is now said that that covenant should be read, although it is an absolute covenant on the face of it, as an absolute covenant only so long as they shall be separate and apart. At one time I was impressed with that, and have thought what the people would have done if they had thought of coming together again. I cannot import that into this covenant. It is an absolute covenant in my judgment, not made dependent on their living separate and apart in the future, and, therefore, I think that my learned brothers have come to a right construction of the deed in construing it as they have done.

Appeal dismissed with costs.

Solicitors for the appellants, *Black & Moss.*

Solicitors for the respondent, *Nokes & Stammers.*

High Court of Justice.

Chan. Div. } May 8, 9; Nov. 28, 1894;
Chitty, J. } Feb. 20, 1895.

CUNNACK v. EDWARDS. (a.)

Friendly society—Trusts exhausted—Unexpended funds — Charity — Cy-près — *Resulting trust* — Bona vacantia.

A friendly society was formed to provide annuities for the widows of its ordinary members. The annuity fund was raised by the subscriptions of ordinary and honorary members, but the widows of honorary members took no benefit.

Held (there being no poverty qualification), that the society was not a charity.

The members and annuitants being all dead, and there being an unapplied balance of the annuity funds in the hands of the trustees of the society, to which neither the trustees nor the representatives of the honorary members made any claim,

Held, that there was a resulting trust in favour of the ordinary members from time to time, or their representatives, in proportion to their contributions, and the fact that the difficulty and expense of ascertaining the parties entitled would more than exhaust the fund did not entitle the Crown to claim it as bona vacantia.

Action.

The Helston Equitable Annuitant Society was founded in March, 1810, for the purpose, in its rules expressed, of raising by subscriptions, fines, and forfeitures a fund for the relief of the widows of its deceased members.

In April, 1830, the rules were revised, and the society subsequently conformed to the provisions of the Friendly Societies Act, 1829 (10 Geo. 4, c. 56).

The society consisted of ordinary and honorary members. The last surviving ordinary member, one T. H. Edwards, through whom the defendant claimed, died, a widower, in 1878, and the last known honorary member, Sir Richard R. Vyvyan, died in 1879.

On joining the society an honorary member signed a declaration that his object in joining the society was not that any widow of his should derive any benefit therefrom (to which he altogether relinquished his right), but merely for the encouragement of the society.

The last annuitant died in 1892.

The defendent thereupon claimed the funds (about £1,250 New Consols) as the representative of the last surviving ordinary member.

The Attorney-General claimed that either the society was a charity and the funds were applicable *cy-près*, or in the alternative that the funds were ownerless and went to the Crown as *bona vacantia*. It appeared that by the rules of 1830 the trustees were from time to time to execute a deed declaring the purpose for which any moneys of the society were laid out, but no such deed had been executed, nor had any steps been taken to wind up the society.

The first point was argued on May 8 and 9, 1894.

Robertson Macdonald, for the plaintiffs, the trustees of the society, stated the case, and disclaimed any beneficial interest.

Farwell, Q.C., and *W. D. Rawlins*, for the defendant.—A friendly society is not a charity; at any rate, unless its benefits are restricted to poor people: *In re Clark's Trusts*, 24 W. R. 233, 1 Ch. D. 497; *In re Dutton*, 27 W. R. 398, 4 Ex. D. 54.

Sir R. T. Reid, A.G., and *Ingle Joyce*, for the Crown.—The head-note in *In re Clark's Trusts* is too wide. A friendly society may be a charity: *Spiller* v. *Maude*, 32 Ch. D. 158n.; *Pease* v. *Pattinson*, 34 W. R. 361, 32 Ch. D. 154. Poverty is not a necessary ingredient of all charities. The voluntary subscriptions of the honorary members go wholly to provide annuities for the widows of ordinary members. The society is therefore partly supported by voluntary contributions, and is a charity.

CHITTY, J.—The Attorney-General, on behalf of the Crown, claims the fund on two grounds. First, on the ground that there is a charity, and that the ordinary doctrine of *cy-près* applies; secondly, on the ground that the property falls under the head of *bona vacantia*. I propose to say nothing on the latter point, but to deal with the first point as to the charity only. It is sufficient to say of this society that it was constituted in the year 1810 for the purpose of raising from time to time, by the subscriptions of the several persons admitted as members thereof, and also by fines and forfeitures imposed by the rules, a stock or fund for the relief—of whom? For the relief of the widows of the deceased members of this society in the manner provided by the rules. The rules, which were revised in 1830, are founded on the principle which I have stated, and it appears to me that the society, subject to one point which I will mention in a moment, was a society established for the purpose of providing annuities for the widows of the contracting members. I can find in that no charity. There is nothing in the rules, nor is there any evidence, to show that the widows provided for were the widows of poor people. Mr. Ingle Joyce said during his argument that many of them seemed to be well-to-do people. It is not necessary for me in this judgment to affirm the proposition of *In re Clark's Trusts*, where the Vice-Chancellor held that a friendly society was not a charitable institution. It is enough for me to say that in my opinion this particular society is not a charity.

I said I would mention one point on which some argument turned—viz., the existence of the honorary members. There certainly was one honorary member, Sir Richard R. Vyvyan, and there may have been more. Now I have the declaration which was signed by Sir Richard R. Vyvyan before me, and the point of the argument for the Attorney-General is that this declaration shows that not only benevolent persons but charitable persons also were subscribing for the widows of others generally. The declaration states: "I do further declare that my object in becoming a member of the above institution is not that any widow of mine shall derive any benefit therein, which I altogether relinquish my right to, but merely for the encouragement of the society." So there was one member, and there may have been a few more, who relinquished all right which he otherwise would have had in favour of his own widow, and left the widows of the other members to be provided for according to the rules. He agreed that his subscription should go for the purpose of providing a fund which would provide the annuities for the others. It appears to me that that does not show that the society was a charity. Again, as I have already said, poverty was not made a qualification on the part of a widow seeking her annuity. It was the annuity provided by particular persons who agreed to become members, and I think the fact that one or two, or it may be more, agreed that their widows should not participate in the benefits of the society is not sufficient to make this a charity.

There will be no order drawn up now, but that is my decision, so that the point will not be argued

(a.) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

again. The trial must stand over, and I will direct the plaintiffs to serve the representative of Sir Richard R. Vyvyan unless he disclaims.

The representative of Sir R. R. Vyvyan having disclaimed, and one Sidney Clarke, the representative of an ordinary member who was not the last survivor, having been served and appointed to represent deceased ordinary members as a body, the action came on again on the 28th of November, 1894.

Robertson Macdonald, for the trustees.

Farwell, Q.C., and *W. D. Rawlins*, for the defendant Edwards, the representative of the last surviving ordinary member.—There is a resulting trust for the ordinary members for the time being subject to the annuities. Under the Friendly Societies Act, 1829, s. 26, five-sixths in value of the existing members can dissolve the society, and then the fund is divided among all the members. Edwards could have done this. [He referred to the *Serjeant's-inn case* (unreported), and *Brown* v. *Dale*, 27 W. R. 149, 9 Ch. D. 78.] Again, only certain kinds of ownerless goods, such as swans, sturgeons, waifs, estrays, &c., go to the Crown as *bona vacantia*; others belong to the first occupant: 2 Stephen's Commentaries, 11th ed., pp. 548, 556; Chitty on Prerogative, pp. 135, 136; *Millar* v. *Taylor*, 4 Burr., at p. 2402; Staundforde on Prerogative, Fo. 37b. The Crown has no title here.

H. J. Tweedy, for deceased ordinary members generally.—There was a resulting trust, not to the members for the time being, but to all the members, or their representatives, in proportion to their contributions.

Sir R. T. Reid, A.G., and *Ingle Joyce*, for the Crown.—This is a case where there is no *cestui que trust* of chattels, and the Crown takes: *Barclay* v. *Russell*, 3 Ves. Jun. 423, 435 (omitted in the Revised Reports); *In re St. James's Club*, 2 De G. M. & G. 382; *Taylor* v. *Haygarth*, 14 Sim. 8; *Lord Colchester* v. *Law*, L. R. 16 Eq. 253, 22 W. R. Dig. 247; Lewin on Trusts, 9th ed., p. 303. The earlier deceased members have had all the benefits they bargained for. When Edwards was alive he and Sir R. R. Vyvyan might have dissolved the institution in the statutory way. But they did not do so. The survivor was really Sir R. R. Vyvyan, whose representative has disclaimed. He had just as much right to the general assets as Edwards. Under the Friendly Societies Act, 1829, s. 26, every member was entitled to a vote on a dissolution, and the Act of 1875 (38 & 39 Vict. c. 60), s. 25, requires the consent of five-sixths of the members (including honorary members, if any). As to resulting trust, the bargain has nothing but widows in view. At all events, the *cestuis que trustent*, if any, are practically unascertainable. [CHITTY, J.—I cannot say there is no resulting trust because of the difficulty of finding the objects.]

Farwell, Q.C., in reply,—*Barclay* v. *Russell* is observed on in *Republic of Peru* v. *Dreyfus*, 36 W. R. 492, 38 Ch. D. 348, 357.

Wilson v. *Church*, 26 W. R. 735, 9 Ch. D. 552, was also cited as to the representation of the ordinary members *en masse*.

Cur. adv. vult.

Feb. 20.—CHITTY, J.—The question is, Who, in the events which have happened, are entitled in equity to the funds in the hands of the plaintiffs, the trustees of the Helston Equitable Annuitant Society, which funds represent the remaining property of that society? The only rules of the society in existence are the revised rules of 1830. The only object of the society was to raise a fund to provide annuities for the widows of members. The fund was to be raised by the contributions of members varying according to the age of the member and the age of his wife, where she was younger than he. Certain fines and forfeitures were also imposed, which went to the increase of the fund. According to the evidence, the funds remaining represent contributions only.

The last annuitant on the fund died in 1892. On her death, the trusts affecting the fund, according to the rules, were exhausted. The rules admitted honorary members; they paid no contributions. The only honorary member outlived the last surviving ordinary member. The representative of this honorary member has disclaimed.

The Attorney-General claimed that the society was a public charity in the technical sense of the term, and asked that the funds might be applied *cy-près*. It was impossible, however, to accede to this claim, though it might have afforded a reasonable solution of the difficulties, and have produced the best result for all concerned. I have already decided against the claim. The trustees of the fund very properly disclaim all beneficial interest. The claimants are, first, the representatives of the surviving ordinary member; secondly, the Attorney-General, on behalf of the Crown; and, thirdly, the representatives of a deceased member, appointed to represent for the purpose of this hearing all the deceased ordinary members as a body. The claim of the representative of the last surviving member may be disposed of in a few words. The society was not a tontine society; there is no ground for saying that the fund belonged in equity to the last survivor. There is nothing in the rules, or in any principle of equity, applicable to the case, on which this claim can be rested. It was said that the last surviving member might have held a meeting under section 26 of the statute of Geo. 4, and voted the funds to himself. To this proposition, extravagant as it is, it is sufficient answer to say that the last survivor never attempted to do anything of the kind.

The contention for the Attorney-General was that the funds were *bona vacantia*, and that the Crown was entitled to them by virtue of its prerogative. It is in virtue of this prerogative right that the Crown takes the personal estate of a man who, being a bastard, dies intestate without leaving issue. Such a bastard can have no next of kin. The Crown's right attaches on proof of the bastardy and no lawful issue of the bastard—subject, of course, to the right of any widow he may have left. But in the case of the death intestate of a person born in wedlock the Crown does not take merely because there is a difficulty in finding the next of kin; an inquiry is directed, and sometimes repeated, to ascertain who are the next of kin, and it is not until every reasonable step by advertisement and otherwise has been taken that the fund is ordered to be paid to the Crown. The mere fact that there will be great difficulty and expense in ascertaining the equitable owner of a fund is not of itself ground for declaring the Crown entitled.

The claim of the person appointed to represent the deceased members generally is founded upon the doctrine of resulting trust. Where a man provides a fund by way of trust for payment of a specified annuity to his widow during her life, and makes no further declaration of trust affecting the fund, the beneficial interest in the fund, or so much of it as is not required for payment of the annuity, results to himself. The same doctrine would apply to the case of several persons agreeing to provide and providing such annuities for their widows; there would be an ultimate trust in their favour when the purposes of the

fund had come to an end. Nor can I see how any difference could justly be made by reason of their raising by common agreement such a fund in different but prescribed proportions as among themselves.

Inasmuch, then, as all the purposes for which the funds of the society were raised by contributions of the members have been exhausted, and there is no indication to be found in the rules as to what was to be done with the funds when the specified purposes were worked out, I am constrained to hold, according to the principles of equity, that the doctrine of resulting trust applies. It is immaterial that no actual declaration of trust was made by the trustees in pursuance of rule 17 of the society. Had any such declaration been actually made, the only trusts which could properly have been declared by the trustee would have been those manifested by the rules. Nor is it necessary to consider what could have been done by a general meeting of the members under section 26 of the Act of Geo. 4; no such meeting was ever held. My reasons for saying I am constrained to hold that the doctrine of resulting trust applies are to be found in what follows. The books of the society prior to 1850 are not forthcoming, and apparently are lost or destroyed. The number of members of the society from the beginning, in 1810, is not known beyond this, that it exceeds several hundreds. The difficulty and expense of ascertaining who were members and who are their legal personal representatives will be enormous. Besides this, inasmuch as the contributions were of varying amounts, the share of each representative in the funds will depend, not merely on the amount of the contribution of the member whom he represents, but also on the various amounts contributed during upwards of eighty years by the other members from time to time. It requires no great experience in matters of this kind to foresee, as I do, that in the endeavour to discover who are the persons entitled, the greater part, and probably the whole, of the funds will be consumed in costs. There are no means at my disposal for cutting this Gordian knot. I have been informed that there are other similar cases which may be brought before the court for decision, and that possibly an attempt may be made to induce Parliament to interfere by passing some Bill; but I know not whether the information is correct. My judgment has been postponed in the hope that the assistance of the Legislature might be invoked; but in this hope I cannot further postpone giving judgment in the action. I therefore make a declaration that in the events which have happened the funds are subject to a resulting trust in favour of the ordinary members of the society from time to time, or their respective legal representatives, in shares in proportion to the amounts contributed by each such ordinary member to the funds of the society. The amounts, if any, paid as fines or forfeitures and the annuities received by widows need not be taken into account. There must be a direction for necessary inquiries on the basis of the declaration.

Solicitors, *Robbins, Billing, & Co.*, for *Marrack, Nalder, & Hockin*, Truro; *Hare & Co.*

Chan. Div. } Romer, J. } Nov. 7, 8, 9.

KIBBLE *v.* FAIRTHORNE. (*a.*)

rtgage—Limitations, Statutes of—Possession by mortgagor—Outstanding legal estate existing during part of the statutory period—Extinguishment of charge—3 & 4 Will. 4, c. 27, s. 34.

Where a mortgagor who remained in possession of the mortgaged property paid no interest and gave no acknowledgment for more than twelve years, the right and title of the mortgagee to the land is extinguished by virtue of section 34 of 3 & 4 Will. 4, c. 27, and the legal estate revests in the mortgagor. The existence, during the earlier part of the statutory period, of a prior mortgage will not prevent this result.

Trial of action.

E. F. Fairthorne, by an indenture dated the 4th of November, 1864, conveyed, by way of mortgage, real estate, of which he was owner in fee, to the Oxford and Abingdon Building Society, to secure a sum of £1,000 advanced on shares therein. On the 3rd of September, 1874, he executed what purported to be a mortgage of the same property to T. Pain, to secure the sum of £700 and interest thereon. He afterwards, in the year 1877, gave an equitable mortgage of the same property to the Buckingham and Oxfordshire Bank. In 1881 the mortgagor became possessed of the mortgage deed of 1874, which was handed to him by the trustee in bankruptcy of T. Pain. The building society in 1886 delivered up to the mortgagor the deed of 1864, with the statutory receipt indorsed thereon, the money thereby secured having been paid off. The mortgagor in 1890 requested the plaintiff Kibble to pay off the equitable charge of 1877 to the bank; and to accept from him what purported to be a first mortgage to secure the amount advanced, and this was accordingly done. Kibble subsequently commenced these proceeding to enforce his mortgage as against his mortgagor, E. F. Fairthorne, and as against C. Fairthorne, E. Fairthorne, and F. Fairthorne, who claimed to have a prior security on the mortgaged premises. The three last defendants had obtained, in 1893, what purported to be a conveyance of the property from Pain's representative. No part of the principal and interest secured by the mortgage of 1874 to Pain had ever been paid.

The plaintiff Kibble pleaded that at the date of the mortgage to him in 1890, not only were the claims of Pain and his representatives barred by the Statute of Limitations, but that their right to the land was barred also, E. F. Fairthorne, the mortgagor, having never been out of possession.

Oswald, Q.C., and *J. Henderson*, for the plaintiff.—The mortgagees claiming through Pain have, by their neglect, lost their right. The whole legal estate is gone by virtue of the deed of September, 1874 never having been acknowledged and no interest paid for more than twelve years. The defendants have not got the legal estate, and if they had, gross negligence and fraud would deprive them of the right to sell or foreclose. The Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57), says that no action can be brought after twelve years, and this Act must be read with 3 & 4 Will. 4, c. 27, and c. 42. The remedy is not merely barred, but the right also. [They also cited *In re Alison*, 27 W. R. 537, 11 Ch. D. 284; *Sanders* v. *Sanders*, 30 W. R. 280, 19 Ch. D. 373; *Dawkins* v. *Lord Penrhyn*, 26 W. R. 6, 6 Ch. D. 318; 27 W. R. 173, 4 App. Cas. 51; *Sands* v. *Thompson*, 31 W. R. 397, 22 Ch. D. 614; *Lloyd's Banking Co.* v. *Jones*, 33 W. R. 781, 29 Ch. D. 221; *National Provincial Bank* v. *Jackson*, 34 W. R. 597, 33 Ch. D. 1; *Farrand* v. *Yorkshire Bank*, 37 W. R. 318, 40 Ch. D. 182.] There is a difference between the Act of Will. 4 as regards real property and the statute of James as regards personal property.

Manley Smith, for E. F. Fairthorne.

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

Neville, Q.C., and *S. Dickinson*, for defendants other than E. F. Fairthorne.—Our mortgage was in 1874, the plaintiff's in 1877. We have the better equity: *Northern Counties of England Fire Insurance Co.* v. *Whipp*, 26 Ch. D. 482. The case of *Lloyd's Banking Co.* v. *Jones* is wholly distinguishable from this case. None of the cases cited touch the present question. It is very old law that when a man has been in possession for more than twenty years (or twelve, as it now is) he gets a statutory title by virtue of section 34 of 3 & 4 Will. 4, c. 27, and that applies to the possession of a mortgagee. No subsequent acknowledgment will revest the estate in anyone else. [ROMER, J.—If the mortgagor is in possession, what then?] In that event the legal estate is outstanding in the mortgagee. The cases cited are under different sections of the Act of 1874.

ROMER, J.—In this case it is admitted, and also established, that the mortgagees under the mortgage of 1874 had for more than the statutory period received no rent, and no acknowledgment under the statute had been given; and therefore the remedy against the land is barred, and these mortgagees have no claim in priority to the plaintiff.

It was suggested that there was a prior legal outstanding mortgage; but the mortgagor was in possession throughout. The mortgagees in respect of the deed of 1874 were in a position to take proceedings against the land by foreclosure, but they did not do so. The time began to run against these mortgagees from the date fixed by the mortgage for redemption. The mortgagees have therefore lost their charge.

For these reasons I hold that the defendants' charge no longer exists, and that the plaintiff's claim is established.

Solicitors, *T. H. Jones*, for *Stockton & Sons*, Banbury; *Hickin, Smith, & Capel*, Crewe.

Q. B. Div.
(Lawrance and Kennedy, JJ.) } Jan. 15; March 5.

WIRRAL HIGHWAY BOARD *v.* NEWELL. (*a.*)

Highway — Repair — Extraordinary expenses — Surveyor's certificate— Highway and Locomotives Amendment Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23.

A surveyor's certificate under section 23 *of the Highway and Locomotives Act*, 1878, *is not invalid by reason only that more highways than one are included in the certificate.*

The surveyor of a highway gave a certificate under section 23 *to the effect that extraordinary expenses had been incurred by reason of extraordinary traffic caused by the respondent in repairing roads in four separate townships. Six months later he gave another certificate which referred to extraordinary expenses incurred partly before and partly after the date of the first certificate on a single road in one of the townships.*

Held, that the first certificate was good, and that, with regard to expenses incurred before it was made, the period of six months limited by 11 *&* 12 *Vict. c.* 43, *s.* 11, *for recovering the amount began to run from the date of the first certificate.*

Case stated by two justices of the county of Chester under 42 & 43 Vict. c. 49.

Extraordinary expenses were incurred by the Wirral Highway Board between April, 1893, and April, 1894, in repairing a road in the township of Burton by reason of excessive weight passing over it and extraordinary traffic caused by the order of the respondent.

On the 7th of December, 1893, the surveyor of the board made a certificate to the effect that up to that time the sum of £285 6s. 11d. had been incurred in respect of roads in the townships of Barnston, Storeton, Burton, and Ness by reason of the respondent's traffic, and on the 14th of December a demand was made for payment of that sum. The money was not paid, and in January the surveyor wrote to the respondent saying that he did not propose to take proceedings on the certificate of the 7th of December; but that, after the completion of the work in which the respondent was then engaged, and which was the cause of the extraordinary traffic, he would issue fresh certificates, in which the roads in each of the townships should be dealt with separately. To this proposal the respondent declined to give any assent. The respondent's extraordinary traffic terminated in April, and on the 31st of May the surveyor made a new certificate to the effect that the sum of £202 3s. 2d. had been spent on the road in the township of Burton, extending from the village of Burton to the boundary of the local board district of Neston and Parkgate, between April, 1893, and April, 1894. The amount was again not paid, and, a complaint having been preferred, the justices held that, six months having elapsed since the date of the first certificate, they could not hear any evidence as to the expenses incurred before that date, and they ordered the respondent to pay £52, which was the amount of extraordinary expenses they found had been incurred from and after the 7th of December, 1893.

Bosanquet, Q.C., for the plaintiffs, the appellants.—The period of six months begins to run in respect of the whole of the expenses from the 31st of May. The certificate of the 7th of December is bad in that it summarizes the roads in several townships and does not particularly specify the road in question. The test of extraordinary traffic being whether the traffic is extraordinary with reference to the particular road in question, the certificate ought to identify the road: *Whitebread* v. *Sevenoaks Highway Board*, [1892] 1 Q. B. 8, 40 W. R. Dig. 94; *Hill* v. *Thomas*, [1893] 2 Q. B. 333, 41 W. R. Dig. 85. In *Cook* v. *Ipswich Local Board*, 19 W. R. 1079, L. R. 6 Q. B. 451, where an apportionment had been made in respect of two streets, it was held that the apportionment was bad, and that time began to run only from a later valid apportionment.

A. A. Tobin, for the desendant, the respondent. — If the certificate of the 7th of December is good, the magistrate's decision is right; for, six months having elapsed since the date of it, the expenses to which it refers cannot be recovered: *Poole and Forden Highway Board* v. *Gunning*, 51 L. J. M. C. 49, 30 W. R. Dig. 89. This certificate is not invalid. The road in question was included among those mentioned. This was found as a fact by the magistrates, and there is no objection to including several roads in the same certificate: *Wallington* v. *Hoskins*, 29 W. R. 152, 6 Q. B. D. 206; *Story* v. *Sheard*, 41 W. R. 31, [1892] 2 Q. B. 515; *Pickering East Lythe Highway Board* v. *Barry*, 3 W. R. 246, 8 Q. B. D. 59. The certificate is not for the information of the person charged; he, indeed, is well aware what roads his traffic has passed over; but it is made rather for the benefit of the board. Though section 23 says "highway" in the singular, by the Interpretation Act, 1889, words in the singular are to include the plural, and "highway" may be read "highways"; therefore, it is quite sufficient if the certificate mentions that extraordinary expenses have been incurred on the highways in the district, without

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

specifying which particular highway or highways. At any rate, the board are not entitled to set up the default of their own surveyor when the person to be charged has made no objection.

Bosanquet, Q.C., in reply, cited *Etherley Grange Coal Co.* v. *Auckland District Highway Board*, 42 W. R. 198, [1894] 1 Q. B. 37

Cur. adv. vult.

The judgment of the COURT was delivered by

KENNEDY, J.—After reciting the facts, he continued: The question raised for our determination is whether the justices were right in limiting the amount recoverable by the appellants to the expenses incurred after the 7th of December, 1893, or whether they ought to have included the extraordinary expenses incurred from April, 1893. I am of opinion that the justices arrived at a proper conclusion, and that our judgment should be for the respondent.

It is argued on behalf of the appellants that the certificate of the 7th of December, 1893, was invalid, as it related to several other highways as well as to the highway in question, and it was suggested that such a certificate was a nullity, and might be rectified by the issue of a second certificate. In favour of this view the case of *Cook* v. *Ipswich Local Board* was cited; but it appears to us that the two cases are essentially different. In the *Ipswich case* the surveyor, whose duty it is to make an apportionment of the sum to be paid by the owner of certain property, having made a bad apportionment by lumping together expenses in regard to two streets which ought to have been kept separate, the court held that such apportionment was a nullity, and that the surveyor was not precluded from making a proper apportionment. In the present case the alleged invalidity of the certificate was caused by the fact that more highways than one were included in the certificate; but it seems to us that the object of the certificate is to inform the highway board of the fact that extraordinary expenses have been incurred upon certain highways within their jurisdiction; and upon that certificate the complaint preferred before the justices is formulated, and the apportionment or estimate of expenses seems to form no necessary part of the certificate, but is the subject of proof before the court having cognizance of the case. It seems to us, therefore, that the December certificate was sufficient for the purpose of founding proceedings for the recovery of the expenses, and, as the proceedings in July, 1894, were not commenced within six months of the giving of the certificate (*Pool and Forden Highway Board* v. *Gunning*) the time had passed during which any claim could be made upon the respondent in respect of extraordinary expenses incurred before the 7th of December, 1893. Under these circumstances we think the justices were right in excluding those extraordinary expenses from the amount ordered by them to be paid by the respondents.

Solicitors for the appellants, *Cunliffes & Davenport*, for *W. H. Churton*, Chester.

Solicitors for the respondent, *Yates, Johnson, & Leach.*

Q. B. Div.
(Wills and Wright, JJ.) Jan. 29.

REG. v. HUGGINS. (a.)

Justices—Disqualification—Bias—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 361—*Charge against unqualified pilot—Conviction—Qualified pilot a member of the court.*

An unqualified pilot was charged before justices and convicted under section 361 *of the Merchant Shipping Act*, 1854, *of assuming and continuing in charge of a ship after a qualified pilot had offered to take charge of her. M., one of the justices, was a qualified pilot. He carried on his business in the same district as the defendant, but was in the exclusive employment of one firm of shipowners who never employed unqualified pilots on their ships, and did not compete with pilots who took part in the "turn" system at pilot stations.*

On an application for a certiorari *to quash the conviction,*

Held, that M. had such an interest in the conviction as to create a reasonable probability of bias, and that the conviction must be quashed.

Rule *nisi* calling upon two justices of the borough of Gravesend to show cause why a writ of *certiorari* should not issue to bring up and quash a certain conviction whereby one Clancy, an unqualified pilot, was convicted under section 361 of the Merchant Shipping Act, 1854, of assuming and continuing in the charge of a certain ship after a qualified pilot had offered to take charge of her.

The rule was obtained on the ground that Thomas Martin, one of the six magistrates by whom the case was heard, and who were unanimous in their decision, had an interest in the matter, he being a qualified pilot actively engaged at Gravesend and in the London Bridge district, and as such, it was alleged, acting in competition with unqualified pilots such as Clancy.

An affidavit of Martin was read to the court, in which he stated that he had no interest in the conviction. Although he was a duly licensed Trinity House pilot, he did not in any way compete with Clancy or other unqualified pilots. The only Trinity House pilots who competed with unqualified pilots were those who took turns at a pilot station, but Martin did not and never had taken part in the "turn" system. For forty-three years he had been a licensed "choice" pilot, that is, a pilot chosen and regularly engaged beforehand by shipowners to pilot their ships, and for the last nineteen years he had acted as choice pilot for the Peninsular and Oriental Steam Navigation Co. which company never employed unqualified pilots on any of their ships. Under the terms of Martin's employment with the company the company were exclusively entitled to his services, and he was not allowed to offer his services to any other employer so long as his engagement with the company lasted.

The Merchant Shipping Act, 1854, s. 2: "'Pilot' shall mean any person not belonging to a ship who has the conduct thereof; 'qualified pilot' shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong."

Section 361: "An unqualified pilot assuming or continuing in the charge of any ship after a qualified pilot has offered to take charge of her . . . shall . . . incur a penalty not exceeding £50."

Section 362: "An unqualified pilot may . . . take charge of a ship . . . when no qualified pilot has offered to take charge of such ship."

Poland, Q.C., and *R. D. Muir*, showed cause against the rule.—The *certiorari* ought not to issue unless the court is satisfied that the magistrate in question had such a substantial interest in the result of the hearing as to make it likely that he had a real bias in the matter: *Reg.* v. *Handsley*, 30 W. R. 368, 8 Q. B. D. 383. The mere possibility of a bias is not sufficient. The facts disclosed by the magistrate's affidavit show that he had no interest in the matter. He is not in any way acting in competition with the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

defendant, and even if he were to leave his present employment and become a "turn" pilot he would not compete with him, because after a qualified pilot has offered to pilot a compulsory ship an unqualified pilot cannot be employed on that ship. There is no case which says that the mere fact of a magistrate being a member of the same class or profession as the defendant disqualifies the magistrate from adjudicating on the case.

They also cited *Leeson* v. *General Council of Medical Education*, 38 W. R. 303, 43 Ch. D. 366; *Reg.* v. *Hodgson*, 12 W. R. 423; *Reg.* v. *London County Council, Ex parte Akkersdyk*, 40 W. R. 285, [1892] 1 Q. B. 190.

Burnie, for the defendant, in support of the rule.—There was in this case a probability of a real substantial bias, because the magistrate as a qualified pilot was interested in the general question of the conviction of an unqualified pilot.

WILLS, J.—This is a case of some difficulty, because in these cases a difficulty always arises of keeping distinct three different reasons, for which a decision of a judicial tribunal may be invalidated—viz., pecuniary interest, bias, and such a degree of interest as might possibly give rise to bias—and in some of the reported cases there is a little confusion in the language employed between pecuniary interest and bias. Then there is another class of case, in which the objection is not so much one of bias as that the same person ought not to be both prosecutor and judge. Again, there are cases in which a body, although it is not strictly speaking a judicial body, nevertheless acts in a way contrary to the natural principles of justice, and a decision so arrived at is not allowed to stand. In each of these cases the considerations applicable to the decision are not identical, and unless the distinction between them is kept clearly in mind, the court is apt to be led away by expressions of opinion which do not in reality touch the case.

In the present case it is important to consider the facts with reference to the question of bias (any suggestion of disqualification by reason of pecuniary interest being out of the question), and we have to determine whether there was any actual bias, or a reasonable risk or apprehension of bias, such as a fair man might reasonably entertain. The consideration of the question must not be altogether confined to the circumstances of this particular case, for the possibility of the recurrence of the same or similar circumstances in other cases of a like nature must also be borne in mind. I do not for one moment suggest that the magistrate in question, Mr. Martin, was subject to any actual bias in this case, there are no facts in the case which could support that view; but he does belong to a small class of privileged persons for whose protection these proceedings against an unprivileged person were taken, and that seems to me to be a very important consideration. I do not think that it would be satisfactory or in the interest of the general administration of justice that the decision should be allowed to stand. It is impossible to overstate the importance of keeping the administration of justice by magistrates not only free from actual interference by motives which ought not to affect it, but free also from anything which might give rise to such a reasonable apprehension as might, if it became general, interfere with the administration of justice and the confidence of the public. If all the justices had been either qualified or unqualified pilots it cannot be contended that there could be any but one answer to the question, and if there was only one pilot amongst the six justices the same observation applies. Without suggesting that Mr. Martin has been guilty of anything approaching misconduct, I think that it is much more to the general interest of the administration of justice that the doctrine in question should be enlarged rather than restricted.

WRIGHT, J.—I am of the same opinion for the same reasons. I only wish to add an observation with regard to the cases cited by Mr. Poland, in which the court has been asked to interfere with the action of administrative bodies, such as the London County Council or the General Council of Medical Education. I think that the distinction to be drawn between those cases and the present is this. This court is, and ought to be, slow to interfere with the action of outside bodies such as I have mentioned, but in the exercise of its jurisdiction over inferior courts different considerations apply, and therefore I think that the court ought to interfere on slighter grounds than in the former kind of case.

Rule absolute for a certiorari.

Solicitors for the prosecution, *Sismey & Sismey*, for *Tolhurst, Lovell, & Clinch*, Gravesend.

Solicitor for the defendant, *E. H. Bedford*.

Q. B. Div.
(Wright and Collins, JJ.) Nov. 22.

LORD MOSTYN (*Appellant*) v. LONDON, SURVEYOR OF TAXES (*Respondent*). (*a*.)

Inland revenue—Income tax—Fines upon renewal of lease—Temporary deposit at interest in bank—Application as productive capital—Exemption—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Schedule A, No. II., r.* 5.

Money received in respect of fines upon renewals of leases and placed by the tenant for life under a will in the names of the trustees on temporary deposit at interest in a bank until required for permanent investment, is not exempt from income tax, as being "applied as productive capital," within the meaning of rule 5 *of section* 60, *Schedule A, II., of the Income Tax Act*, 1842.

Case stated by Commissioners of Income Tax on appeal against their decision confirming an assessment in respect of fines upon renewals of leases made under the 5th head of rule 2 of Schedule A of section 60 of the Income Tax Act, 1842.

That rule includes, among property chargeable, "all fines received in consideration of any demise of lands or tenements (not being a parcel of a manor or royalty demisable by the custom thereof) on the amount so received within the year preceding by or on account of the party, provided that in case the party chargeable shall prove to the satisfaction of the commissioners for general purposes in the district that such fines, or any part thereof, have been applied as productive capital on which a profit has arisen or will arise otherwise chargeable under this Act for the year in which the assessment shall be made, it shall be lawful for the said commissioners to discharge the amount so applied from the profits liable to assessment under this rule."

During the year commencing in April, 1890, and terminating in April, 1891, the appellant, who was tenant for life under the will of his late father of certain freehold property which was let upon leases renewable upon payment by the lessees of certain prescribed fines, as such tenant for life granted renewals of certain leases, and upon such renewals

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

received, as agent for the trustees of the said will, fines amounting to £1,795 from lessees, of which a portion, amounting to £906, was placed upon deposit at the London and Westminster Bank in the names of the said trustees, and remained on such deposit until the end of the financial year ending in April, 1892. Interest on some of such deposits together with other deposits was paid to the said trustees by the said bank up to April, 1891, amounting together to £44, upon which the appellant agreed to pay income tax; but he contended that, as the fines in question, amounting to £906, had been so placed on deposit producing the said amount of interest for the year of assessment, the said fines had been applied as productive capital on which a profit had arisen otherwise chargeable under the Income Tax Acts within the operation and effect of the proviso to the above rule, and that the commissioners should, in accordance with such proviso, discharge the amount so applied from the profits liable to assessment.

The appellant stated at the hearing that under the said will all fines on renewals of leases should, after payment of debts and reduction of mortgages, be invested or expended in the purchase of freehold, copyhold, or leasehold property, and that the tenant for life therefore received and must apply such fines as capital, and had no power to appropriate them to his own uses or in any way utilize them as income.

The fines were placed in the bank temporarily on deposit as received, and were intended to remain there until required for permanent investment.

It was contended by the surveyor of taxes on the above facts that the placing of money in a bank on deposit was not an application as productive capital within the meaning of the Act, the appellant having admitted that the money was placed in the bank temporarily until such time as it was required for permanent investment.

The commissioners were of opinion that the assessment should be confirmed, and confirmed the same accordingly, but, at the request of the appellant, stated this case for the opinion of the High Court.

The question for the opinion of the court was whether the respective amounts placed on deposit as stated had been applied as productive capital on which a profit had arisen otherwise chargeable under the Income Tax Acts within the meaning of the proviso above set forth.

Pollard (*Bucknill, Q.C.*, with him), for the appellant.—The appellant is entitled to exemption under the proviso to the rule. The money deposited in the bank and bearing interest has been applied as productive capital.

Lockwood, S.G. (*Danckwerts* with him), for the respondent.—The investment being temporary only, the money is not applied as productive capital, and is not within the proviso. Moreover, the proviso only gives the commissioners a discretionary power to discharge money so applied, and the court will not interfere with the exercise of that discretion.

RIGHT, J.—I think this appeal must fail. I doubt whether the proviso to the rule gives more than a discretionary power to the commissioners, but I do not decide the case upon that ground. [His Lordship read the proviso to the rule above set out, and continued:—] In my opinion, if these words are read according to the ordinary meaning of the English language, they imply something more than a temporary deposit at a bank. The word "applied" must mean something more than what has been done here. These fines cannot be said to have been applied; they are being held in suspense until it is determined how to apply them. A temporary deposit of this kind is not an application as productive capital. I do not think that the word "productive" is applicable here, but the word "applied" is, to my mind, the word which is most inconsistent with the contention of the appellant.

For these reasons I think the appeal fails.

COLLINS, J.—I am of the same opinion. It is not easy to see exactly what is included in this proviso, but I am clearly of opinion that it does not cover money temporarily deposited at a bank. There must be some more permanent application, and it is not enough that the money is being held in suspense until the owner has determined how to apply it.

Appeal dismissed.

Solicitors for the appellant, *Hulberts & Hussey.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Dec. 19.

SCHOLFIELD v. LORD LONDESBOROUGH. (a.)

Bill of exchange—Alteration—Forgery—Acceptance of bill with blank spaces—Stamp—Negligence—Estoppel—Liability of acceptor for amount of altered bill—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-section* 1.

The defendant was the acceptor of a bill of exchange for £500. *In the bill as drawn a space was left before the words "five hundred pounds" in which there was sufficient room for the insertion of two words, and between the* £ *and the figures* 500 *sufficient space was also left for the insertion of another figure. The bill bore a stamp sufficient to cover* £4,000. *After the acceptance the drawer fraudulently inserted the words "three thousand" before the words "five hundred pounds," and the figure "3" between the* £ *and the* 500, *and in this form he indorsed and negotiated the bill. In an action by the plaintiff, who was a* bonâ fide *holder for value, to recover the full amount of the altered bill, Charles, J., held that there was no evidence of such negligence on the part of the defendant in accepting the bill in the form in which it was drawn as estopped him from setting up the subsequent alteration as a defence to the action; and that therefore the defendant was only liable to the extent of* £500 *under section* 64, *sub-section* 1, *of the Bills of Exchange Act,* 1882.

Held, by Lord Esher, M.R., *and* Rigby, L.J., *that the acceptor of a bill owes no duty to subsequent holders not to accept a bill drawn in such a form as to facilitate fraud, his only duty being to pay the bill which he has accepted at maturity; that, assuming that there is such a duty on the part of the acceptor, the above facts did not show any evidence of negligence on his part; that, assuming that there was negligence on his part, the negligence was not the proximate cause of the loss, inasmuch as the forgery of the drawer intervened; and that therefore the defendant was not estopped from setting up the subsequent alteration of the bill, and was only liable to the extent of* £500.

Held, by Lopes, L.J., *that the acceptor of a bill owes a duty to subsequent holders not to be guilty of negligence*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

with reference to the form of the bill which he accepts; that the defendant, in accepting the bill framed in such a way as to give obvious opportunities for its fraudulent alteration and bearing a stamp sufficient to cover a much larger amount, was guilty of such negligence as disentitled him to set up the fraudulent alteration; that the negligence was the proximate cause of the loss; and that therefore the defendant was liable for the full amount of the altered bill.

Young *v.* Grote, 4 *Bing.* 253, *commented upon.*

Appeal from the judgment of Charles, J., in favour of the defendant at the trial of the action without a jury (reported [1894] 2 Q. B. 660).

The action was to recover £3,500 on a bill of exchange drawn by one Francis Charles Scott Sanders upon and accepted by the defendant. The plaintiff was the holder of the bill in good faith and for value. When the defendant accepted the bill it was a bill for £500 only, and afterwards, before indorsement, it was fraudulently altered by the drawer into a bill for £3,500. The defendant pleaded this alteration as a defence to the whole action, but in the alternative, whilst denying all liability, paid £500 into court. The plaintiff replied that the defendant "ought not to be admitted to say that the bill was altered in material particulars and thereby made void, because such alterations were made easy and every opportunity for them was given by the culpable negligence of the defendant in accepting the bill in the form in which he accepted it and on the bill stamp on which it was drawn, and without the said negligence the alterations would not and could not have been made."

The bill was dated London, the 8th of September, 1890, and bore a £2 stamp, sufficient to cover £4,000, a stamp of 5s. being the proper stamp for a bill of £500. In the left-hand corner were at the time of the acceptance the figures 500 preceded by the sign £. Between the £, however, and the figures, was a space left sufficiently wide to admit of another figure being interpolated. The figure 5 was boldly written, and was somewhat larger than the two ciphers which followed it. The body of the bill was in three lines. On the first were the words "three months after date." These words commenced in the middle of the paper and terminated at the extreme end, leaving no room for anything to be inserted. On the second line were the words "pay to me or my order the sum of," but after the word "of" was left ample room for the addition of any word. On the third line were the words "five hundred pounds for value received," but the words in this line did not extend to the left as far as the word "pay" in the line above, ample space being left for the insertion of a word of eight or nine letters before the word "five," and such word when inserted would just bring the commencement of the third line immediately below the commencement of the line above. Sanders, having obtained the defendant's acceptance to the bill so drawn, inserted the figure 3 between the £ and the 500, and in the body of the document added the words three thousand between the word "of" in the second line and the words "five hundred" on the third, writing the word "three" on the second line and the "thousand" on the third, and in that shape he negotiated it.

Charles, J., held that the defendant was not estopped by having accepted the bill in the form in which it was originally drawn or upon a stamp sufficient to cover a larger amount, from setting up the subsequent alteration as a defence to the action for the full amount; but that, as the alteration was not apparent, the defendant was liable under section 64, sub-section 1, of the Bills of Exchange Act, 1882, for £500, the amount of the bill when accepted; and that, as the defendant had paid £500 into court, he was entitled to judgment. The plaintiff appealed.

Finlay, Q.C., and *E. Morten*, for the plaintiff.—The decision in *Young* v. *Grote*, 4 Bing. 253, is applicable to this case. That decision proceeded upon the ground of estoppel by negligence in drawing the cheque. That principle is stronger in the case of a bill of exchange, which will probably pass through many hands, and the character of the indorsees cannot be known. It is the duty of the acceptor of a bill not to accept it in such a form as to facilitate fraud: *Halifax Union* v. *Wheelwright*, 23 W. R. 704, L. R. 10 Ex. 183. That duty he owes to subsequent innocent holders of the bill. In *Bank of Ireland* v. *Evans' Trustees*, 3 W. R. 573, 5 H. L. Cas. 389, which was followed in *Mayor, &c., of Staple of England* v. *Bank of England*, 21 Q. B. D. 160, 36 W. R. Dig. 78, *Young* v. *Grote* was cited, and recognized as an authority; and Blackburn, J., recognizes its authority in *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175. In *Baxendale* v. *Bennett*, 26 W. R. 899, 3 Q. B. D. 525, the judgment went upon the ground that the instrument had never been issued. The facts here, namely, accepting a bill with blanks left for so obvious a purpose and bearing a stamp sufficient to cover a much larger amount, show great negligence on the part of the defendant, and the negligence is negligence in the transaction directly leading to the loss, and the defendant is therefore estopped from denying that he accepted the bill for £3,500.

Jelf, Q.C., and *A. T. Lawrence*, for the defendant.—*Young* v. *Grote* was decided upon the relation of banker and customer. It may be assumed, though it is not admitted, that a customer owes some duty to his banker upon whom he draws a cheque, upon the ground, as stated by Pothier in his Traité du Contrat de Change, ss. 99, 100, of the relationship of principal and agent. But the acceptor of a bill owes no duty to subsequent holders. The acceptor might be bound to accept the bill, and if he refused to do so on the ground that it was so drawn that someone might interpolate a figure, he would be liable to an action. Commercial dealings in such an event could not be carried on. The acceptor is only liable on his acceptance, and he cannot be liable for the fraud of a person who is not his servant or agent. In *Robarts* v. *Tucker*, 16 Q. B. 560, Parke, B., suggested that *Young* v. *Grote* might be supported upon the ground that the customer, by signing a blank cheque might be considered as giving authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. Section 64 of the Bills of Exchange Act, 1882, exhausts the whole subject of the alteration of a bill, and does not mention this alleged duty. Secondly, assuming that there is the duty alleged, there was no negligence on the part of the defendant. The defendant had perfect confidence in Sanders, and the fact of the stamp being too high was no evidence of negligence. Further, even if there was negligence, the negligence was not the proximate cause of the loss. The interposition of Sanders' crime prevented the negligence from being the proximate cause of the loss. It is no want of reasonable care not to anticipate that a crime will be committed.

They referred on this point to *Bank of Ireland* v. *Evans' Trustees; Ex parte Swan*, 7 C. B. N. S. 4[illegible] at p. 447; *Baxendale* v. *Bennett; Société Générale* v. *Metropolitan Bank*, 21 W. R. 335, 27 L. T. N. S. 8[illegible] *Mayor, &c., of Staple of England* v. *Bank of Ireland.*

Finlay, Q.C., in reply.—The Bills of Exchange

Act, 1882, does not exhaust all the law upon bills of exchange: section 97, sub-section 2. The question of negligence is outside the Act.

He referred to *Orr* v. *Union Bank of Scotland*, 1 Macq. 513, 3 W. R. Dig. 143.

Cur. adv. vult.

Dec. 19.—Lord ESHER, M.R.—In this case an action is brought against the defendant as the alleged acceptor of a bill of exchange for £3,500. It was proved at the trial that the defendant was in some way interested in the formation or carrying on of a club, and that he made advances for the purposes of the club. Sanders, who was apparently also interested in the club, drew a bill of exchange for £500 upon stamped paper, but he left certain spaces in the bill, and in that state he laid it before the defendant for his acceptance. There was no evidence as to what took place between the defendant and Sanders at that time as to the acceptance. Sanders is now in penal servitude, and of course was not called. It was admitted that the signature to the acceptance was the defendant's, and that at the time of his acceptance the bill was for £500 only. It is clear that Sanders filled in the spaces and changed the bill into one for £3,500, and that he had left the spaces for the purpose of committing the fraud. The defendant after accepting it handed it back in the ordinary course to the drawer, and then Sanders, having altered it, indorsed it, and it subsequently came into the hands of the plaintiff, who took it *bonâ fide* and for value, and who now sues the defendant upon it for the full amount of £3,500.

Upon the above facts, if the defendant is not prevented from setting up the forgery, he would not, before the Bills of Exchange Act, 1882, have been liable at all on the bill. But by section 64, sub-section 1, of that Act Charles, J., has held that he must pay the plaintiff the £500, the amount of the bill when accepted. If, therefore, the case is to be treated as coming within the code, the defendant can only be made liable for £500, which sum he has paid into court. But it is said that the case is not within the code because the defendant is estopped from setting up the truth, and is liable to pay the amount appearing on the face of the bill. To my mind nothing but estoppel can prevent the defendant from setting up the truth.

Now the doctrine of estoppel is not peculiar to bills of exchange, but is a general doctrine of the common law applicable to other transactions. It is not said that the defendant made any representation to the plaintiff, either in writing or otherwise, and, therefore, he cannot be estopped by a representation false in fact which induced the plaintiff to take the bill. It is said, however, that the estoppel is founded on negligence on the part of the defendant, the negligence alleged consisting in accepting the bill with certain gaps in it, there being also a subsidiary question as to the amount of the stamp. Now, negligence to be actionable must be the neglect of some duty, and in order to prove negligence the plaintiff must first show that the defendant owed, not merely a duty, but the duty to him not to accept a bill of exchange with gaps in it and upon paper bearing too large a stamp. We must see what was the position of the defendant. At the time of acceptance he had no legal relation of any kind with the plaintiff. What, then, is the position of the acceptor of a bill? Before acceptance there may or may not be a contract between him and the drawer that he will accept the bill. In the ordinary course as between merchants there is generally such a contract, either express or implied from the course of business. According to the custom of merchants, when one merchant is indebted to another, the creditor may draw upon the debtor up to the amount of the debt, and the latter accepts the bill. That is a contract in existence before the acceptance. It has nothing to do with the contract which is created by the acceptance. The contract to accept is merely unilateral. The proposed drawer cannot be compelled to draw the bill. He may draw it, and he is the master of its form. Moreover, a bill is often negotiated before acceptance. The first and other indorsers and indorsees may be brought into existence before the bill is accepted. The acceptor has no control over the persons into whose hands the bill may pass. Indeed, he does not know whether the bill will ever be negotiated at all. It may be that the drawer will himself present it for payment, and may buy it back, and he may be, even if the bill has been negotiated by the drawer, the person who will then present it for payment. Taking all these matters into consideration, I ask, What is the liability of the acceptor? The moment he accepts the bill he enters into a contract to pay the amount of the bill to the payee or to his order or to the bearer. It is perfectly clear that if the drawer were to present the bill for payment, he could not say that he had subsequently to the acceptance inserted certain figures in it, as in this case, and that the acceptor must pay him the full amount. Therefore the contract which is created by the acceptance is to pay the bill he has accepted either to the payee or the indorsee. There is no other duty created by the contract of acceptance. What, then, can the drawer transfer? He can only transfer what he himself has. He has a promise by the acceptor to pay the amount of the bill as accepted. The acceptor owes him no duty not to accept a bill with spaces left in it. It seems to me that, according to ordinary principles of law, the drawer can only transfer the promise to pay. If the opposite argument is well founded, then the drawer, having a promise to pay without the alleged duty, can, nevertheless, transfer the promise with the alleged duty. That seems to me to be contrary to principle. What, then, is the position of the drawee as regards accepting a bill which when presented for acceptance has spaces left in it? The bill, as I have stated, may have been already indorsed. For instance, a merchant abroad, who is owed money by a merchant in England, draws a bill upon the latter for the amount of his debt. The foreign merchant enters into business engagements abroad upon the faith that the bill will be accepted when it is sent to England. The English merchant has agreed, either expressly or by reason of the course of dealing, to accept the bill. What a position the foreign merchant would be in if the English merchant were to say that he had agreed to accept a bill without spaces in it and that he refused to accept that particular bill. Unless the court lays it down as a matter of law that a bill need not be accepted whenever there are spaces left in it, the drawee would be in this position, that a jury might find that he ought to have accepted the bill, and he might then be liable for damages for non-acceptance. He would never know which way a jury might find. It seems to me that the only duty of the drawee is to accept the bill, if there is a contract to that effect, and to pay it when it is presented for payment. That is the obligation stated by Pothier in his Traité du Contrat de Change, ss. 116, 117. If there is no duty it is clear that there can be no negligence. According to Pothier the acceptor owes no duty to subsequent indorsees, except to pay the bill when it is presented for payment, and this view is confirmed when one considers that the duty contended for is in relation to the negotiation of the bill, with which the acceptor has nothing to do, and which he cannot control even if he were told that

the drawer was about to indorse it to a convicted thief.

But supposing that there is such a duty as alleged, the next question is, Was there any negligence on the part of the defendant? The alleged duty is not to accept a bill in such a form as to render an interpolation easy. The alleged neglect of that duty is that the acceptor, at the time of acceptance, did not anticipate that the bill with spaces left in it might get into the hands of a felonious indorsee, who might commit a felony, and that to avoid that the acceptor ought to have drawn some lines to fill in the spaces. The result of that would be that, unless the mere fact of the existence of the spaces and of the acceptor not filling them in is conclusive evidence of negligence, upon the same set of facts one jury might find negligence and another might not. If that were so business would be greatly hampered. No sensible merchant would care to take bills at all. But if the question is one of fact in each case, against which I strongly protest, there seems to me to be no evidence of negligence in this case. Even then, assuming that there is the alleged duty, in my opinion such evidence as was given in this case is no evidence at all of negligence. To suppose that the acceptor is to minutely examine the bill and see whether figures could not be interpolated is unbusinesslike.

But, again, even supposing that there is such a duty and a neglect of that duty, did they create an estoppel? According to the authorities there must be negligence in or immediately connected with the transaction—it must be the proximate cause of the loss—whereas that was not the case here, inasmuch as the felony of the drawer intervened, and therefore the negligence was not the proximate cause of the loss. That being so there is no estoppel.

Is there any authority which compels us to come to a contrary decision? I can find none. I come first to *Young* v. *Grote*. In my view that case is the fount of bad arguments. It has never been upheld for the proposition for which it is generally cited. It was a case between banker and customer, and therefore it cannot be an authority as to the acceptor of a bill of exchange. What rule or principle can *Young* v. *Grote* be cited for? The ground of the decision is given by Best, C.J.:—"We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer." If that is so, what becomes of the subsequent cases which say that the intervention of the fraudulent act of a third person prevents the negligence being the proximate cause of the loss? The truth is that *Young* v. *Grote* has been considerably disliked; and the courts, in subsequent cases, have suggested various possible grounds for the decision. In my opinion the only ground upon which that case can possibly be supported is that the plaintiff issued a blank cheque, signed by himself, and that the person into whose hands the cheque came had authority, according to the law merchant, to fill in the cheque. That, however, is not estoppel. and if that be the true ground upon which to place the decision, it may, perhaps, have been rightly decided, but it is not worth citing as an authority, because that principle is very much older than that case.

I propose now to refer to a few cases to see how *Young* v. *Grote* has been dealt with from time to time. *Swan* v. *North British Australasian Co.* was the case of a forged transfer of shares by deed. Blackburn, J., after referring to the rule laid down by Wilde, B., in the Court of Exchequer and correcting it, deals with *Young* v. *Grote*, and says that "it is sufficient to point out that a party signing in blank a cheque or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment in *Freeman* v. *Cooke*. He means the holder to be induced to take the instrument as if it had been filled up from the first. And that makes a marked distinction between such a case and the present, in which Mr. Swan never did mean that anyone should take this transfer of the shares as genuine." It is clear that the learned judge was there referring to the case of a blank cheque, and not to a completed bill. In *Baxendale* v. *Bennett* Bramwell, L.J., said: "The defendant is sued on a bill alleged to have been drawn by W. Cartwright on, and accepted by, him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill." That shows that the plaintiff here cannot recover unless the defendant is estopped from denying that he did accept a bill for £3,500. He goes on to say that the doctrine of estoppel "never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct." How can that be applied to the case of an acceptance like this one? If the defendant says that he only accepted a bill for £500, how is he saying anything contrary to his former conduct? The Lord Justice then goes on to say that everyone has a right to suppose that a crime will not be committed, and to act on that belief. I need not read what I said in that case. I expressed my doubts strongly as to the decision in *Young* v. *Grote*. The *Mayor, &c., of the Staple of England* v. *Bank of England* was a case as to the custody of the seal of a corporate body, and the doctrine of estoppel founded upon negligence is there stated again. In that case I read the passage from the opinion of the judges as delivered by Parke, B., in *Bank of Ireland* v. *Evans' Trustees*, and adopted by the House of Lords, where he said that "the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself." That shows that even if there is the duty and the negligence alleged here there is not that species of negligence which would alone warrant a jury in finding that the defendant was disentitled to insist upon the acceptance for £3,500 being void. Bowen, L.J., said: "It seems to me here that the proximate cause was the felony and crime of Drew, and that it cannot be said that the felony was itself either the natural or likely or necessary or direct consequence of the carelessness of the plaintiffs." Applying that to the present case, it cannot be said that the felony of Sanders was the natural consequence of the alleged carelessness of the defendant. I need not refer more fully to the case of *Bank of Ireland* v. *Evans' Trustees*, except to say that the Lord Chancellor states that the decision in *Young* v. *Grote* proceeded upon the ground of estoppel. In *Robarts* v. *Tucker* Parke, B., places the decision in *Young* v. *Grote* upon the ground that the customer had, by signing a blank cheque, given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. If that is the true ground, the decision, as I have said, may or may not be right, but it is not the ground upon which the judges decided it. In my opinion the case of *Young* v. *Grote* ought no longer to be cited as an authority. The defendant, therefore, is not estopped, and the case comes within section 64, sub-section 1, of the Bills of Exchange Act, 1882, which provides that where a bill has been materially altered, but the alteration is not apparent, the holder in due course may avail himself

of the bill as if it had not been altered. The bill having been accepted for £500, the defendant is only liable to pay that amount. The judgment must therefore be affirmed.

LOPES, L.J., read the following judgment:—This is a case of great importance, and I regret that I cannot concur with the view taken of it by the other members of the court. [His lordship having stated the facts as set out above, proceeded:—] That it was easy so to alter the document will be clear upon its inspection, and is conclusively proved by what has actually happened. There can be no doubt that Sanders expressly prepared the bill with a view of doing that which he subsequently did. The questions which arise are these: (1) Did the defendant, the acceptor, owe any duty to the subsequent holders of the bill? (2) Was there any breach of that duty; or, in other words, was there such negligence by the defendant in accepting the bill framed as it was, as disentitled him to set up its alteration in material particulars as a good answer to an action brought on the bill by a *bonâ fide* holder for value? (3) Was what happened the proximate consequence of such breach of duty?

The principle in regard to negligence having legal consequences appears to be this: first, there must have been a failure to exercise that care, prudence, or diligence which a man of average care, prudence, or diligence would exercise in the case; and, secondly, that general proposition means specifically (*a*) that the negligent person at the time must owe some duty either to the person affected by the alleged negligence or to the public of which he is one, and (*b*) that the result has come about in or in immediate connection with the negligent act or omission. There is a subordinate question with regard to the effect of section 64 of the Bills of Exchange Act, 1882, which I will deal with after I have disposed of the above questions. The learned judge in the court below held that the defendant did owe a duty to subsequent holders not to be guilty of negligence with reference to the form of the instrument, but he considered that accepting a bill in a form facilitating forgery was not enough, he must negligently so accept it, and that the defendant in this case had not been negligent. I agree with the learned judge when he holds that the defendant did owe a duty to subsequent holders, but I disagree with him in respect of the negligence. I should have thought that the accepting a bill in a form facilitating forgery was in itself strong evidence of negligence.

In considering the question of duty it is important to bear in mind that bills of exchange are a part, and a very important part, of the mercantile currency of the world; they are negotiable instruments, and are created for the purpose of readily passing from hand to hand. Happily bills of exchange generally pass through the hands of honest people, and are seldom fraudulently dealt with. They may, however, fall into the hands of dishonest people, and by prudent persons are therefore so drawn as to render any tampering with them well-nigh impossible. Crime is the exception, but I expect, if bills were often framed as the one in this case was framed, crime would be of frequent occurrence. It would be passing strange if a person who accepts a negotiable instrument, such as a bill of exchange, and who thus permits it to go forth on the credit of his name, he being the person primarily liable to all subsequent holders, should not owe to those subsequent holders the duty of taking reasonable care that the document should be so framed, when accepted, as not to offer obvious opportunities for the commission of a crime. If this had been *res integra*, I should without hesitation have thought the duty contended for existed, but there is no lack of authority on the subject. If the Master of the Rolls is correct in holding that the acceptor of a bill of exchange owes no duty to subsequent holders for value, that holding means the reversal of numerous cases hitherto recognized. In *Young* v. *Grote* it was assumed that the customer owed a duty to his banker, and that he was guilty of negligence in not drawing his cheque on them with ordinary care. It is true that that was a case between customer and banker, but it appears to me, if there was a duty there, *à fortiori* there must be a duty between the acceptor of a bill of exchange and subsequent holders where the instrument in question is created for the purpose of passing from hand to hand. In *Swan* v. *North British Australasian Co.* Blackburn, J., speaking of *Young* v. *Grote*, says: "It may be that case is to be supported on some of the grounds stated by Williams, J., in *Ex parte Swan*, or upon the broader ground, apparently supported by the authority of Pothier in the passage cited in *Young* v. *Grote*, that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary in this case to inquire how that may be." By which I understand the learned judge to mean that it was not necessary because they were not then dealing with negotiable instruments. But it is impossible not to see that in the case of negotiable instruments Blackburn, J., thought the duty did exist. I can find no case where it has been doubted that a party putting in circulation a bill of exchange owes a duty to subsequent holders to take reasonable precautions against fraudulent alterations.

Baxendale v. *Bennett* was a case where the defendant drew a bill without a drawer's name addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it was stolen, filled up with a drawer's name, and transferred to the plaintiff, a *bonâ fide* holder for value. The bill, it is to be observed, was never issued, and this may account for what Brett, L.J., says at p. 532: "There must be the neglect of some duty owing to some person. Here how can the defendant be negligent who owes no duty to anybody? Against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room. To say that was a want of due care is impossible; it was not negligence for two reasons, first, he did not owe any duty to anyone, and secondly, he did not act otherwise than in a way an ordinary careful man would act." This may very well be so in a case where the bill is obtained by the commission of an offence, and then becomes circulated against the will of the acceptor. It is very like the case of a bill being stolen from a person in the street with violence, and subsequently circulated. In such a case it would be difficult to say that the acceptor had been wanting in any reasonable precautions or owed any duty to anybody. Bramwell, L.J., does not seem to doubt the existence of a duty, if the instrument had been voluntarily parted with, but founds his judgment on the fact that the bill had been obtained by the commission of a crime and against the will of the defendant. *Ingham* v. *Primrose*, 7 C. B. N. S. 82, 7 W. R. C. L. Dig. 12, proceeds on the ground that the acceptor owed a duty to the *bonâ fide* holder for value, and though the case has been severely criticized on the point of the negligence relied on, it has not, so far as I know, ever been questioned on the point of duty. The judgment of the court (Erle, C.J., and Williams, Willes, and Byles, JJ.) was delivered by Williams, J. In *Société Générale* v. *Metropolitan*

Bank the duty was assumed, and I know of no case where it was ignored.

Mere carelessness, where there is no breach of duty to be careful, is not sufficient. In the words of Blackburn, J., in *Swan* v. *North British Australasian Co.*, which are cited with approval by Cockburn, C.J., in *Johnson* v. *Credit Lyonnais*, 26 W. R. 195, 3 C. P. D. 32, at p. 42, "a person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt." I come to the conclusion therefore, that there must be a duty, and I agree with Charles, J., in the court below in holding that a person who signs a negotiable instrument with the intention that it should be delivered to a series of holders does incur a duty to those who take such negotiable instrument not to be guilty of negligence with reference to its form.

I now come to the second question—viz., assuming a duty, was there any breach of such duty, such negligence in accepting the bill in the form in which it then was as disentitled the defendant to set up its alteration as a good answer to this action by a *bonâ fide* holder for value? The negligence must be in the transaction itself. Blackburn, J., so says in *Swan* v. *North British Australasian Co.* Here the negligence alleged is negligence in accepting the bill in its then form, and is, therefore, in the transaction itself. What is the negligence alleged against the defendant? It is accepting a bill of exchange framed in such a way as to give obvious opportunities for its fraudulent alteration should it fall into the hands of a dishonest person. It is the absence of such care as a reasonably prudent person would and ought to take when accepting a negotiable instrument. There is a stamp sufficient to cover eight times the amount for which the bill is drawn. There is a space between the £ and the 500 sufficient for the insertion of one, if not two figures without any chance of detection—a most suspicious space, which in my judgment should have attracted the attention of any ordinarily prudent man—and then in the body of the instrument there are spaces, appropriately left, for the insertion of any words that it may suit a dishonest person to interpolate. The unaccountable early termination of the second line and the space left after the word "of," and the late commencement of the third line with the word "five," a space being left before it permitting of the insertion of a word which would make the third line start even with the second, I cannot help thinking ought to have been observed, and have at once induced the defendant to pause before he placed his signature as acceptor to that document. It is not only one suspicious circumstance. There was a combination of them. To hold a person accepting a bill of exchange so framed not negligent, and therefore not liable to a *bonâ fide* holder for value, would tend to impair the negotiability of such instruments. This case is very like the case of *Young* v. *Grote*. There the plaintiff left cheques signed in blank with his wife for her to fill them up according to her need. She filled up one so imperfectly as to enable the bearer to alter the £50 for which it was given to £350, and it was held that the plaintiff was estopped from setting up against the banker, who had acted with ordinary caution in paying the cheque in the usual course of business, that his agent had only drawn the cheque for the smaller sum, inasmuch as it was his negligence through his agent that enabled the fraudulent holder to cheat the banker. It is true this was a case between a customer and his banker, but if I am right in holding that an acceptor of a bill of exchange owes a duty to subsequent holders such as I have described, it seems to me that the case is in principle as applicable to a bill as to a cheque drawn by a customer on his banker. It was said that it is difficult to extract the principle from *Young* v. *Grote*, and that the authority of the case has been impaired by adverse comments at different times made with regard to it. It may be that estoppel is not the correct legal ground on which to rest the decision in that case. No doubt various reasons have been assigned for the conclusion arrived at. I adopt the language of Cleasby, B., in *Halifax Union* v. *Wheelwright*, where he says:—"But these various reasons for the conclusion only show how incontestable the conclusion itself it; and it is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice—viz., that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default against a person who was misled by that default without any fault of his own." This is the principle which I have always attributed to *Young* v. *Grote*, and is a principle which I consider most applicable to the case with which I am dealing, and which if applicable cannot be controverted. *Young* v. *Grote*, though criticized in regard to the particular circumstances of the case, is a binding authority, and has been recognized in numerous cases by judges of the highest authority, and as recently as 1891 in the House of Lords in the case of *Bank of England* v. *Vagliano*, 39 W. R. 657, [1891] A. C. 107. The case of *Société Générale* v. *Metropolitan Bank* was cited. The material alteration there was the adding the letter "y" after the word eight. It was said that a space had been left sufficient to enable the "y" to be introduced, and that that was negligence which enabled the parties to commit a forgery. The court did not consider that there was sufficient proof of negligence. *Young* v. *Grote* and *Ingham* v. *Primrose* were referred to, but the court thought those cases entirely different. Bovill, C.J., said that you cannot prevent the possibility of a person committing a forgery. "Parties cannot prevent forgery being committed. They must use reasonable care not to afford opportunities for it," and he then says that leaving a space for a word or figure, as in the case before him, did not, in his opinion, amount to negligence. There the printed form was filled up with "eight" days' date, and it was said there was negligence in allowing sufficient space between the words "eight" and "days" for the addition of the letter "y," but the Chief Justice said that he could not, sitting as a juryman, say that there was negligence enabling the forgery to be committed, for it would be ridiculous to expect all persons to exclude such a possibility as that. It was the usual way of filling up blanks in a form, and a man was not to assume that forgery would be committed. He finds no fault with *Young* v. *Grote* and *Ingham* v. *Primrose*, but distinguishes them from the case with which he was then dealing. Negligence must depend on the particular circumstances of each case, it is a matter of "more or less."

I can quite understand that in the case of the *Société Générale* v. *Metropolitan Bank* the interpolation of the letter "y" on a printed form of bill was thought insufficient evidence of negligence. It may be true that neither of the matters relied upon by it would be sufficient if taken by itself to constitute negligence, but it is their combination; they act and re-act on one another, and in the aggregate, in my judgment, show such a want of reasonable care on the part of the defendant as disentitles him to set

the forgery. It is said that it is no want of reasonable care not to anticipate a forgery, but that is not, in my opinion, the right test. I should rather ask if it is not a want of reasonable care not to take reasonable and usual precautions against it, in the case of a negotiable instrument which is to pass indiscriminately from hand to hand. If it is suggested that the conduct of the defendant is as consistent with non-negligence as with negligence, I say it is not. Granted that the burden is on the plaintiff of proving negligence, I say he has done so. If it is said that the drawer, Sanders, may have used devices to induce the defendant to accept the bill, such as covering over the spaces with his hand, I reply that there is no such evidence, and if there was, such conduct ought to have aroused his suspicions. The defendant, I presume, is a man of experience, and has probably accepted many such bills before. The defendant, by his want of care and caution, has enabled Sanders to commit the forgery, and whenever one of two innocent persons must suffer by the act of a third party he who has enabled such person to occasion the loss must sustain it: *Halifax Union* v. *Wheelwright*.

The third question is whether the breach of duty or negligence was the proximate cause of what happened—that is, leading the plaintiff into the mistake or belief that the bill indorsed to him was for £3,500. The point made was that there was the interposition of a crime, and that the crime was the proximate cause and not the negligence of the defendant. This, in my judgment, is untenable. It might as well be said that in *Scott* v. *London and St. Katharine Dock Co.*, 13 W. R. 410, 3 H. & C. 596, where a sack fell from a house and injured a passenger in the street through the negligence of the defendants' servants, the sack was the proximate cause of the injury, and not the negligence. Parke, B., in the case of *Bank of Ireland* v. *Evans' Trustees*, drawing the distinction between direct and remote negligence, says, in effect, that when the intervention of the new cause is the result that might be anticipated from the particular negligence in the case, then the negligent person would be liable to answer for the neglect; but when the result is not "the necessary or ordinary or likely result of that negligence," then the loss must lie where it falls according to the general principle of law. Here the forgery is the result to be anticipated from the alleged negligence, and therefore the negligent party, that is, the defendant, must answer for the neglect. Both in *Young* v. *Grote*, *Ingham* v. *Primrose*, and *Société Générale* v. *Metropolitan Bank*, in all of which cases crimes were interposed, it was not held nor suggested that the neglect was not the proximate cause.

The only other point is that arising under section 64 of the Bills of Exchange Act, 1882. That section has no application to this case so far as the £3,000 is concerned. Before this Act a material alteration, by whomsoever made, was a complete defence, and avoided and discharged the bill, except as against a party who made, or assented to the alteration. Now, under the proviso to section 64, a holder for value may, when a bill has been materially altered, but the alteration is not apparent, avail himself of the bill as if it had not been altered; and it was under this proviso that Charles, J., held that the defendant was liable to pay the plaintiff £500, although he did not consider there was any negligence entitling the plaintiff to recover the whole amount of the altered bill.

I agree with Charles, J., on the stamp objection. For the reasons given, agreeing with Charles, J., on the question of duty, but disagreeing with him on the question of negligence, I am of opinion that judgment should be entered for the plaintiff for £3,500.

RIGBY, L.J.—There are two questions in this case: the first is the question of duty, and the second is the question of negligence. The first is a question of law, and the second is a question of fact. Either question, if answered in a particular way, is sufficient to dispose of this case, but as both questions have been fully argued, I desire to state my opinion upon both. I agree with the Master of the Rolls upon both questions.

As I have very little to say upon the question of negligence, I will take that first. We have been left in doubt as to the circumstances under which the defendant's acceptance was obtained. If there was negligence on the part of the defendant at that time, the facts showing it have not been brought before us, and the *onus* upon the plaintiff has not been fulfilled. It is not enough for the plaintiff to prove facts which are consistent either with negligence or absence of negligence. This much is clear, that Sanders, when he placed the draft before the defendant for acceptance, contemplated a fraud. Is it not likely that, when he placed the bill before the defendant, he would have done it in such a way as to conceal its imperfections? I should infer that he adopted some device to close the defendant's eyes to the imperfections. I do not know what device may have been used, but I should infer that Sanders would do all in his power to conceal the imperfections from the defendant. Such a state of the evidence makes it impossible to say that the plaintiff has proved negligence.

I pass from the question of negligence to that of duty. The duty as formulated is a duty not, in accepting the bill, to facilitate fraud. This is a very difficult proposition to deal with. What is a duty not to facilitate fraud? If such a duty exists, it must of necessity be limited to a duty not to facilitate a particular fraud. To illustrate my meaning, I may point out that anyone who accepts a bill payable to order, in one sense, does an act which facilitates a fraud, because anyone into whose hands the bill may get can commit a forgery in regard to the indorsements on that bill. Such a fraud is not difficult to commit, and I do not see, if the duty as formulated exists to its full extent, why it should not apply to such a case.

But then the negligence complained of must be the proximate, or, as I should prefer to call it, the direct or immediate cause of the loss. What is the direct or immediate cause of the loss in a case of forgery? It is the crime but for which no one would have been deceived. Here Sanders undoubtedly prepared for and executed the fraud, but if he had been an honest man, and had negotiated the bill in its unaltered condition, a subsequent indorser might have committed a forgery, and the ultimate holder would have been deceived. It would be very difficult to say that, when the bill comes ultimately into the hands of a rogue, his crime is the direct consequence of some act of the acceptor. Unless this can be said, the suggested duty of the acceptor does not apply to such a state of things. I cannot think it is correct to call that a principle which does not apply to the majority of cases, and I fail to see a duty to prevent a particular kind of fraud when the door is open to other kinds of fraud which cannot be prevented. It is said that the duty is to be found in the law merchant. If that is so, I should expect to find it in the Bills of Exchange Act, 1882. I am aware that section 97 of that Act provides that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the ex-

press provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques"; but that provision cannot, in my judgment, apply to so far-reaching a principle as that contended for—namely, that it is the duty of the acceptor to provide against possible crime. I find that the question of the alteration of a bill is dealt with, and so far as the law merchant is concerned I should say completely dealt with, in section 64 of the Act.

That provision in section 64 does not prevent the application of the doctrine of estoppel, for that doctrine is outside the Act. Upon this question of estoppel it is necessary to refer to *Young* v. *Grote*. That case has been frequently considered, but it has never been overruled. It was a special case, and the arbitrator found that the plaintiff had been negligent, whereby the defendant, who was his banker, had been misled into paying the cheque. The plaintiff delivered to his wife signed cheques, with blanks for her to fill up, and she allowed one to be filled up in such a manner that the sum named could be altered, and after it was so altered the larger amount was paid by the banker, and it was held that the loss must fall on the customer. The important fact, which has been referred to by judges who have commented on the case as possibly justifying the decision, is that the cheque was drawn in blank by the plaintiff, and left to be filled up by the person in whose hands it was as his agent. Parke, B., in *Robarts* v. *Tucker*, pointed out that the customer, by signing a blank cheque, might be considered to have given authority to any person in whose hands it was to fill up the cheque in whatever way the blank permitted. Such a decision is no authority with reference to the suggested duty of an acceptor of a bill of exchange that may pass through the hands of numerous indorsees. I may say that Pothier, in his Traité du Contrat de Change, ss. 99, 100, was confining his attention to the case of principal and agent, with special reference to the relation of banker and customer, and there is nothing to show that he would have extended his reasoning to cases other than that which he was considering. He mentions the view put forward by Scacchia, that a banker who pays a bill which has been falsified by the holder by alteration in a way that might deceive an intelligent person has a remedy against the drawer to recover the amount paid in excess, but he did not accept this view without qualification. He says that the mandator ought to repay the mandatory moneys properly incurred by the latter *ex causâ mandati*, that is, for the purpose of executing the mandate, but not expenses incurred *non ex causâ mandati sed tantum occasione mandati*, and of this he gives an example. He then points out that these principles would naturally apply to the case of a banker deceived by an alteration in the amount of the bill into paying a larger sum than that for which it was drawn. Such a payment is not made *ex causâ mandati*, but only *ex occasione mandati*, unless the banker has been misled by the fault of the drawer into paying the larger sum. If the principal has done something which naturally deceives his agent into paying too large a sum, the principal is liable to refund the excess to the agent. How can the law applicable as between principal and agent be applied to the case of a bill which may pass through the hands of many persons between whom there is no such relationship? I am not so satisfied that the learned judges, who in subsequent cases were considering that decision, would have arrived at the same conclusion on the facts as was arrived at by the court in that case. I think there must be some vice in the reasoning of the learned judges in *Young* v. *Grote*, for it is not confined to the case of principal and agent, but would seem to indicate that it is the duty of the drawer of a cheque or the acceptor of a bill of exchange to consider generally the possibility of fraud being committed, and to take precautions accordingly. This not being, as I have pointed out, a general principle, cannot, in my opinion, be a sound one, and in so far as *Young* v. *Grote* may be taken to lay it down, I think we should decline to follow that case. For these reasons I agree with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Smith, Fawdon, & Low.*

Solicitors for the defendant, *Saltwell, Tryon, & Saltwell.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 1.

BURY v. THOMPSON. (a.)

Landlord and tenant—Notice to quit—Sufficiency of notice—Option.

The defendant demised to the plaintiff certain premises for a term of twenty-one years from the 25th of December, 1887, subject to a proviso that the lessee might determine the demise at the end of the seventh or fourteenth year on giving notice of his desire to do so six months before the expiration of such seventh or fourteenth year. On the 21st of October, 1893, the plaintiff wrote to the defendant: "I see that my first seven years will be determined on the 25th of December, 1894. . . . I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt." Negotiations by letter for a reduction of the rent took place and continued until within six months of the 25th of December, 1894, when the first seven years of the demise came to an end, but the parties were unable to agree as to the amount of the reduction.

Held, that the letter of the 21st of October, 1893, was a good notice to determine the lease at the expiration of the seven years.

Judgment of the Divisional Court (ante, p. 203) *affirmed.*

Appeal of the defendant from the judgment of a divisional court (Pollock, B., and Grantham, J.), reported, *ante*, p. 203, on a special case stated in an action.

The plaintiff by his writ claimed a declaration that the term of years created by a lease had been determined by him on the 25th of December, 1894, by notice pursuant to a proviso in the lease.

By the lease the defendant demised to the plaintiff certain premises for the term of twenty-one years from the 25th of December, 1887, determinable nevertheless as thereinafter mentioned.

The lease contained the following proviso:—"Provided always and it is hereby agreed and declared that if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of the said term, and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year, then and in such case at the end of such seventh or fourteenth year, as the case may be, the said term hereby granted shall absolutely cease and determine."

On the 21st of October, 1893, the plaintiff wrote

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

to the defendant: "I have just been looking at my lease, and I see that my first seven years will be determined on the 25th of December, 1894. I have been making inquiries for some time past, and I find that I am paying too high a rent, and considerably higher than any of the adjoining houses are able to let for now. I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt."

The defendant answered by letter, as follows:—"I think your idea of rent is considerably too low, but I should be glad to meet your views if possible, therefore if you will at once waive your right to determine the lease at Christmas next year, I will agree to take a reduced rent of £20 per annum, making it £250 in lieu of £270 for the second period of seven years."

Some further correspondence then passed with reference to the amount of the reduction of rent, as to which, however, the parties were unable to come to an agreement, and eventually, on the 7th of July, 1894, the defendant wrote as follows:—

"As you did not give me notice to determine the tenancy, I quite understood that you had made up your mind to continue for another seven years, and I can see no reason now for altering the terms of the lease."

The Divisional Court held that the letter of the 21st of October, 1893, was sufficient and effectual to determine the term of years created by the lease, and gave judgment for the plaintiff (see the report, *ante*, p. 203).

The defendant appealed.

Alfred Lyttelton, for the defendant.—The letter of the 21st of October was not a good notice to determine the tenancy. It is not clear and unambiguous, but is qualified and alternative, for it contains an offer on the part of the tenant to remain if a reduction in the rent is made: see *Doe* v. *Jackson*, 1 Doug. 175, *per* Lord Mansfield. To constitute a good notice it must be one which will bind both landlord and tenant, but it is clear that the landlord never regarded this as a notice to determine, for he writes: "If you will waive your right to determine the lease," not "your notice to determine." The Divisional Court decided the case on the authority of *Ahearn* v. *Bellman*, 27 W. R. 928, 4 Ex. D. 201, but there the notice to quit was absolutely clear and unequivocal, and there is therefore a distinction between the present notice and the one in this case.

He also referred to *Muskett* v. *Hill*, 5 Bing N. C. 694.

Edward Bray, for the plaintiff, was not called upon.

LORD ESHER, M.R.—In my opinion this case comes within the rule laid down in *Ahearn* v. *Bellman*. By the letter of the 21st of October the plaintiff clearly expressed that it was his intention not to stop on as tenant unless a reduction was made in the rent. If the landlord had agreed to make a reduction, then the defendant was prepared to remain for another term. The parties, however, were unable to agree as to the reduction. I think that as this court cannot overrule *Ahearn* v. *Bellman* we are bound to hold that the letter was a good notice to determine the tenancy, and the appeal must therefore be dismissed.

LOPES, L.J.—By the terms of this lease the plaintiff lessee had power to determine the lease at the termination of the seventh or fourteenth year, on giving six months' notice of his desire to do so. A notice given in pursuance of a proviso such as that is a good notice if it is so expressed that it clearly conveys to the mind of the landlord that the tenant does not desire that the relationship of landlord and tenant shall continue beyond the term of seven or fourteen years. Now, can it be said that this letter would not convey to the mind of a landlord of ordinary mental capacity that the tenant did not desire to continue a tenant under the lease. In my opinion no one could misunderstand the tenant's meaning, which was that he wished to determine the tenancy unless the landlord would accept a reduced rent. I am unable to distinguish this case from *Ahearn* v. *Bellman*, which is binding on this court.

RIGBY, L.J.—I am of the same opinion. As Bramwell, L.J., said in *Ahearn* v. *Bellman* a notice to quit ought to be clear and certain in its terms, and not ambiguous and not optional. The question is whether this notice is ambiguous, whether it conveys to the landlord notice of the tenant's desire to terminate the lease. The plaintiff in the notice gives a very good reason why he wishes to terminate it, for he says that he understands that the rent which he is paying is too high, and he says he cannot stop in the house unless a reduction is made, and therefore he gives an early intimation of that in order that the defendant may have time to consider what course he will adopt. The letter is obviously intended by the plaintiff to be a communication to the landlord of his wish to determine the lease. With regard to the case of *Doe* v. *Jackson*, I agree with the interpretation placed upon the judgment of Lord Mansfield by Bramwell and Cotton, L.JJ., in *Ahearn* v. *Bellman*.

Appeal dismissed.

Solicitor for the plaintiff, *T. F. Adshead.*

Solicitors for the defendant, *Gush, Phillips, Walters, & Williams.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 12, 13, 14.

DENVER HOTEL CO. *v.* ANDREWS.

SAN PAULO (BRAZILIAN) RAILWAY CO. *v.* CARTER. (*a.*)

Revenue—Income tax—Profits and gains of business—English company owning railway abroad—Business carried on partly in England and partly abroad—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2—*Schedule D, cases* 1 *and* 5.

An English company, resident in England, was incorporated for the purpose of making and working a railway in Brazil. The business of the company was carried on under the control and direction of a board of directors in London. The directors were in the habit of buying in England and sending out to Brazil materials for the repair and extension of the railway.

Held, that, though all the profits of the company were received in Brazil, the business of the company was not carried on entirely abroad, and therefore the decision of the House of Lords in Colquhoun *v.* Brooks, 38 *W. R.* 289, 14 *App. Cas.* 493, *did not apply, but the company was chargeable to income tax on the full amount of the profits and gains of its business within case* 1 *of Schedule D of the Income Tax Act*, 1842.

Judgment of Vaughan Williams *and* Wright, JJ. (ante, *p.* 109), *reversed.*

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

London Bank of Mexico and South America v. Apthorpe, 39 *W. R.* 564, [1891] 2 *Q. B.* 378, *followed.*

Appeal from the judgment of a divisional court (Vaughan Williams and Wright, JJ.) on a special case stated by the Commissioners of Income Tax for the City of London (*ante*, p. 109).

The San Paulo Brazilian Railway Co. appealed against an assessment which had been made upon them under case 1 of Schedule D of the Income Tax Act, 1842. The appellants were an English company resident in this country, having their registered office and their board of directors in London. The original business of the company, according to the memorandum and articles of association, was the making and the working of the San Paulo Railway in Brazil. Substantially the whole revenue of the company arose from the moneys paid to them in Brazil for the carriage of passengers, goods, merchandise, and cattle on the San Paulo Railway. The business of the company was carried on under the direction of the directors in England, the entire control being in London. The directors entered into contracts for, and purchased in England and sent to Brazil, the materials for additions, extensions, and improvements of their property, for repairs thereto, and for new plant, such as engines, wagons, &c. The accounts were kept in London, where the balance-sheets, reports, &c., were made out, all meetings were held, and dividends declared and paid. The directors had appointed a superintendent, who resided in Brazil, and was a salaried servant of the directors, removable at their pleasure, and was bound to obey and execute the orders sent out to him by the directors from London.

The assessment of which the appellants complained was an assessment of £370,122, being the full amount of the profits and gains of the company. They contended that they were not chargeable under case 1 of Schedule D on the full amount of their profits and gains, but, under case 5 of Schedule D, only upon the full amount of the actual sums received in the United Kingdom. It was admitted that if the appellants were only chargeable under case 5 the proper amount of the assessment would be £295,070. The commissioners, being of opinion that the company were chargeable under case 1, confirmed the assessment, but, at the request of the company, stated this special case.

The Divisional Court, being of opinion that the assessment ought to have been made under case 5, gave judgment for the appellants (*ante*, p. 109).

The surveyor of taxes appealed to the Court of Appeal.

Sir R. T. Reid, A.G., and *Danckwerts*, for the surveyor of taxes.—The Divisional Court treated this case as being governed by *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493. But the ground of the decision in that case was that the business there in question was entirely carried on abroad: see *London Bank of Mexico* v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378. The case of *Bartholomay Brewing Co.* v. *Wyatt*, 42 W. R. 173, [1893] 2 Q. B. 499, was also decided on the same ground. Here a great part of the business is carried on in England, the facts of the case being very similar to those in *Cesena Sulphur Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428, which was referred to and not dissented from by Lord Herschell in *Colquhoun* v. *Brooks*.

Bigham, Q.C., and *Bremner*, for the company.—This business is a foreign possession within case 5 of Schedule D, and the company are only chargeable on that part of their profits which is remitted to this country. The decision in *Colquhoun* v. *Brooks* includes this case. The mere buying of goods in this country for the purpose of carrying on a business abroad is not carrying on business here: *Sulley* v. *The Attorney-General*, 8 W. R. 472, 5 H. & N. 711. No doubt the management is here, but the question is where the business is carried on. Some businesses may be carried on partly in one country and partly in another; but in the case of a railway or a mine nothing can possibly be earned except in the country where the railway or the mine is. The whole of this business is carried on abroad.

Lord ESHER, M.R.—We are told that in this case we must submit to the judgment of the House of Lords in *Colquhoun* v. *Brooks*. But there is no need to talk about submitting to it; for in that case the House of Lords affirmed the decision of the majority of this court. Lord Herschell did not reason in quite the same way as we had done, but he and the other learned lords came to the same conclusion as we arrived at here. The decision went upon the ground that, notwithstanding the largeness of the words of Schedule D, "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere," some limitation must be placed on their construction; and the rule was laid down that where the whole of the trade of a person, who was resident in the United Kingdom, was carried on abroad, he was not chargeable with duty under case 1, but under case 5. The decision was that case 1 was not applicable to the state of facts there in question, but that case 5 was applicable, and that, therefore, the assessment should be made in accordance with the rule to case 5.

In *London Bank of Mexico and South America* v. *Apthorpe* we had to consider how far the decision in *Colquhoun* v. *Brooks* went; we there held that it only applied where a business or trade was carried on entirely abroad, and that where a person resident in the United Kingdom carried on a business partly in this country and partly abroad he came within case 1 of Schedule D, and not case 5. It has been argued that the profits of this company are all earned abroad; but the whole of the trade earns the profits; and the question is where the trade is carried on. It is suggested that where the master of a foreign business, who controls every step of that business and determines in each case what contracts are to be made and what orders are to be undertaken, does all that in England, what he so does is not part of the business; and that where he buys in England materials necessary for the carrying on of the business, and sends them abroad, but does not himself work them there, such buying is not part of the business. Such suggestions could only be made in the stress of argument. We have to decide this case on the facts, and the facts, as stated, show that an important part of this business is done in England; it is clear that no one engaged in the business in Brazil has power to do anything except obey orders received from England. The present case is within the rule laid down in *London Bank of Mexico and South America* v. *Apthorpe*, which is binding on this court. The appeal must, therefore, be allowed.

LOPES and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitors for the company, *Clements & Williams.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

[There was a similar appeal in the case of *Denver*

Hotel Co. v. *Andrews*, which was decided by the Divisional Court at the same time as the foregoing case. This appeal was also allowed.]

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 12.

BAXTER *v.* FRANCE (No. 2). (*a.*)

Practice—Third-party procedure—Refusal to give directions as to trial—Effect of—Difficult question of indemnity—Discretion—Ord. 16, *rr.* 52, 55.

The object of the third-party procedure is to avoid multiplicity of actions, and to have all questions arising in the transaction between the parties determined in the action; and, therefore, where a part of the claim by the defendant against the third party is not a claim for contribution or indemnity, and cannot therefore be tried in the action, the judge, in the exercise of his discretion, ought to refuse to give directions under ord. 16, *r.* 52.

The effect of the refusal to give directions is to dismiss the third party from the action.

Where a difficult and complicated question of contribution or indemnity is raised by the third-party notice, the judge, in the exercise of his discretion, may refuse to give directions.

Appeal from an order of Day, J., at chambers.

The action was to recover possession of land and for mesne profits. It appeared that in 1863 the plaintiff's father let the land in question to the defendant France's father, as tenant from year to year, who paid rent for the same until the death of the plaintiff's father intestate in 1878. France's father died intestate in 1891, and France thereupon entered into possession of the land. On the 6th of February, 1893, France executed a conveyance of the land "as beneficial owner" to his co-defendants in fee simple for valuable consideration, alleging a title under the Real Property Limitation Acts, and as evidence of that title he made a statutory declaration to the effect that his father from 1878 until his death in 1891, and he himself since that date, had been in undisturbed possession of the land as absolute owners. France's co-defendants thereupon entered into possession of the land, and erected a building upon it.

The plaintiff, who was the heir-at-law of his father, in his statement of claim alleged that France's father paid rent for the land down to 1888. France's co-defendants thereupon served a third-party notice upon France under ord. 16, r. 55, claiming to be indemnified by him against any loss or damage or costs arising out of the plaintiff's claim against them, upon the ground that by the indenture of the 6th of February, 1893, France had conveyed the land to them as beneficial owner, and with the covenants to be implied therefrom under and by virtue of the Conveyancing and Law of Property Act, 1881. It appeared that France's co-defendants claimed to recover against him (*inter alia*) the amount expended by them in building on the land. Upon a summons for directions under ord. 16, r. 52, Day, J., refused to make any order.

France's co-defendants appealed.

Haldane, Q.C., and *J. E. Bankes*, for the appellants.—France's co-defendants are claiming for breach of the covenant contained in section 7, sub-section 1 (A), of the Conveyancing Act, 1881. If the plaintiff succeeds in the action, the co-defendants will claim from France the price paid for the land, the mesne profits, and the costs, and also the expenses incurred in building on the land. There would in that case be a breach of the covenant of the right to convey. This gives rise to a claim for indemnity against France. If the plaintiff succeeds, the co-defendants will claim against France the money which they are out of pocket as an indemnity for the breach of covenant. Even if the claim for the expenses incurred in building on the land is not a claim for indemnity, still the court will give directions for the trial of the other claims against France, which are clearly claims for indemnity.

They referred to *Schneider* v. *Batt*, 30 W. R. 421, 8 Q. B. D. 701; *Pontifex* v. *Foord*, 32 W. R. 316, 12 Q. B. D. 152.

Channell, Q.C., and *Spearman*, for the defendant France, were not called upon.

Lord ESHER, M.R.—This is an action of ejectment against the defendant France, and also against certain other persons who are in possession of the premises in question. The latter defendants have served a third-party notice upon the defendant France claiming indemnity against him in case the plaintiff succeeds in the action. A summons for directions was then taken out as to the mode of trying that question between the defendants. Day, J., dismissed the summons. It is contended before us that the learned judge ought to have given directions upon the summons. Now it seems clear that it is in the discretion of the judge whether or not he will give directions in any particular case. In the first place, it seems to me that the principle laid down in *Schneider* v. *Batt*, when carried to its logical conclusion, shows that when a judge refuses to give directions upon a summons taken out for that purpose he thereby dismisses the third party from the action, leaving him in as a defendant if he is a defendant already.

In the next place, it appears from that case that the object of the third-party procedure is to have all the disputes between the plaintiff, the defendant, and the third party settled in the one action, and if it is plain that there remains some dispute as between the defendant and the third party arising in the transaction which cannot be tried in the action, so that there must be another action, the judge will rightly exercise his discretion in every case in which that appears by refusing to give directions.

In the present case, assuming the plaintiff succeeds in the action, the question is whether the co-defendants are entitled to indemnity against the defendant France. If nothing had been done upon the land the co-defendants could only have claimed from France the price they had paid for the premises, mesne profits, and costs, and in such a case it may be that the judge would give directions, because all those questions could be tried in the one action. But these co-defendants have erected a building on the land, and they will lose the expense so incurred if the plaintiff succeeds. The claim for the expense of erecting that building cannot possibly be a claim for indemnity, but will give rise to an action for damages. Therefore part of the dispute arising in the transaction cannot be tried in this action. The case accordingly falls within the rule which I have stated above. There must inevitably be another action, and therefore it was right for the judge to refuse to give directions, and thereby to strike out France as a third party. But, further, the learned judge, upon being asked to decide at chambers such a difficult preliminary question under section 7, sub-section 1 (A), of the Conveyancing Act, 1881, was right in the exer-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

cise of his discretion in refusing to try it and give directions.

LOPES, L.J.—I am of the same opinion. The defendant France sold certain land to his co-defendants, and they built upon the land. The plaintiff brings an action to recover possession of the land. The title of France is under the Statute of Limitations. The main question at the trial will be whether rent was paid for the land up to within twelve years of the time of action brought. Under these circumstances the co-defendants served a third-party notice upon France, and, upon their taking out a summons for directions, the learned judge refused to make any order. In my opinion the learned judge was right. It is material to bear in mind the object of the third-party rules—namely, to prevent multiplicity of actions, and the rules only apply to a clear case of indemnity or contribution where all disputes between the parties will be finally disposed of in the action. That is the principle laid down in *Schneider* v. *Batt*. How is that to be applied in this case? I do not intend to express any opinion upon the construction of section 7, sub-section 1 (A), of the Conveyancing Act, 1881, but I will assume for the moment that the case comes within that section and can be considered as a case of indemnity. That being so, it might be that the co-defendants would have a partial claim to indemnity in respect of the purchase-money, mesne profits, and costs. But, beyond that, they claim compensation for the cost of erecting a building on the land. That is clearly not a question of indemnity. Therefore the claim for indemnity against the third party would not cover all questions in dispute arising in respect of the transaction. That is sufficient to decide this case.

The result, therefore, is, according to the principle of *Schneider* v. *Batt*, that, by refusing to give directions, the third party is dismissed from the action as third party.

RIGBY, L.J.—I agree that the decision of the learned judge is right. The third-party procedure is extremely useful for bringing in a third party, whether a defendant or not, for the purpose of having the question of contribution or indemnity tried in the one action. There may be one of three cases. There may be a plain case of indemnity when the learned judge will give directions. Again, there may be a question of indemnity proper to be tried in the action, where it is right and convenient that all matters between the parties should be disposed of in the action, in which case the judge will give directions. Lastly, there may be a case where the question of indemnity is far more difficult and complicated than any other question in the action, based upon a hypothetical state of facts which may not be proved at the trial. Upon that ground alone, without expressing any opinion upon section 7, sub-section 1 (A), of the Conveyancing Act, 1881, and of the position of the parties upon a hypothetical state of facts which may never arise, I think that the judge's decision is right.

Appeal dismissed.

Solicitors for the defendant France, *Black & Fisher*, for *Nutsey & Payne*, Shrewsbury.

Solicitors for the other defendants, *Patersons, Snow, Bloxam, & Kinder*, for *Salt & Sons*, Shrewsbury.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Jan. 21.

PILBROW, *Appellant*.

VESTRY OF ST. LEONARD, SHOREDITCH, *Respondents*.(a.)

Metropolis — Sewer — Drain — Liability to repair — "Premises within the same curtilage"—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

The appellant was owner of buildings consisting of forty-six sets of apartments, divided into two blocks, separated by a causeway 20 feet wide, which opened at one end into a public thoroughfare. Access to one of the blocks was obtained from the causeway; the only access to the other was from the thoroughfare. In the causeway was a dustbin used in common by the occupiers of the dwellings in both blocks. The drainage was by means of twelve branch drains running into a main drain under the causeway, which ran into a sewer within 100 feet of the buildings.

Held (*by* Lord Esher, M.R., *and* Lopes, L.J., Rigby, L.J., *dissenting*), *that the main drain was a "drain," and not a "sewer," within the meaning of section* 250 *of the Metropolis Management Act*, 1855, *being a "drain of and used for the drainage of premises within the same curtilage"; and that therefore the appellant was liable to pay the expenses incurred by the vestry in necessary works of cleansing, alteration, and amendment of such drain.*

Appeal from the judgment of a divisional court on a special case stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

The appellant appeared to a summons obtained by the clerk to the vestry of the parish of St. Leonard, Shoreditch, to recover expenses amounting to £209 7s. 6d. incurred by the vestry, as sanitary authority for the parish, in necessary works of cleansing, alteration, and amendment of drains at Norfolk-buildings, of which the appellant was the owner.

The buildings consisted of forty-six sets of apartments, divided into two blocks, separated by a causeway twenty feet wide, which opened at one end into a public thoroughfare. Access to one of the blocks was obtained from the causeway, but the only access to the other was from the thoroughfare. In the causeway was a dustbin used in common by the occupiers of the dwellings in both blocks. The buildings were erected and the drains were put in by the owner in 1882 without any plans having been submitted to the local authority or any inspection or sanction of the drains by them. The drainage was by means of twelve branch drains running into a main drain under the causeway, which ran into a sewer within 100 ft. of the buildings. The main drain was a single nine-inch pipe. The branch drains were inserted into the main drain through holes cut in that pipe. No order of the vestry had ever been made for draining either of the blocks by a combined operation.

In November, 1891, the inspector of nuisances appointed by the vestry gave notice to the appellant to amend and reconstruct the main drains, and provide a properly-ventilated inspection chamber, and to amend the branch drains, and to disconnect certain waste pipes. This requisition not being complied with, the works specified were ultimately done by the vestry, who now sought to recover the expenses incurred thereby.

The magistrate decided that, having regard to the provisions of the Metropolis Management Act, 1855,

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

the alleged main drain in question, draining blocks of houses by a combined operation, was, under the circumstances, and notwithstanding the absence of any order of the vestry for the purpose, a "drain," and not a "sewer." He therefore held that the appellant was liable to pay the sum claimed by the vestry, but stated this case for the opinion of the High Court.

Section 250 of the Metropolis Management Act, 1855, is as follows:—"The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies."

Section 74 provides for a vestry or district board ordering that a group or block of contiguous houses should be drained by a combined operation. Section 85 provides that, where any drain appears to be in bad order and condition or to require amendment, the vestry or district board shall require the owner or occupier of the premises by notice to do the necessary works, and if such notice be not complied with, may execute such works and recover the expenses from the owner or occupier.

The Divisional Court (Mathew and Charles, JJ.) held that the main drain was "used for the drainage of premises within the same curtilage," and was, therefore, a "drain" and not a "sewer" within section 250, and consequently affirmed the decision of the magistrate.

The appellant appealed to the Court of Appeal.

Haldane, Q.C., and *R. Woodfin*, for the appellants.

Finlay, Q.C., and *Lewis Thomas*, for the respondents.

Lord ESHER, M.R.—The question is whether a certain thing which has been constructed and used in a particular way is a "drain" or a "sewer" within the meaning of the Metropolis Management Act, 1855. The judges in the Divisional Court have held it to be a drain because it is used for the purpose of draining a curtilage. In my opinion the interpretation of section 250 does not in any way depend on considerations of conveyancing law. I think that the matters which we ought to consider are the mode in which the premises now in question were built, the object with which they were built, and the manner in which they are used. We have to deal with a definite small space of ground, which has, in my opinion, been built upon for the purpose of being used as one set of premises. The smallness of the space is one of the matters to be taken into consideration. The case of buildings round a common or a large square is very different. Here the intention of the builder was to enclose a small square with boundary walls; he built one block of buildings on one side of the square, and another block on the opposite side, and between them he left a narrow space, which he did not leave as a thoroughfare but paved throughout as a yard. His object, to judge from the manner in which he built the blocks, was not to let them as two separate houses for terms of years, but to let out the whole in sets of apartments, probably on weekly tenancies. Forty or fifty families were to live in the buildings, each having its own private rooms, while the staircases and everything else except the separate rooms were to be used in common by all.

It seems to me that, independently of the fact of there being a common dustbin in the yard, anyone, as soon as the buildings were erected, would have said that the yard must be intended to be used in common by all the persons living in the buildings. I think that, as a matter of building, and also as a matter of use, the two blocks and the yard form one set of premises, and that all within the boundary walls forms a "curtilage" within the meaning of that word as used in section 250 of the Metropolis Management Act. The builder put down a drain in this yard for the purpose of collecting the sewage from each block of buildings and carrying it into what is undoubtedly a sewer. It appears to me that what he so laid down is a drain, and not a sewer. I do not think that anyone using ordinary language would call it anything but a drain. We are, however, asked to give the word "sewer" a meaning other than its ordinary meaning, and to hold that this Act of Parliament has turned what was meant to be a drain, and is in fact a drain, into a sewer. I cannot see any reason for so holding, and I agree with the view taken by the Divisional Court. It is said that we are bound by our decision in *Vestry of St. Martin-in-the-Fields* v. *Bird*, *ante*, p. 194. We there held that the shops on either side of the Lowther Arcade could not be said to be within the same curtilage. The facts of that case, however, seem to me to be quite different from those with which we now have to deal, and I do not think that what I am now deciding is in any way inconsistent with our decision then. The appeal must, therefore, be dismissed.

LOPES, L.J., concurred.

RIGBY, L.J.—In this case we have to interpret section 250 of the Metropolis Management Act, 1855. So far as I am aware, there is no distinction in law, apart from statutory definitions, between a "drain" and a "sewer." Generally speaking, I should think that the two words might be used indifferently in a conveyance. The question is, What is the difference between them under this section? I will, in the first place, read the section as it would be if the words which have to be construed—viz., "or premises within the same curtilage"—were omitted. It would then stand thus: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, . . . and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies." Reading the section thus I should feel inclined to say that, where we are concerned with the drainage of premises occupied by forty-six different sets of people, the case was one to which the word "sewer" was intended to be applicable. But then we have the words "or premises within the same curtilage." What is the meaning of "curtilage" as used in this section? It is to be noticed that the word is used in some statutes in a sense somewhat different from its ordinary legal meaning—*e.g.*, in 7 & 8 Geo. 4, c. 29, ss. 13, 14, the dwelling-house is treated as being within the same curtilage as the buildings occupied therewith. The word "curtilage" there means everything which is included within the boundary, which contains the dwelling-house plus the curtilage in the strict sense. I think that this use of the word is found frequently, and that we have an instance of it in this section; but so far as I know the word is never applied to

anything which is common to more than one messuage. The idea of something belonging to a dwelling-house seems to run through all the definitions which have been given of the word.

In my opinion there is no authority for treating "curtilage" as equivalent to ring fence or boundary. The element of smallness is, no doubt, one matter to be considered, but it is by no means the most important thing. I do not think it right to exclude the other element—viz., that it must belong to one messuage. To my mind, the main distinction to be drawn in considering this question is the distinction between a plurality of messuages and a single messuage. Here we have at least two messuages, one on one side of the yard, and one on the other; and I do not see how the yard can be the curtilage of both.

It is said that this question ought not to be treated from a conveyancing point of view; but I do not see how the matter under consideration can be tested in any other way. Are we entitled to treat the word "curtilage" as open to a special interpretation in connection with its particular position in this section, and to disregard its ordinary meaning altogether? It seems to me that if we throw away its ordinary meaning we are practically without any definition at all, and the result will be that there is no restriction whatever to limit the size of what may be held to be a curtilage within the meaning of the Act.

In my opinion this case is governed by our decision in the Lowther Arcade case (*Vestry of St. Martin-in-the-Fields* v. *Bird*, *ante*, p. 194). The legal incidents of the two cases seem to me to be the same.

Appeal dismissed.

Solicitor for the appellant, *S. E. Lambert.*

Solicitor for the respondents, *H. M. Robinson.*

High Court of Justice.

Chan. Div. } Jan. 12; Feb. 13.
Chitty, J. }

In re FLOATING DOCK CO. OF ST. THOMAS. (LIMITED) (*a.*)

Company—Capital—Reduction of capital—Confirmation by court—First preference, second preference, and ordinary shares—Preferential rights as to capital as well as dividend—Total extinction of second preference and ordinary shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.

The court has jurisdiction to sanction a reduction of capital involving the entire cancellation of groups of deferred shares against the will of some of the holders if such shares are deferred as to capital as well as dividend.

The capital of a company consisted of first preference, second preference, and ordinary shares, with contingent non-cumulative preferential rights as to dividend and absolute preferential rights as to capital. A large amount of capital being lost or unrepresented by available assets, an extraordinary meeting of more than three-fourths of each class of preference shareholders and a few ordinary shareholders unanimously passed a special resolution for reduction, throwing the loss as far as possible on the second preference and ordinary shares, so as to entirely cancel them, and leaving the balance only to be borne by the first preference shares. A second preference shareholder, who was not at the meeting, attended at the hearing of the petition for confirmation and opposed the reduction. The evidence showed that it was highly improbable that the company would ever earn more than enough to pay the first preference dividends.

Held, having regard to the evidence and to the large majority in favour of the proposed reduction, that it ought to be allowed.

Petition.

This was a petition to confirm a special resolution for the reduction of the capital of the above company.

The capital consisted of £163,618, divided into 46,748 fully-paid shares of £3 10s. each, of which 20,824 were first preference shares, 20,521 second preference shares, and 5,943 ordinary shares.

The preferential rights were defined by the following articles:—

Article 100.—The net profits of the company (after setting apart such sums for repairs and renewals as the directors shall from time to time consider necessary or proper) shall, subject to these presents, be in each year divided and disposed of at the ordinary meeting as follows:

(1) A dividend at the rate of £6 per cent. per annum contingent on the profits of each year shall be paid to the holders of the first preference shares.

(2) Out of the surplus profits (if any) a dividend at the rate of £5 per cent. per annum, also contingent on the profits of each year, shall be paid to the holders of the second preference shares.

(3) Out of the remaining profits (if any), if and so far as the same shall in each year be sufficient for the purpose, two per cent. of the whole net profits shall be paid to the legal personal representative or representatives for the time being of the late John Black Cameron, and two per cent. of the whole net profits shall be paid to the legal personal representative or representatives for the time being of the late Robert Norman.

(4) The ultimate surplus (if any) of the net profits in each year shall be paid to the holders of ordinary shares.

Article 115.—If the company should be wound up, the assets of the company, so far as the same will extend, shall be divided among the first preference shareholders, and if any surplus shall remain after payment to them of the nominal amount of their shares, the same shall be divided among the second preference shareholders, and only the ultimate surplus (if any), after paying them the nominal amount of their shares, shall be divided among the ordinary shareholders.

The original company was formed in 1866 to construct and work a floating dock at St. Thomas, in the West Indies.

The present company was the third, being reconstructed in 1878 from the second company by a scheme sanctioned by Malins, V.C. At such reconstruction no reduction of capital was made or sought for.

Owing to collisions, storms, natural deterioration, and decrease of trade, due to alterations in the ocean steamer routes, the present value of the total capital had been reduced to £50,710, about £112,000 being lost or unrepresented by available assets. The company duly passed and confirmed a special resolution to reduce the capital to £50,710 by cancelling the ordinary and second preference shares and reducing the first preference shares to £2 10s. each. The proposed reduction was unanimously passed at the meeting at which more than three-quarters, both of the first and second preference shares respectively, and a few ordinary shares, were represented, but was opposed by a holder of 431 second preference shares

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

who did not attend the meeting. The interest required for the annual dividend on the first preference shares amounted to £4,259 12s. 9½d., and the company's income since its reconstruction by the court in 1878 had only once exceeded that amount—viz., in 1882, when it reached £4,283. The evidence showed that there was practically no prospect of the company earning more than the first preference interest. It was estimated that the dock would last another seventeen years.

Byrne, Q.C., and *Cator*, for the company.—The preferential rights extend to capital as well as dividend, so there is clear jurisdiction to make the order, and having regard to the evidence the court should exercise its discretion as prayed: *British and American Trustee and Finance Corporation* v. *Couper*, 42 W. R. 652, [1894] A. C. 399; *In re Denver Hotel Co.*, 41 W. R. 339, [1893] 1 Ch. 495; *In re Quebrada Railway Co.*, 40 Ch. D. 363, 37 W. R. Dig. 34; *In re Gatling Gun (Limited)*, 38 W. R. 317, 43 Ch. D. 628; *In re American Pastoral Co.*, 34 SOLICITORS' JOURNAL 320, W. N., 1890, p. 62; *In re Agricultural Hotel Co.*, 39 W. R. 218, [1891] 1 Ch. 396; and *In re Barrow Hæmatite Co.*, 37 W. R. 249, 39 Ch. D. 582.

R. J. Parker, for the respondent.—The jurisdiction is admitted, but as the capital seems to have been overestimated from the first, and never represented by available assets, the proposed order is scarcely fair: *In re New Chille Gold Mining Co.*, 36 W. R. 909, 38 Ch. D. 975. The reduction should be rateable on all classes alike. Again, the first preference dividend is non-cumulative, so there is always a chance for me in each year so long as the company is kept going. *Dent* v. *London Tramways Co.*, 16 Ch. D. 344, 29 W. R. Dig. 42. That chance entitles me to resist total extinction. The directors ought to have kept the dock in repair (article 100). The circumstances are the same as in 1878, and the court reconstructed the company then without reduction.

CHITTY, J.—No objection has been raised, nor, after the decision of the House of Lords in the *British and American Trustee and Finance Corporation* v. *Couper*, could have been raised, to the jurisdiction of the court to make the order asked for. The function of the court is to see that the proposed reduction is fair and reasonable in the circumstances of the case, and to protect the interests of persons who dissent or do not appear. It is quite unnecessary to refer to the various sections of the Acts. The proposed reduction involves neither the diminution of liability in respect of unpaid capital nor the return of any paid-up capital to the shareholders. The case simply is that to the extent of £112,000 the capital has ceased to be represented by available assets. In my opinion the company have proved that allegation. It was contended for the respondent that the £163,618 capital never was represented. There is much to be said for that contention, but it must be remembered that at the time the company was incorporated there were great expectations of future profits which unfortunately have not been realized. During the sixteen years since the reconstruction of 1878 the profits of the dock have only once exceeded the amount required to pay the first preference shareholders. It was argued that if it was right to reduce now it would have been right in 1878, but at that time, again, reasonable expectations of future profits were entertained. It was also said that the directors ought to have properly maintained the dock under the 100th article. But that article gives them a discretion as to the amount to be devoted to repairs or renewals. There is a duty, no doubt, to maintain the work in a reasonable state of repair by timely repairs and timely renewals, but it is scarcely necessary to say that such a clause as this does not compel the directors to construct a new dock, any more than a covenant to repair a house involves a liability to build a new house. The evidence shows natural deterioration, and I can find no ground for attributing the depreciation in value to any negligence on the part of the directors in repairing or renewing.

Now I pass to the articles, and observe first that this is not a case of reducing capital at the expense of ordinary and second preference shareholders, where the preferential rights extend to dividend only. Here the preferential rights extend to capital (article 115). The resolutions for reduction were carried unanimously in well-attended meetings. More than three-quarters of the first preference shares and more than three-quarters of the second preference shares were represented, besides a few of the ordinary shares. The dissentient shareholder did not attend. He stands alone in a minority of one, but the court will not on that account refuse to give him a proper hearing.

Now the Companies Acts have conferred this right of reducing capital on the company itself, and the court will not refuse to confirm the company's resolution unless it sees that something unfair or unreasonable is being done. In this case I have the great advantage of the large majority of three-quarters of each class of preference shareholders present, and voting unanimously that this was the right thing to do from a commercial point of view. I have the majority required both by the Acts and the articles in respect of each class of preference shares. The evidence shows that this is not a mere temporary depression in trade, but that the current of trade has changed.

Asking myself whether, on this evidence, there is any reasonable probability of a change for the better coming within any reasonable period of time, and of this dock earning more than £4,259 12s. 9½d. a year, I say that, from a practical point of view, it is in the highest degree improbable. Unless that sum is reached the second preference shareholders have no interest whatever in the concern. Where there is a loss of capital, as in the present case, the loss should be made to fall upon that class which, according to the constitution of the company, has to bear it. In this view I have carefully considered the constitution of this company, and in the result I think I ought to exercise my judicial discretion by confirming the proposed reduction. The petitioners consenting, the respondent will have his costs. It is much more satisfactory to me to have the advantage of an argument from the respondent, because I am able to attend to all the points, some of which may otherwise possibly escape observation.

Resolution confirmed.

Solicitors, *Radcliffe, Cator, & Hood; Field, Roscoe, & Co.*, for *Smith, Pinsent, & Co.*, Birmingham.

Chan. Div.
Kekewich, J. } Oct. 26; Nov. 13.

In re BENDY.
WALLIS *v.* BENDY. (*a.*)

Settlement—Covenant to settle after-acquired property—Purchase out of accumulations and proceeds of sale.

Property not originally included in a marriage settlement may, owing to the subsequent dealings of the parties,

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

become subject to the covenant to settle after-acquired property.

Originating summons.

By the marriage settlement of Mr. and Mrs. Bendy certain specific property of the wife was settled on the usual trusts for the benefit of the husband and wife and the issue of the marriage. The settlement also contained the following covenant: that if the wife should, at the time of the said then intended marriage, be, or if at any time during the said then intended coverture she should become, seised, possessed, or entitled of or to any real or personal property (other than the property thereby specifically settled) for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, except any property of or to which she was at that time possessed or entitled, and except property of a less value than £200 vesting in possession before or during the said then intended coverture at the same time and from the same source, and except movable chattels or effects of household, domestic, or personal use or ornament, all of which excepted property it was thereby declared should remain the absolute property of the wife, and except also any annuity or annuities or other estate or interest for the life of the said wife, or for any term or period determinable upon her death, which, it was thereby declared, should belong to the said wife as her separate estate independently of the said husband, and so that she should not have power to anticipate the same, then and so often as the same should happen all such real and personal property, except as aforesaid, should be assured to the trustees upon trusts corresponding with the trusts thereby declared of the trust funds thereinbefore settled.

Mrs. Bendy was at the time of her marriage entitled to an undivided moiety of a leasehold house and some bank shares. On the sale of the house she received and paid her share into her banking account, and subsequently bought some debentures of Wallis & Co. (Limited), paying for them a sum considerably in excess of the amount of her share of the proceeds of the house, the balance being accumulations of income.

The bank shares were subsequently sold, and the proceeds, together with accumulations of income and a sum of £350 borrowed from her bankers, was invested by her in the purchase of a leasehold house. This loan was subsequently repaid by her and her husband.

The question now raised was whether the debentures and house were subject to the covenant to settle after-acquired property.

Stokes, for the plaintiffs, the trustees, cited *Lewis* v. *Madocks*, 17 Ves. 48.

Trollope, for the infant defendant.

Warmington, Q.C., and *Munns*, for the defendant husband.

KEKEWICH, J.—The exception from the covenant to settle property of the wife other than that specified must, in my opinion, be construed to include property to which the wife was entitled at the date of the settlement, and that property remains hers unaffected by the covenant. What I have now to consider is whether property not included in the covenant has become subject to it by subsequent dealings.

The principle of *Lewis* v. *Madocks* seems to be that, although a covenant to settle after-acquired property must be reasonably construed, and therefore will not be held to include such property as cannot be included without defeating the paramount object of the settlement, yet, if such property is invested so as to show intention on the owner's part to convert it into capital, then it is subject to the covenant.

In this case it was not intended that Mrs. Bendy's property other than that specifically comprised in the settlement should, as it then stood, be liable to the covenant. Here she has invested proceeds of her separate property in the purchase of some debentures and a leasehold house, part of the purchase-money of the latter being borrowed by her. The debentures, I think, are within the covenant. The leasehold house remains the lady's property, subject to a charge in favour of the trustees of the settlement for the amount of the proceeds of sale of the property sold, accumulations of separate estate, and borrowed money, which I hold to have been devoted to the settlement.

Solicitors, *Munns & Longden; Dod, Longstaffe, Son, & Fenwick.*

Chan. Div.
Vaughan Williams J. } Nov. 22, 23.

BLACK v. WILLIAMS. (*a.*)

Ship—Mortgage—Equitable charge—Priorities—Notice—Registration—Debenture—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 43, 66, 67, 69—*Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 3.

Section 3 of the Merchant Shipping Act Amendment Act, 1862, *must be read as if it had been originally incorporated in the Merchant Shipping Act*, 1854, *and does not nullify any part of the latter Act, which must be construed as explained by the said section. Equitable titles by notice must be recognized, but not preferred to legal titles, and the title of a mortgagee who has a mortgage in the statutory form and registered will be preferred to a prior equitable unregistered title.*

Summons.

Debentures were issued in 1889 by the Victoria Steamboat Association, by which the association charged its undertaking and all its property, both present and future, and both its real and personal estate, including its uncalled capital for the time being. All these debentures were to rank *pari passu* as a first charge on the property and undertaking of the association. The charge was to be a floating security, and the association might, in the course of its business, employ, sell, or deal with all or any of the property charged as it might think fit, but nothing therein contained was to authorize the creation of any charge on the property in priority to the debentures.

By a debenture trust-deed dated later in the same year (1889) it was provided that the association would execute legal mortgages to the trustees for registration of all steamboats which it should acquire during the continuance of the security.

Between the dates of June, 1891, and October, 1893, the Marine Securities Corporation (Limited) advanced various sums of money to the association for which they took and registered mortgages in the proper statutory form. They also entered into agreements providing that if default was made the mortgagees might take possession of and sell the ships and that the shipowners should not, during the continuance of the security, without the consent of the mortgagees, execute any further mortgage of the ships, except by way of second mortgage to the trustees for the debenture-holders (this provision

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

referred to in the judgment as paragraph 12). The ships comprised in the last-mentioned mortgages did not belong to the association in 1889.

This was a summons in a debenture-holder's action taken out by the Marine Securities Corporation for an order that, notwithstanding the appointment of receivers and managers in the action, they might be at liberty to take possession of the steamships comprised in their mortgages, and to sell the same or otherwise exercise all the powers as mortgagees under their mortgages. The association was ordered to be wound up on the 8th of August, 1894.

The question raised in the summons was as to the priorities of the registered mortgages of the Marine Securities Corporation and the debenture-holders.

The following are the material sections of the Merchant Shipping Acts:—

Merchant Shipping Act, 1854, s. 43: "No notice of any trust, express, implied, or constructive, shall be entered in the register book, or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration."

Section 66: "A registered ship or any share therein may be made a security for a loan or other valuable consideration, and the instrument creating such security, hereinafter termed a 'mortgage,' shall be in the form marked I in the schedule hereto, or as near thereto as circumstances permit; and on the production of such instrument the registrar of the port at which the ship is registered shall record the same in the register book."

Section 67: "Every such mortgage shall be recorded by the registrar in the order of time in which the same is produced to him for that purpose, and the registrar shall, by memorandum under his hand, notify on the instrument of mortgage that the same has been recorded by him, stating the date and hour of such record."

Merchant Shipping Acts Amendment Act, 1862, s. 3: "It is hereby declared that the expression 'beneficial interest,' wherever used in the second part of the principal Act, includes interests arising under contract and other equitable interests, and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property."

Farwell, Q.C., and *W. Baker*, for the summons.—The applicants have the legal title, and, therefore, priority over the debenture-holders. It was held that the court could not recognize equitable titles in *The Liverpool Borough Bank* v. *Turner*, 9 W. R. 292, 2 De G. F. & J. 502, and in consequence of that decision section 3 of the Act of 1862 was passed. Section 69 of the Act of 1854 must be read with section 3 of the amending Act. The case is like one of registered land in a register county, where registered securities can only be affected where fraud is proved: *Le Neve* v. *Le Neve*, White & Tudor's L. C., 6th ed., vol. 2, p. 26; *Wyatt* v. *Barwell*, 19 Ves. 435. Here there is no suggestion of fraud.

They also referred to *Bell* v. *Blyth*, 17 W. R. 194, L. R. 4 Ch. App. 136; *Wheatley* v. *The Silkstone and Haigh Moor Coal Co.*, 33 W. R. 797, 29 Ch. D. 715; *The English and Scottish Mercantile Investment Trust (Limited)* v. *Brunton*, 41 W. R. 133, [1892] 2 Q. B. 700; *Hughes* v. *Sutherland*, 29 W. R. 867, 7 Q. B. D. 160.

Alexander, Q.C., and *Dundas Gardiner*, for the debenture-holders.—Section 69 is so far repealed as to give the court power to give effect to equities. The applicants had notice that the company had issued debentures. We do not say they were guilty of fraud, but they should have made inquiries. There is no analogy between ships, and land in a register county.

They referred to Hardcastle on the Construction of Statute Law, 2nd ed., p. 346; *Stapleton* v. *Hayman*, 12 W. R. 317, 2 H. & C. 918; *The Celtic King*, [1894] P. 175; *Jones* v. *Smith*, 1 Hare, 43; *Patman* v. *Harland*, 29 W. R. 707, 17 Ch. D. 353.

Upjohn and *Solomon*, for the various trustees.

Stokes, for the liquidator.

Farwell, Q.C., replied.

VAUGHAN WILLIAMS, J.—The first point on this summons is on the construction of the Merchant Shipping Act. [His lordship read section 43 of the Merchant Shipping Act, 1854, and continued:—] It was held when a construction was first put upon that section, and upon the Act as containing the section, that the courts do in no way recognize equitable titles. That was the decision in *Liverpool Borough Bank* v. *Turner*. That case was not a case in which any question of priorities arose. It was a case in which the owners of a ship had given a letter which, in equity, would have created a charge on some vessels of theirs, and then, having subsequently become bankrupt, a question arose as to whether any effect could be given to that letter as against the assignees in bankruptcy of the shipowners who had issued it. It was held that no effect whatever could be given to that letter; that the effect of section 43 and the other sections of the Act was that equitable titles could not be recognized or dealt with at all.

That was conceived by the commercial world to be a great hardship, and consequently the Legislature, when the Act of 1862 was passed, by section 3, gave effect to the view of the mercantile community, and, in effect, provided that all equitable titles in future should be recognized. The section of the Act which so provided did not provide it as a state of the law which should prevail in future, but declared that that had been the state of the law under the enactment as it originally stood. It did not profess to create a new law, but it did profess to declare what was the true meaning of the existing statute as passed. [His lordship read section 3 of the Act of 1862, and continued:—] I wish to say, before dealing with the arguments of counsel on the construction of that section, that the words with regard to beneficial interests, which at first sight seem a little unaccountable in this section, are really to be accounted for easily when you look at the argument which was addressed to the court in the case of the *Liverpool Borough Bank* v. *Turner*, and the judgments of the Vice-Chancellor and the Lord Chancellor respectively. It is quite plain that, the question being whether the court could recognize equitable interests, Sir John Rolt had called attention to those three sections of the Act which did make use of the term—viz., sections 18, 38, and 39—and had argued that it was impossible to

say that the statute did not intend to recognize equitable interests, because in those sections it seemed expressly so to do. That argument, whether it was good or whether it was bad, did not prevail either with the Vice-Chancellor or the Lord Chancellor. They both thought that, notwithstanding those words, the true effect of the statute was to prevent any effect being given to equitable interests.

Having said that, now let me deal with the contention of counsel on this section. It really is not in dispute that now equitable interests are to be recognized; but, in effect, Mr. Alexander comes here to say that equitable interests in ships and legal interests under mortgages in the statutory form, and registered in the way contemplated by the statute, are to be put upon an equality, and that, at all events, if they are not put upon an equality, any priority. or advantage that a registered mortgagee in the statutory form would get over a mere equitable mortgagee is to be disregarded if you show that the statutory mortgagee had, at the time that he acquired his interest, express, implied, or constructive notice of the title of the equitable mortgagee. Now, in considering which of these two conclusions is right, I have to turn to section 69 of the Act of 1854, and I wish to say, before I deal with the words of that section, the principle on which I think I ought to construe section 3 of the Act of 1862.

I ought to read section 3 as if it had been in terms introduced into the Act of 1854 as declaring the meaning of that Act in its initiation. It is impossible that I should put a construction on section 3 which would nullify any one section of the Act of 1854. I am bound to give effect to every word of section 69. I am bound to read section 69 of the Act of 1854 in the light of section 3 of the Act of 1862, but still I am bound to read section 69 and give effect to every word of it. [His lordship read section 69, and continued:—] Now Mr. Alexander naturally was unwilling to say that his argument involved a contention that section 69 was repealed, and he said that an effect could be given to section 69. When I pressed him as to what effect could be given, he and his learned junior both really gave an effect to section 69 which ignored the words entirely "notwithstanding any express, implied, or constructive notice." They are asking me to disregard those words and to regulate the priorities in pursuance of the fact of notice, express, implied, or constructive, having been given. According to my view it is impossible I should do that.

It seems to me section 69 is a living section and every word of it is a living word, and that I must give effect to it. I have come to the conclusion that when section 3 was passed, though it was intended to declare that the Act did not ignore, or did not intend that that court should ignore, equitable titles, it still did intend that all the provisions of the Act of 1854, with regard to the registration of titles and to the priority of unregistered titles, should have effect given to them. That is my conclusion. I am bound to recognize the equitable title of the debenture-holders, but that equitable title is controlled by the plain words of that part of the Act of 1854 which relates to mortgages, beginning with section 66 and going on to section 75. The title, therefore, of these people, they having got a mortgage in the statutory form which has been registered, is to be preferred to the title of those people who, having a prior equitable title, chose not to get, as they were entitled to get if they chose, their prior equitable title converted into a legal title in the statutory form and registered. The Act of Parliament is passed for the benefit of commerce, in order that English ships may be easily dealt with by English shipowners. It is felt that occasions arise when it is to the interest of the whole community that you should be able to raise money on ships, and for that purpose the Legislature, in the interests of the general public, provides that registered titles in the statutory form shall have a priority, and thus it enables those who are disposed to purchase or lend money upon ships to do so with perfect safety that their titles will not be overridden by priority being claimed in favour of equitable unregistered titles which happen to be prior in time, and which, for reasons of their own, the owners of those equitable titles have not thought fit to convert into the legal form, or to register in the way provided by the statute.

It is said here that, according to the proper construction of the Act, the debenture-holders are entitled to insist upon the priority of their equitable title, which is prior in time, if it can be said properly that the mortgagees, the applicants here, took their security with notice of the prior security of the debenture-holders. Now I have to determine whether the mortgagees had such a constructive notice as would prevent their subsequent title being made effective in preference to the prior title of the debenture-holders. I have had the great advantage of having this matter discussed. The case of *The English and Scottish Mercantile Investment Trust* v. *Brunton* did not, according to my view, lay down any new principle whatever. It merely put an old principle in a forcible and clear manner. That case is really only the decision of Wigram, V.C., in a new dress. Wigram, V.C., at the end of his judgment (I am reading from the note to *Le Neve* v. *Le Neve*), says: "I believe I may with sufficient accuracy for my present purposes assert that cases in which constructive notice has been established resolve themselves into two classes: first, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by inquiry after the charge, incumbrances, or other circumstances affecting the property of which he had actual notice; and, secondly, cases in which the court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry." I may at once get rid of the second of those classes, because Mr. Alexander somewhat reluctantly, but still fully, at last admitted that he could not ask me to say that the evidence brought this case within the second class of cases. Therefore all I have to consider is whether the mortgagees here had such a notice as to bring them within the first class of cases—that is, had they notice that the property in dispute was in fact charged, incumbered, or in some way affected? This is a question of fact. Undoubtedly the mortgagees here had notice that there were debentures. They had also notice that the debentures affected ships. The first agreement they took specifies the names of the ships which were going to be the subject-matter of the mortgage, and the other agreements specify particular ships. The outcome of the agreements is that the mortgagees had notice of the debentures. They had also notice that the debentures charged or affected ships. If they had had notice that the debentures charged or affected these particular ships, I should have had no choice but to say that they came within the first part of this rule, and in those circumstances—had it not been for the construction I put on the Merchant Shipping Act—the title of the debenture-holders would have prevailed. But the effect of the notice and the letters and things written months before was only that there were debentures which did extend to ships.

I cannot help thinking that, as prudent business men, these people ought to have inquired what ships. Why did not they inquire what ships? The reason why they did not inquire, I think, is contained in paragraph 12. If that clause stood alone, I should unhesitatingly have drawn the inference, in fact, that these gentlemen did not look at or make further inquiries about the debentures because they supposed that, whatever the debentures were, they did not affect their specific ships. It is quite obvious that clause 12 ought never to have been introduced if the debenture-holders' security extended to these ships, and if, in consequence of what was stated, or in consequence of the form of this document, they did not get notice, in my judgment I could not properly come to the conclusion that the mortgagees had actual knowledge that the property was in fact charged, incumbered, or in some other way affected. But a difficulty does arise, because in this case it is not as in *The English and Scottish Mercantile Investment Trust* v. *Brunton*, that there was a statement in fact by the manager for the mortgagees. It does not seem that there was. The statement made seems rather to have been a statement of the law that there was nothing to affect the title of the mortgagees if they advanced this money. That might mean that these ships were not included in the debentures, or it might mean that, according to the proper construction of the Merchant Shipping Acts, even if they were included, the mortgagees would get a priority if they chose to immediately register their mortgages, because no statutory mortgages had been taken by the debenture-holders or registered. I am very much inclined to think that, if they did not inquire merely for the legal reason that I have suggested, Mr. Alexander's contention would be right, but I am not prepared to say I am satisfied of that. One does not know exactly what motives operate in a man who is negotiating a matter of this kind. I am not to impute dishonourable motives to either of the negotiating parties here. The mortgagees did not look because everybody took it for granted for some sufficient reason—either because the ships were new ships not included in the old debentures or because there was some legal reason, I do not know which it was; but for one or other of these reasons everybody supposed, and acted upon the assumption, that there was no need to look at the old debentures, because they did not affect in any way the security which was then being taken by the mortgagees. In these circumstances, if it were necessary to deal with the fact, I do not think that on the evidence I should be justified in finding that the mortgagees had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected. The applicants are entitled to what they ask for.

Solicitors, *Gresham, Davies, & Dallas*; *H. Montagu*; *E. O. Goss*; *Parker, Garrett, & Parker*.

Q. B. Div.
Commercial Causes.
(Mathew J.)

March 12.

PETERSEN *v.* DUNN & CO. (*a.*)

Ship—Charter-party—Excepted perils—"Strikes and lock-outs of pitmen"—Demurrage—Written clause.

The defendants chartered the plaintiff's ship to proceed to Ardrossan, the charter-party providing that the ship should there load "in the customary manner, say in twelve colliery working days," a cargo of coals, "to be loaded according to the custom of the port"; "strikes and lock-outs of pitmen and others" being excepted perils. The following written clause was added:—"It is understood that vessel is to be loaded at once, and lay days to count when vessel ready and notice given." The ship arrived at Ardrossan, and gave notice that she was ready to load; but before twelve working days had elapsed a strike broke out at the pit, in consequence of which the ship did not load the cargo of coals till twenty-three ordinary working days had gone by. By the charter-party demurrage was to be paid at the rate of fourpence per registered ton per day. The plaintiff claimed for fifteen days' demurrage.

Held, that the written clause only fixed the time when the lay days began, and that the delay was caused by an excepted peril.

The plaintiff was the owner of *The Traesint*.

By a charter-party signed by the captain of the ship on behalf of the plaintiff and the defendants, the charterers, on the 3rd of November, 1893, it was provided that *The Traesint* should proceed to Ardrossan, and there load "in the customary manner, say in twelve colliery working days," a cargo of coals, "to be loaded according to the custom of the port." It was further provided that the vessed should be ready at her loading berth at Ardrossan by the 15th inst., and that any days on demurrage should be at the rate of fourpence per registered ton per day.

The following perils were excepted:—"The Act of God, perils of the sea, fires . . . strikes, and lock-outs of pitmen and others, accidents to mines or machinery, stoppage of mines . . . and all and any other occurrences beyond the control of the parties."

The charter-party also contained the following written clause, added after the clause excepting the above-mentioned perils: "It is understood that vessel is to be loaded at once and lay days to count when vessel ready and notice given."

From admissions made by the plaintiff and defendants it appeared that *The Traesint* proceeded to Ardrossan and gave notice, on the 13th of November, 1893, that she was ready to load on the following day. That she was, in fact, ready to load on the 14th of November, 1893. That the loading was completed on the 14th of December, 1893. That no coal was sent to Ardrossan to be loaded until the 11th of December, 1893. That no cargo was loaded under the charter until the 13th of December, 1893. That there was a general strike of miners from the 23rd of November to the 11th of December, 1893, which prevented the sending of coal from the colliery to Ardrossan. That there are five colliery working days in a week at Ardrossan (Saturdays and Sundays being excepted), and that, but for the strike, there would have been twenty-three working days between the 14th of November and the 14th of December, 1893.

The plaintiffs claimed £155 10s., being fifteen days' demurrage of the ship from the 30th of November to the 14th of December, 1893, at fourpence per registered ton per day.

Bigham, Q.C. (*T. E. Scrutton* with him), for the plaintiff.—The vessel was ready to load on the 14th of November, which was the first lay day. On the eighth lay day, the 23rd of November, the strike broke out. The defendants are not entitled to the benefit of the strike clause, as they had no coal ready to be put on board. The strike was not the real cause of the delay; and the contention of the defendants that they were prevented from loading by an excepted peril cannot be sustained. For seven lay days they were not prevented by the strike, which only began on the 23rd of November. By the

(*a.*) Reported by T. MATHEW. Esq., Barrister-at-Law.

written clause in the charter the vessel was to be "loaded at once," and lay days were to count "when vessel ready and notice given." The vessel could have been loaded at once, and the charterers, having waited for seven days till the strike broke out, are liable.

[No witnesses were called.]

Joseph Walton, Q.C. (*F. W. Hollams* with him), for the defendants.—It is not disputed that if the cargo of coal had been ready at Ardrossan the strike would not have prevented the loading of the ship. The strike was at the pit's mouth. The ordinary practice is to bring the coal down to the ship in trucks, and put it on board at the quay, there being no storage room at Ardrossan. The ship in the present case had "twelve colliery working days" to load in, and was to be loaded "according to the custom of the port"; and the written clause does not override this provision. The defendants have two answers to the claim: first, the strike, an excepted peril, prevented the loading; secondly, there were no working days between the 23rd of November and the 11th of December. The loading was actually completed in ten working days.

He cited *Smith & Service* v. *Rosario Nitrate Co.*, [1894] 1 Q. B. 174.

MATHEW, J.—In this case a note was made at chambers of the contention on one side and the other, and upon this note, without reference to pleadings or admissions, the case has been argued.

I give judgment for the defendants. It was agreed by charter-party that the ship should proceed to Ardrossan, and there load, from a colliery to be named by the freighters, a cargo of coals, in twelve working days. According to the ordinary course of business the coal would be brought down in trucks and tipped into the ship, and would not be stored at Ardrossan. There is a provision in the charter-party in writing to the effect that "vessel is to be loaded at once, and lay days to count when vessel ready and notice given." That, however, does not affect the question. The main object of the written clause is to show when the lay days begin. The lay days began on the 14th; and if the colliery had had proper notice the ship might have been loaded in two days. The charter-party allowed twelve days for the loading, and the plaintiff in effect says that it only allowed seven. The case is perfectly clear, and the defendants are entitled to judgment.

Judgment for the defendants.

Solicitors for the plaintiff, *Stokes, Saunders, & Stokes.*

Solicitors for the defendants, *Hollams, Sons, Coward, & Hawksley.*

Q. B. Div.
(Wills and Wright, JJ.) Feb. 16.

NORTON *v.* MONCKTON. (*a.*)

Justices—Committal warrant—Civil debt—Wrongful arrest — Money paid to obtain release — Special damages—Costs—43 Eliz. c. 2, s. 4.

The plaintiff was arrested under a committal warrant signed and issued by the defendant, a justice of the peace, for non-payment of a debt made up of a certain sum of money alleged to be due from the plaintiff to the local sanitary authority, under an order made at quarter sessions, and of the costs awarded.

Held, that such a warrant was altogether bad, and that the plaintiff was entitled to recover from the defendant, as special damages, the whole amount so paid by him to obtain his release from gaol.

Clark *v.* Woods, 17 *L. J. M. C.* 189, *followed.*

Special case stated by arbitrator.

In this action, the defendant having admitted that he had no jurisdiction to issue the committal warrant under which the plaintiff was arrested and detained for some hours in custody, the question as to what damages the plaintiff was entitled to was referred under an order of reference, dated the 10th of August, 1894, to the award of John Brennan, Esq., solicitor, registrar of the Maidstone County Court.

The plaintiff claimed (*a*) £49 6s. 10d., money paid under duress owing to the unlawful acts of the defendant, (*b*) £1,000 damages for personal discomfort and damage to his credit and reputation. The question on which the arbitrator desired the opinion of the court was whether he ought to award the plaintiff by way of special damage or otherwise the sum of £49 6s. 10d., or any and what part thereof.

The material facts set out in the special case were as follows: The plaintiff, William South Norton, who practised as a solicitor under the style of Messrs. Norton & Son, was summoned by the Malling Rural Sanitary Authority to abate a nuisance arising from the defective drainage of five cottages at East Malling, of which Messrs. Norton & Son were the owners within the meaning of the Public Health Act, 1875.

On the 11th of December 1893, the plaintiff appeared before the justices sitting in petty sessions at West Malling, who made an order against him. From this order the plaintiff appealed, and entered in due time into a recognizance, conditioned to appear and try the appeal at the next court of quarter sessions, and to abide the judgment of the court on appeal, and to pay such costs as might be awarded. Owing to a technical defect the recognizance was invalid. When the case came on at quarter sessions on the 4th of January, 1894, a preliminary objection was taken by the counsel for the local authority on the ground that the necessary recognizance had not been entered into. The plaintiff's counsel thereupon undertook that a fresh recognizance should be entered, and gave a surety. The appeal was then heard upon its merits, and was dismissed with costs. The plaintiff, however, never entered into a fresh recognizance. On the 8th of February the costs directed by the order of the court of quarter sessions to be paid by the plaintiff to the local authority were taxed at the sum of £45 5s. To this sum was added the taxed costs of the appeal, &c., bringing the total amount up to £49 6s. The plaintiff was present when the amount of the claim and the costs were taxed, but had never taken any steps to settle the account. The sanitary authority subsequently obtained a distress warrant, and it was then found that the plaintiff had no goods to satisfy the distraint.

On the 23rd of April, 1894, the defendant, who was one of the justices for the county of Kent, without jurisdiction, as was admitted, signed and issued a committal warrant against the plaintiff for the said sum of £49 6s. 10d., under which the plaintiff was arrested and detained in Maidstone Prison, and in order to obtain his release he paid to the governor of the prison, under protest, the sum of £49 6s. 10d., being the sum set out in the margin of the warrant. The plaintiff was then released, and the money was paid over to the local board, who had never authorised the governor of the prison to receive the same on their behalf.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

It was contended before the arbitrator for the plaintiff that he was entitled to recover the sum of £49 6s. 10d. by way of special damage or otherwise, on the ground, *inter alia*, that the plaintiff, being wrongfully arrested, had paid that amount to the governor under duress, whether or not he was bound to pay the local authority their costs.

For the defendant it was contended that the plaintiff was not entitled to recover such sum by way of special damage or otherwise against him: (*a*) because the plaintiff was legally bound to pay the whole amount under a valid order made by the court of quarter sessions; (*b*) that to decide otherwise would be in effect to reverse the order of quarter sessions.

Macaskie, for the plaintiff.—My client is entitled to recover the whole of the sum of £49 6s. 10d. by way of special damage. He was compelled to pay that sum in order to obtain his release. Section 4 of 43 Eliz. c. 2 does not extend to costs, and the warrant, as is admitted, is altogether bad. It is therefore unnecessary to argue whether the money, or any part of it, was legally due to the local board or not. The present case is identical with that of *Clark* v. *Woods*, 17 L. J. M. C. 189, which was decided as long ago as 1848, and has not been questioned. In that case the plaintiff was apprehended and taken to the house of correction, there to remain until a sum, made up of the arrears of poor rate due from him and the costs of the award, was paid. It was held there that section 4 of 43 Eliz. c. 2 did not extend to costs, and that such a warrant was altogether bad; and that the plaintiff was entitled to recover as damages the whole amount so paid by him to obtain his release. [He referred to *Pitt* v. *Coomes*, 2 A. & E. 459, cited in a note to *Marriott* v. *Hampton* in Smith's Leading Cases, and to the judgment of Lord Denman in *Sowell* v. *Champion*, 6 A. & E. 411.] The fact that in the present case the money was paid to a third party not authorized to receive it on behalf of the local authority makes no difference. [He was stopped.]

C. Fooks, for the defendant. — The arbitrator is right in not admitting that the first part of the claim is properly made out. It is an action by a solicitor, who, as such, is an officer of this court, and therefore I submit that in this case the court has special jurisdiction. When the matter was heard at quarter sessions an objection was taken to the appeal being heard, and the appeal was only heard on an undertaking being given by the plaintiff's counsel that his client would enter into a fresh recognizance. That he has not done, and he has always maintained that he is not liable for these costs because he did not enter into any binding recognizance. Now he is willing enough to change round, and says that under the statute of Elizabeth a warrant to get back costs is bad. Such blowing hot and cold should not be allowed, and his conduct has been such that he is not entitled to the relief he seeks. I submit, moreover, that the plaintiff is liable to pay such costs, and cannot recover back money paid in respect of his debt, because he has undertaken to abide by the judgment of the court of quarter sessions, and to pay such costs as might be awarded. I submit, therefore, that this case is distinguishable from that of *Clark* v. *Woods*, and that the plaintiff is legally bound to pay the sum claimed under the order directing him to do so made at quarter sessions.

WILLS, J.—In this case the committal warrant was issued without jurisdiction, and therefore the plaintiff is entitled to recover the money he had to pay to obtain his release from prison. We are bound by the decision in *Clark* v. *Woods*, cited for the plaintiff's case, and we direct that the arbitrator must award the plaintiff the sum of £49 6s. 10d., as claimed, by way of special damage.

WRIGHT, J.—I am of the same opinion.

Solicitor for the plaintiff, *W. A. E. Headley*.

Solicitors for the defendant, *Long & Gardiner*.

Q. B. Div. (Wills and Wright, JJ.) — Jan. 14, 15.

BROWN AND ANOTHER v. WREN BROTHERS. (*a*.)

Evidence—Admission in letter—Subsequent qualification in same letter—Presumption as to continuance of previous state of circumstances—Evidence to go to jury.

A letter, written in January, 1893, *by a person who was sued as a partner in a firm for the price of goods supplied to the firm between June*, 1893, *and February*, 1894, *was as follows:—"I have not banked any money this last eight months, as I have dissolved partnership with my brother last April."*

Held, that the letter was evidence to go to a jury that the partnership, which was admitted to exist down to April, 1892, *still existed at the time the goods sued for were supplied, notwithstanding the subsequent statement that the partnership had been dissolved.*

Appeal by the plaintiffs from a judgment of his Honour Judge Holl, Q.C., sitting at the Luton County Court.

The plaintiffs brought an action to recover £23 for goods supplied between June, 1893, and February, 1894, to Wren Brothers, the defendants, on the order of Wren Brothers, who carried on business at Luton and Ware.

The defendant William Wren said he was not a partner in the firm of Wren Brothers at the time the goods were supplied, and the questions at the trial were—(1) whether William Wren had held himself out as a partner in the firm of Wren Brothers, and (2) whether he was in fact a partner during the period when the goods were supplied.

For some years before 1884 the plaintiffs traded with Wren & Co.; after that the name of the firm was Wren Brothers, and the plaintiffs traded with them, the name over the door of the premises at Luton being Wren Brothers. The plaintiffs sent their goods to Wren Brothers at Luton, and were paid by cheque signed Wren Brothers.

The account sued for in this action was sent to the defendant William Wren, and was repudiated by him in April, 1894.

The cashier of the plaintiffs stated in his evidence that he did not know William Wren, that all his dealings by word of mouth were with Walter Wren, that he made no inquiry who was the brother besides Walter represented by Wren Brothers, and that he did not specially rely on William Wren, though he knew that William Wren was carrying on business alone in Ware, and he believed that he was carrying on business with Walter Wren at Luton and Ware, and that the plaintiffs sent goods to William Wren at Ware, and had an account with him separately.

The manager of the London and County Bank at Ware, where Wren Brothers kept their account, said that in 1884 there was an account opened in the names of Walter Wren and William Wren, which was continued in their joint names until 1886, when Walter called and opened a new account as "Wren Brothers,"

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

of Ware and Luton, in the names of Walter Wren and Arthur Wren, and that the first communication he received from William Wren was a letter to the bank informing the bank that he had dissolved partnership with Walter Wren in 1892, and that he did not receive any notice from Walter Wren. This letter was received on the 2nd of January, 1893, and was as follows:—"Sir,—I have not banked any money this last eight months, as I have dissolved partnership with my brother Walter last April.—WILLIAM WREN."

It was contended before the county court judge that there was no evidence that William Wren was a partner in the business of Wren Brothers at Luton, or that he had ever held himself out to the plaintiffs as a partner, or that they knew that he was a partner, or that he was a partner in fact when the goods in question were ordered.

It was contended for the plaintiffs that it appeared from William Wren's letter to the bank of the 2nd of January, 1893, that he had been a partner down to April, 1892, and that, therefore, he ought to have given notice to the plaintiffs of the dissolution of the partnership, and that the letter itself, admitting that he had been a partner down to April, 1892, was evidence to go to the jury that the partnership still continued at the time in question.

The judge held that there was no evidence to go to the jury that the plaintiffs knew that William Wren had been a partner with his brother, or that they had ever dealt with Wren Brothers on the faith of William Wren being a partner, and, that being so, no notice to the plaintiffs was necessary, and, secondly, that the implied admission in William Wren's letter of the 2nd of January, 1893, that he had been a partner down to April, 1892, could not be separated from the subsequent statement that the partnership had then been dissolved, and that the letter, therefore, was no evidence of any partnership, in fact, at the time when the cause of action arose, and that there was no evidence of liability on the part of William Wren, as a partner, which ought to be left to the jury.

The plaintiffs appealed.

George Elliott, for the plaintiffs.

Lindsell, for the defendant William Wren.

WILLS, J.—I think there must be a new trial, that the jury may have an opportunity of determining whether, at the time the goods in question were supplied, the partnership between Wren Brothers still continued. The defendant William Wren says, in his letter of the 2nd of January, 1893, that he was up to April, 1892, a partner in the firm. That is evidence that down to April, 1892, he was a partner, and that is not long before these goods were ordered. I think there is some evidence to go to the jury that the state of things, which he then admitted to exist, still existed, unless something is shown which leads one to believe the contrary. It was contended, however, that the admission in the letter cannot be taken apart from the subsequent statement in the same letter that the partnership had been dissolved. I do not think so, and it seems to me that here is where the mistake occurs. If the subsequent statement were a qualification of the prior statement, so that the prior statement would be misunderstood without the subsequent qualification, then the two must be read together. Here the subsequent statement does not qualify the prior admission; it leaves it still an admission, notwithstanding the subsequent statement of a dissolution, that he was a partner down to April, 1892, and that is evidence on which the jury may come to the conclusion that the partnership still existed at the date in question.

The principle in such cases is very clearly laid down in Wills on Evidence, p. 110, and is to the effect above stated. The defendant has admitted that a short time before the ordering of the goods he was a partner, and it lies on him to rebut the presumption that such partnership continued, and the whole letter is evidence to go to the jury, who may or may not act upon it. It cannot be said that it was not a question for the jury, and the case must go back that the defendant may deny, if he can, the existence of the partnership.

WRIGHT, J.—I agree.

Order for new trial.

Solicitor for the plaintiffs, *J. G. Roberts.*

Solicitors for the defendant William Wren, *Walker, Son, & Field*, for *Hooper & Co.*, Biggleswade.

Prob. Div. & Adm. Div. Probate. } Feb. 21; March 1.

ROYLE AND OTHERS v. HARRIS AND OTHERS. (a.)

Probate — Execution — Position of signature — Wills Amendment Act, 1852 (15 & 16 *Vict. c.* 24), *s.* 1.

The deceased, having obtained a form of will of a married woman lithographed on the first side of a sheet of foolscap paper, filled in her own name and a description of her separate property as "money, furniture, house linen, wearing apparel, and jewellery," which she duly bequeathed to her "sisters and friends." She did not fill in the appointment of executors or the date of the will, but her signature appeared at the foot of the will as well as that of the two witnesses, who, according to the evidence, saw no other writing than that on the first page. On the second and third pages, however, there appeared a list of specific bequests in the handwriting of the testatrix to persons, some of whom were her sisters and others her friends.

The Court, *in an action, granted probate of the will as contained in the first page, and refused to include in the grant any part of that contained in the second and third pages.*

Trial before the court itself of a probate action in which the plaintiffs were three sisters and next of kin of Sarah Akeroyd, late of 25, Alexandra-road, Folkestone, Kent, widow, who died on February 15, 189[illegible] having made and duly executed her last will and testament not dated and without having appointed any executor or executrix thereof, and they claimed a grant of administration with the will annexed as contained in the first page, or, in the alternative, a grant of administration without any testamentary paper annexed. The defendants, who claimed to be legatees mentioned on the second and third pages of the will, opposed this claim, and counter-claimed a grant of administration with the whole of the paper annexed as the will, or with such portion as the court might direct annexed, and to such persons as the court might direct. The paper produced consisted of a lithographed form of will of a married woman bequeathing her separate estate, on the first of four pages of foolscap paper. The blanks were filled up in the handwriting of the testatrix, commencing with her own name, and the description of her separate property was filled up as "money and furniture, house linen, wearing apparel, and jewellery," which she duly bequeathed to my "sisters and friends." No[illegible] the appointment of executors or the date of the will

(a.) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

was filled up, but the lithographed words revoked all former wills, and at the bottom of this page were the signatures of the testatrix and of the witnesses opposite the testimonium clause. One of the witnesses proved the due execution of this document, but saw nothing of any writing on the pages of this document other than the first. It was admitted that the other attesting witness could prove no more. In fact, however, beginning on the second page of the document there was a list of bequests in the handwriting of the testatrix to persons, some of whom were the sisters and the other friends of the testatrix, the first was in these terms: "My sister Emily Damant, £200, or equally divided between her surviving children"; other gifts followed, first of sums of money, in similar form, then of "£25 and my household effects," then of £50, then "my household linen, wearing apparel, and jewellery." On the third page, opposite to several of the names, were addresses of some of the legatees. There was evidence that up to this point the writing was apparently the same as on the first page. Then in a bolder hand followed bequests of two sums of £25 and certain articles, and in the same handwriting the name of one of the legatees had been altered, and there was a following statement, but written across both pages, stating that the testatrix had made these changes at a certain time and placed named.

Feb. 21.—*Searle*, for the plaintiffs.

Bayford, Q.C. and *W. B. Hextall*, for the defendants.—In addition to the arguments noticed in the judgment it was urged that as the bequests appearing on the second and third pages followed exactly in the same order as the description in the will they should be treated as an interlineation.

Cur. adv. vult.

March 1.—JEUNE, P., after stating the facts, said: Assuming for the moment that the second and third pages were written before the execution of the will of the testatrix, the question is whether their contents can be admitted to probate. It is clear, I think, that their contents cannot be admitted to probate. It is clear, I think, that they cannot be treated as incorporated, or as interlineations, such, for example, as were admitted to probate in the case of *In the Goods of Birt*, 19 W. R. 511, L. R. 2 P. & D. 214, because there is nothing on the face of the first page referring to them. Nor do I think it possible to contend that the signature is so placed opposite to the writing on the second and third pages as to bring the case within the language of the Wills Amendment Act, 1852. The appearance of the place of the signatures in relation to the contents of the document in this case is very different from that in the case of *In the Goods of Coombs*, L. R. 1 P. & D. 302, 15 W. R. Prob. Dig. 25. I have looked at that will, and the signatures of the testator and witnesses, which are written across the second page and opposite the third, on which there is no space available for signatures, make it apparent, on the face of the will, how the testator intended to give effect by such his signature to the writing signed as his will. But it is suggested that, as in the case of *In the Goods of Wotton*, 22 W. R. 352, 3 P. & D. 159, the will may be considered to begin with what I have called the second and third pages, and to end with what I have called the first page, so that the dispositions on the second and third pages are not underneath, and do not follow, the signature within the meaning of the 1st section of the above-mentioned Act. [The learned judge then proceeded to point out that, whilst there were points of similarity between the two cases, inasmuch as the first page in each case was a lithograph form, yet in *In the Goods of Wotton* the name of the testatrix was not filled up in the printed form, nor was any other part of the body of the printed form filled up except the appointment of executors, and that the second page began with the ordinary commencement of a will, including the name and description of the testatrix, and the language which follows on the second and third pages is that of a complete disposition of the property, and these pages could not be intended to be inserted in the body of the first, and, so considered, could hardly fail to be deemed the real commencement of the will and these pages were written before the execution of the will.] I should be glad if in this case I could come to a conclusion similar to that reached *In the Goods of Wotton*, but I cannot do so. I have no doubt that the fact is that the words on the second and third pages were not intended to commence the will, but were, whenever they were written, intended to expand and explain the bequest to "my sisters and friends" on the first page. Very probably they were written where they are because there was insufficient room for them after the words "my sisters and friends" on the first page. I have assumed that the second and third pages were, in fact, written before the execution of the will. There is no direct evidence that they were, and I should, for several reasons, have found the question not easy to decide. But in the above view it is not necessary to consider it. The result is, that the first page alone can be admitted to probate. This is not, I think, a case such as *Margary* v. *Robinson*, 35 W. R. 350, 12 P. D. 8, where two crosses placed by a blunder in the middle of a document were held not to constitute an execution of any part of it, nor a case such as *Sweetland* v. *Sweetland*, 13 W. R. 504, 4 Swa. & T. 6; *Phipps* v. *Hale*, 22 W. R. 743, L. R. 3 P. & D. 166; or *In the Goods of Dilkes*, 22 W. R. 456, L. R. 3 P. & D. 164, where signatures in the earlier parts of a document were considered to be signatures of authentication and not of execution. So far as it goes, the first page of the document in this case constitutes a properly executed will. I pronounce, therefore, in favour of the will as contained in the first page of the document in question, costs of all parties to come out of the estate.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *John Hands*, for *Smith & Atkinson*, Folkestone.

Solicitor for the defendants, *John Greenfield*.

House of Lords.

From C. A. (England). Feb. 14.

WHITE v. MELLIN. (a.)

Libel—Trade libel—Rival traders—Disparagement of another's goods—Advertisement—Injunction.

The appellant retailed a patent food of the respondent's, and affixed thereto a label stating that certain other goods used for similar purposes, and in which he had a proprietary interest, were better than any other preparation yet known. An action for an injunction was brought by the respondent to restrain the appellant from doing so. There was no evidence of special damage given by or on behalf of the respondent.

Held, that this was merely a puffing advertisement

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

of the appellant's goods, that there was no actionable wrong, and, consequently, that no injunction could be granted.

In the case of disparagement of a person's goods, whether the remedy sought is injunction or damages, the plaintiff must show that the representations of the defendant were made of and concerning his (the plaintiff's) goods, and untrue, and that they have occasioned him special damage.

Decision of the Court of Appeal (42 *W. R.* 549) *reversed.*

This was an appeal from the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), reported 42 W. R. 549. The facts and the whole course of the proceedings are given in the Lord Chancellor's judgment.

Swinfen Eady, Q.C., and *Charles Macnaghten*, for the appellant.—There is no cause of action, because there is no damage. There is no statement which is either false or malicious: *Evans* v. *Harlow*, 5 Q. B. 624. In *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, 23 W. R. 5, L. R. 9 Ex. 218, special damage was shown.

Thomas v. *Williams*, 28 W. R. 983, 14 Ch. D. 864, and *Ratcliffe* v. *Evans*, 40 W. R. 578, [1892] 2 Q. B. 524, were also referred to.

J. Fletcher Moulton, Q.C., and *A d B. Terrell*, for the defendant.—The respondent asked for an injunction, not damages. It is enough to show probability of damage, actual damage need not be proved.

Halsey v. *Brotherhood*, 29 W. R. 9, 30 *Ibid.* 279, 15 Ch. D. 514, 19 *Ibid.* 386; *Bonnard* v. *Perryman*, 39 W. R. 435, [1891] 2 Ch. 269, were also cited.

Swinfen Eady, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL, L.C.—The respondent, who was the plaintiff in the action, is the proprietor of a food which is sold under the name of Mellin's Food for Infants and Invalids. It appears that the appellant, who was the defendant in the action, had sold a bottle or bottles of Mellin's Food, and upon the outside wrapper had pasted an advertisement in these terms: "The public are recommended to try Dr. Vance's Prepared Food for Infants and Invalids, it being far more nutritious and healthful than any other preparation yet offered." "Local agent, Timothy White, Chemist, Portsmouth."

The appellant was interested in this particular food, and no doubt was desirous of pushing its sale. It is said that he had been in the habit of putting this advertisement of Vance's Food not only upon the wrapper which covered the respondent's bottles, but also upon other articles which he sold. It was perfectly natural that the respondent should feel annoyed at this action on the part of the appellant, that his goods when vended should bear upon them the advertisement of a rival food recommended in the terms which I have read. But the question is whether the act complained of warrants an action by the respondent against the appellant.

Romer, J., by whom the case was tried, dismissed the action, being of opinion that the advertisement was a mere puff by the appellant of these particular goods, and did not give rise to any legal claim on the part of the respondent. When the case came before the Court of Appeal they ordered a new trial. The defendant's witnesses not having been heard, Romer, J., being satisfied at the end of the plaintiff's case that no case had been made out, the Court of Appeal, though differing from the view of the learned judge who tried the case, could not give judgment for the plaintiff, but they directed that there should be a new trial in order that the defendant's witnesses might be heard and then the case decided upon the whole of the evidence. Lindley, L.J., delivered this statement of the law. He said: "If upon hearing the whole of the evidence adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods, to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff this action will lie." Lopes, L.J., stated the law thus: "All I desire to say is that in my opinion it is actionable to publish maliciously, without lawful excuse, a false statement disparaging the goods of another person, and causing such other person damage, or in circumstances likely to cause such other person damage."

None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff, but I think it must be taken that they had arrived at the conclusion that the evidence given by the plaintiff did bring the case within those statements of the law—of course if the plaintiff on his evidence had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant—the action was in that case properly dismissed. I take it, therefore, that, although the learned judges did not analyze the evidence or make any reference to it, they must have concluded that it established a case coming within the law as they laid it down. As I understand in the view of those learned judges or in the view of Lindley, L.J.—to take his statement of the law in the first place—it was necessary, in order to the maintenance of the action, that three, or rather, perhaps, I might say two things, should be proved: first, that the defendant had disparaged the plaintiff's goods; that such disparagement was false; and then that damage had resulted or was likely to result. Now the only statement made by the defendant by means of the advertisement is this, that Vance's Food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms, not only to the respondent's infants' food, but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

Now I will state what I understand to be the result of the plaintiff's evidence. Mellin's Food for Infants and Invalids is a preparation of such a nature that the food is said to be pre-digested, and, therefore, not to make that call upon the digestion which food ordinarily does; that, as regards children under six months of age, Mellin's Food is the only one which would be suitably used in the place of ordinary means of nourishment—the mother's milk—and that any farinaceous food would, at that age, be not only not nutritious, but prejudicial. And so far, I think, taking the plaintiff's evidence and accepting it for this purpose, there being no evidence to the contrary, the plaintiff establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that, as regards these children of very tender age, Vance's Food, or any other farinaceous food, would be not only more healthful and nutritious, but as heathful and nutritious. But then it appears that when a child has passed the age up to which nutrition at the breast may ordinarily be said to continue, the use of some

farinaceous food is not only not prejudicial, but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this pre-digested food. That I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that the other preparation, Vance's, is more nutritious and healthful for infants and invalids? I put aside the question of invalids; upon that there was no evidence at all; the plaintiff did not say that his was more healthful, or that the defendant's was not more healthful in that case; therefore, it is unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

Now, certainly the word "infants" is not, in ordinary parlance, confined to children of very tender age. If one looks at the derivation etymologically it would apply to children so long as they are not able to articulate distinctly — not able to speak — and nobody would hesitate to refer to children, I should say, at least under two years of age, as infants just as much as they would to children under six months' of age. Therefore, if you look at the class of infants as a whole, it is by no means shown that the statement that Vance's Food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's Food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but, looking fairly at the language used, and the meaning to be attributed to it, I am not satisfied that it has been shown that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, assuming that he did so, it is admittedly requisite for the maintenance of the action that something further should be proved, and that is, that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not even state that he had sustained any injury, nor did he even say that it was calculated to injure him; and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence. On the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing—it may be extremely and in an exaggerated fashion—these particular goods, Vance's Food. That was outside the wrapper; inside was found an advertisement of Mellin's Food, in which Mellin's Food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that anyone buying this at the chemist's would be led to believe that Mellin's Food, which he had bought, was not a good article, or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? Why should people give such a special weight to this anonymous puff of Vance's Food, obviously the work of someone who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's Food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley, L.J., gives.

Lopes, L.J., adds the word "maliciously," that "it is actionable to publish maliciously, without lawful excuse, a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bonâ fide* merely to sell his own goods, or, at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended by the addition of the "maliciously." Both those are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods, and so sell them, nor is there anything to show that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present is the case of *The Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, in which case a declaration was held good which alleged the disparagement of the plaintiff's goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to that decision as material and essential, because in the earlier case of *Evans* v. *Harlow* a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff, and of and concerning him in his said trade, and of and concerning his design as follows." In that case there was no allegation of special damage, there was a demurrer to the declaration, and the declaration was held bad. Now the only distinction that I can see between that case and the case of *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* is that in the latter case special damage was alleged, whereas in the former it was not. Bramwell, B., does not call specific attention to the *differentia* between the case before him and the case of *Evans* v. *Harlow*, but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. Pollock, B., who was the other judge, pointed out that in *Evans* v. *Harlow* there was no allegation of special damage. Therefore, the utmost that the *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* can be claimed as an authority for, is this, that an action will lie for falsely disparaging another's goods where special damage results. *Evans* v. *Harlow* is a distinct authority that it will not lie where special damage does not result.

Of course in the present case it cannot be pretended that any special damage was either alleged or proved. But Mr. Moulton sought to extricate himself from that difficulty in this way: he said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages, but a claim for an injunction, and that although it may be that, to support an action for damages, it would be necessary to allege and prove special damage, that is not necessary where an injunction is claimed—that it is enough if a false statement is made and is likely to be repeated.

Now, no authority was cited to show that a court of equity, under any of the branches of its jurisdic-

of the appellant's goods, that there was no actionable wrong, and, consequently, that no injunction could be granted.

In the case of disparagement of a person's goods, whether the remedy sought is injunction or damages, the plaintiff must show that the representations of the defendant were made of and concerning his (the plaintiff's) goods, and untrue, and that they have occasioned him special damage.

Decision of the Court of Appeal (42 *W. R.* 549) *reversed.*

This was an appeal from the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), reported 42 W. R. 549. The facts and the whole course of the proceedings are given in the Lord Chancellor's judgment.

Swinfen Eady, Q.C., and *Charles Macnaghten*, for the appellant.—There is no cause of action, because there is no damage. There is no statement which is either false or malicious: *Evans* v. *Harlow*, 5 Q. B. 624. In *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, 23 W. R. 5, L. R. 9 Ex. 218, special damage was shown.

Thomas v. *Williams*, 28 W. R. 983, 14 Ch. D. 864, and *Ratcliffe* v. *Evans*, 40 W. R. 578, [1892] 2 Q. B. 524, were also referred to.

J. Fletcher Moulton, Q.C., and *A à B. Terrell*, for the defendant.—The respondent asked for an injunction, not damages. It is enough to show probability of damage, actual damage need not be proved.

Halsey v. *Brotherhood*, 29 W. R. 9, 30 *Ibid.* 279, 15 Ch. D. 514, 19 *Ibid.* 386; *Bonnard* v. *Perryman*, 39 W. R. 435, [1891] 2 Ch. 269, were also cited.

Swinfen Eady, Q.C., replied.

The House took time for consideration.

Lord HERSCHELL, L.C.—The respondent, who was the plaintiff in the action, is the proprietor of a food which is sold under the name of Mellin's Food for Infants and Invalids. It appears that the appellant, who was the defendant in the action, had sold a bottle or bottles of Mellin's Food, and upon the outside wrapper had pasted an advertisement in these terms: "The public are recommended to try Dr. Vance's Prepared Food for Infants and Invalids, it being far more nutritious and healthful than any other preparation yet offered." "Local agent, Timothy White, Chemist, Portsmouth."

The appellant was interested in this particular food, and no doubt was desirous of pushing its sale. It is said that he had been in the habit of putting this advertisement of Vance's Food not only upon the wrapper which covered the respondent's bottles, but also upon other articles which he sold. It was perfectly natural that the respondent should feel annoyed at this action on the part of the appellant, that his goods when vended should bear upon them the advertisement of a rival food recommended in the terms which I have read. But the question is whether the act complained of warrants an action by the respondent against the appellant.

Romer, J., by whom the case was tried, dismissed the action, being of opinion that the advertisement was a mere puff by the appellant of these particular goods, and did not give rise to any legal claim on the part of the respondent. When the case came before the Court of Appeal they ordered a new trial. The defendant's witnesses not having been heard, Romer, J., being satisfied at the end of the plaintiff's case that no case had been made out, the Court of Appeal, though differing from the view of the learned judge who tried the case, could not give judgment for the plaintiff, but they directed that there should be a new trial in order that the defendant's witnesses might be heard and then the case decided upon the whole of the evidence. Lindley, L.J., delivered this statement of the law. He said: "If upon hearing the whole of the evidence adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods, to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff this action will lie." Lopes, L.J., stated the law thus: "All I desire to say is that in my opinion it is actionable to publish maliciously, without lawful excuse, a false statement disparaging the goods of another person, and causing such other person damage, or in circumstances likely to cause such other person damage."

None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff, but I think it must be taken that they had arrived at the conclusion that the evidence given by the plaintiff did bring the case within those statements of the law—of course if the plaintiff on his evidence had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant—the action was in that case properly dismissed. I take it, therefore, that, although the learned judges did not analyze the evidence or make any reference to it, they must have concluded that it established a case coming within the law as they laid it down. As I understand in the view of those learned judges or in the view of Lindley, L.J.—to take his statement of the law in the first place—it was necessary, in order to the maintenance of the action, that three, or rather, perhaps, I might say two things, should be proved: first, that the defendant had disparaged the plaintiff's goods; that such disparagement was false; and then that damage had resulted or was likely to result. Now the only statement made by the defendant by means of the advertisement is this, that Vance's Food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms, not only to the respondent's infants' food, but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

Now I will state what I understand to be the result of the plaintiff's evidence. Mellin's Food for Infants and Invalids is a preparation of such a nature that the food is said to be pre-digested, and, therefore, not to make that call upon the digestion which food ordinarily does; that, as regards children under six months of age, Mellin's Food is the only one which would be suitably used in the place of ordinary means of nourishment—the mother's milk—and that any farinaceous food would, at that age, be not only not nutritious, but prejudicial. And so far, I think, taking the plaintiff's evidence and accepting it for this purpose, there being no evidence to the contrary, the plaintiff establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that, as regards these children of very tender age, Vance's Food, or any other farinaceous food, would be not only more healthful and nutritious, but as healthful and nutritious. But then it appears that when a child has passed the age up to which nutrition at the breast may ordinarily be said to continue, the use of some

farinaceous food is not only not prejudicial, but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this pre-digested food. That I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that the other preparation, Vance's, is more nutritious and healthful for infants and invalids? I put aside the question of invalids; upon that there was no evidence at all; the plaintiff did not say that his was more healthful, or that the defendant's was not more healthful in that case; therefore, it is unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

Now, certainly the word "infants" is not, in ordinary parlance, confined to children of very tender age. If one looks at the derivation etymologically it would apply to children so long as they are not able to articulate distinctly — not able to speak — and nobody would hesitate to refer to children, I should say, at least under two years of age, as infants just as much as they would to children under six months' of age. Therefore, if you look at the class of infants as a whole, it is by no means shown that the statement that Vance's Food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's Food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but, looking fairly at the language used, and the meaning to be attributed to it, I am not satisfied that it has been shown that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, assuming that he did so, it is admittedly requisite for the maintenance of the action that something further should be proved, and that is, that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not even state that he had sustained any injury, nor did he even say that it was calculated to injure him; and I own it seems to me impossible, in the absence of any such statement or evidence, to say that it is a case in which such must be the necessary consequence. On the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing—it may be extremely and in an exaggerated fashion—these particular goods, Vance's Food. That was outside the wrapper; inside was found an advertisement of Mellin's Food, in which Mellin's Food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that anyone buying this at the chemist's would be led to believe that Mellin's Food, which he had bought, was not a good article, or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? Why should people give such a special weight to this anonymous puff of Vance's Food, obviously the work of someone who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's Food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley, L.J., gives.

Lopes, L.J., adds the word "maliciously," that "it is actionable to publish maliciously, without lawful excuse, a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bonâ fide* merely to sell his own goods, or, at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended by the addition of the "maliciously." Both those are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods, and so sell them, nor is there anything to show that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present is the case of *The Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, in which case a declaration was held good which alleged the disparagement of the plaintiff's goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to that decision as material and essential, because in the earlier case of *Evans* v. *Harlow* a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff, and of and concerning him in his said trade, and of and concerning his design as follows." In that case there was no allegation of special damage, there was a demurrer to the declaration, and the declaration was held bad. Now the only distinction that I can see between that case and the case of *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* is that in the latter case special damage was alleged, whereas in the former it was not. Bramwell, B., does not call specific attention to the *differentia* between the case before him and the case of *Evans* v. *Harlow*, but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. Pollock, B., who was the other judge, pointed out that in *Evans* v. *Harlow* there was no allegation of special damage. Therefore, the utmost that the *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* can be claimed as an authority for, is this, that an action will lie for falsely disparaging another's goods where special damage results. *Evans* v. *Harlow* is a distinct authority that it will not lie where special damage does not result.

Of course in the present case it cannot be pretended that any special damage was either alleged or proved. But Mr. Moulton sought to extricate himself from that difficulty in this way: he said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages, but a claim for an injunction, and that although it may be that, to support an action for damages, it would be necessary to allege and prove special damage, that is not necessary where an injunction is claimed—that it is enough if a false statement is made and is likely to be repeated.

Now, no authority was cited to show that a court of equity, under any of the branches of its jurisdic-

tion, had ever granted, or would grant, an injunction in such a case. Certainly there is no rule of equity under which it may be said generally that a court of equity would restrain every publication of a false statement. In the case of *Canham* v. *Jones*, 2 V. & B. 218, the Bill stated that a certain Mr. Swainson had been the sole proprietor of a secret for preparing the medicine called "Velno's Vegetable Syrup," and that the plaintiff had obtained title to it under his will, and had sold the medicine. Then the complaint was, that the defendant, who had been a servant of Swainson, was employed in the preparation of the syrup, but was not acquainted with the complete preparation, certain essential ingredients being introduced only by Swainson himself, and only in the presence of the plaintiff. Then it alleged, "that the defendant, being discharged from his service, had made out and advertised for sale a spurious preparation under the name of Velno's Vegetable Syrup, stated by him to be the same medicine or composition and quality as that made by Swainson and the plaintiff, the defendant's advertisement certifying that the medicine prepared by him at his residence under the name of Velno's Vegetable Syrup is precisely the same with that made and sold by the late Mr. Swainson." It was alleged that that was untrue, and that it really was a spurious preparation pretending to be the same when it really was not. To that Bill the defendant put in a general demurrer for want of equity. That demurrer was sustained by the Vice-Chancellor (Sir Thomas Plumer) although for the purposes of the demurrer it was taken that the defendant selling this article was falsely stating that it was the same as the plaintiff's.

The learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked at, it will be seen that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a court of common law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a court of common law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82nd sections of the Common Law Procedure Act, 1854, undoubtedly conferred upon the courts of common law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort with no limitation as to defamation"; and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in *Bonnard* v. *Perryman*.

Obviously, to call for the exercise of that power, it would be necessary to show that there was an actionable wrong well laid; and if the statement only showed a part of that which was necessary to make up a cause of action—that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shown—a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plaintiff would not be entitled to an injunction any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed which the law would remedy for him; and for the reasons which I have given, certainly taking *The Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* to be good law, he has not brought himself within it.

But I cannot help saying that I entertain very grave doubts whether any action could be maintained for an alleged disparagement of another's goods merely by the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or in that particular respect than his competitor's are. Of course I put aside the case (it is not necessary to consider it) whether, where a person intended to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; but I am dealing with a class of case which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans* v. *Harlow* Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by avowing them to be false, scandalous, malicious, and defamatory that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." Those observations seem to me to be replete with good sense. It is to be observed that *Evans* v. *Harlow* does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson, J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman, J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door would indeed be opened to litigation, and that the courts might be constantly employed in trying the superior merits of rival productions if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbour's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course, "better" means better as regards the purpose for which they are intended, and the question of better or worse, in many cases, depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbour's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure; whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said,

advertisements and announcements of that description have been common enough; but the case of *Evans* v. *Harlow* was decided in the year 1844, somewhat over half a century ago, and the fact that no such action has ever been entertained and maintained in the courts of justice is very strong indeed to show that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal. For the reasons which I have given, I have come to the conclusion that the judgment of the court below cannot be sustained, even assuming the law to be as stated by the learned judges; but, inasmuch as the case is one of great importance, and some additional colour would be lent to the idea that an action of this description was maintainable by the observations in the court below, I have thought it only right to express my grave doubts whether any such action could be maintainable even if the facts brought the case within it.

Upon the whole, therefore, I think that the judgment of Romer, J., was right, and ought to be restored, and that this appeal should be allowed, with the usual results as to costs; and I so move your lordships.

Lord WATSON.—The ground of this action is slander, not of the plaintiff himself, in his personal or business capacity, but of an article of food which he manufactures and sells as Mellin's Infants' Food. The defendant, who is a chemist, sells the plaintiff's food at his establishments in Portsmouth and its neighbourhood. He also sells another food, in which he has a proprietary interest, which is known as Dr. Vance's Prepared Food for Infants or Invalids.

The alleged slander is contained in a label notice or advertisement used by the defendant, by which "The public are recommended to try Dr. Vance's Prepared Food for Infants or Invalids, it being far more nutritious and healthful than any preparation yet offered." In his statement of claim the plaintiff avers that the defendant was in the habit of affixing that label to the wrappers in which "Mellin's Infants' Food" is made up for sale. The defendant admits that he affixed the label to various articles sold by him, and in some cases to the wrappers in which the plaintiff's food is sold, care being always taken that the printed or written matter on the wrappers should not be interfered with or rendered illegible. Beyond that admission there is no evidence bearing on the point.

The wrong complained of being the slander of goods, the fact that the representations made by the defendant, in the label already referred to, might be calculated to disparage the food manufactured by the plaintiff, and to interfere with the sale, can afford no cause of action. Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good, and even better, articles at the same price: but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods, and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these things be established, it must be held that the defendant has acted within his rights, and that the plaintiff has not suffered any legal *injuria*.

It is true that, in the present case, the plaintiff, who does not aver that he has sustained any special damage, only claims an injunction. That circumstance cannot make any difference in his favour. Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The *onus* resting upon a plaintiff who asks an injunction, and does not say that he has yet suffered any special damage, is, if anything, the heavier, because it is incumbent upon him to satisfy the court that such damage will necessarily be occasioned to him in the future.

The case was tried before Romer, J., who, after the plaintiff's evidence was concluded, gave judgment against him, without waiting to hear proof from the defendant. The Court of Appeal reversed that decision, and directed the case to be retried.

Having examined the plaintiff's evidence, and having also heard all that could possibly be said for it from Mr. Moulton, I must confess my inability to appreciate the reasons which induced the learned judges of the Appeal Court to disapprove of the course which has been taken by Romer, J.

It is not suggested that the plaintiff had not ample opportunity of adducing all the proof which he desired. The evidence which he did adduce appears to me to fail upon every point which was essentially necessary to his success in the action.

In the first place I do not think the representation conveyed by the defendant's label is, in any legal sense, a representation of and concerning the infants' food of the plaintiff. It is a highly-coloured laudation of Dr. Vance's Food and nothing else. It makes no difference to the plaintiff's goods, beyond what might be implied in the case of every other kind of food which is recommended and sold as being suitable for consumption by infant children. Nor, in my opinion, is the circumstance that the label was sometimes put upon the plaintiff's wrappers, however distressing it might be to him, sufficient to convert it into a disparagement of the contents of the wrapper. An advertisement in the window of a bootmaker to the effect that he makes the best boots in the world may be more offensive to his next neighbour in the same trade than to a bootmaker at a distance, but the disparagement, in kind and degree, is identical in both cases.

In the second place, assuming that the representation did refer to the plaintiff's food, I am of opinion that his evidence does not prove it to be untrue. At the best the evidence comes to no more than this, that the plaintiff's food is more suitable for children under six months old who cannot get their mothers' milk, and that Dr. Vance's food is more suitable for children above that age who are not the victims of indigestion. In these circumstances it appears to me to be difficult to hold that it was not open to either of the parties to say that his was the best food for infants without conveying a false imputation upon the food of the other.

In the third and last place, I am of opinion that, even if the plaintiff had proved that the representation concerned his food and was wilfully false, his evidence discloses no cause of action. There is not in the whole of it an attempt to prove that the plaintiff has suffered in the past, or is likely to suffer in the future, any damage whatever through the representations of which he complains.

I therefore agree that the order of the Court of Appeal ought to be reversed, and the judgment of Romer, J., restored.

Lord MACNAGHTEN.—I entirely agree. Upon the legal aspects of the case I have nothing to add. I only wish to protest against its being supposed that there is any shadow of foundation for the respondent's

claim in equity. I mean no imputation upon the draftsman, because the claim as originally launched was founded on an implied contract arising out of the custom of trade, and if that could have been made out the respondent would have had something to say.

Mr. Moulton, in his ingenious argument, endeavoured to rest his case on some ground which was neither law nor equity, but something between the two. It was, he argued, a legitimate development of equitable principles, now that a court of equity is free to deal with legal rights.

A reference to a case in the Court of Appeal, when Lord Cairns sat there as Chancellor with James, L.J., and Mellish, L.J., will suffice, I think, to dispel that notion. A gentleman of the name of Knott had published a pamphlet about insurance companies. He had collected a large body of statistics, and with the light thus afforded he compared the relative stability of different offices. One office thought the comparison particularly odious, and applied for an injunction. The application was refused by Hall, V.C. There was an appeal from his decision. The case of the appellants was mainly rested on the judgment of Malins, V.C., in *Dixon* v. *Holden*, 17 W. R. 482, L. R. 7 Eq. 488. Cairns, L.C., in his judgment, quoted two passages from the Vice-Chancellor's judgment in *Dixon* v. *Holden*. One of them was in these words: "In the decision I arrive at," said the Vice-Chancellor, "I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." The Lord Chancellor's comment was this: "I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this court": *Prudential Assurance Co.* v. *Knott*, 23 W. R. 249, L. R. 10 Ch. App. 142.

Your lordships will observe that the Lord Chancellor does not say that the proposition of the Vice-Chancellor was merely unusual, but that it was at variance with the settled principles of the court.

I think Romer, J., was quite right in the view he took of the case, and that he acted quite rightly in dismissing the action at the close of the plaintiff's case, and I concur in the motion proposed by the Lord Chancellor.

Lord MORRIS.—I also concur. If the averment in the statement of claim, that there is an implied condition in the trade as therein set forth, be now struck out, as it is admitted it must be, because there was no proof of it at the trial, in my opinion the statement of claim discloses no cause of action at all. It contains no averment of the act complained of being done maliciously, nor does it allege any special damage; not that I think, even if it did, any cause of action would be established on the evidence, because the only reflection of the defendant upon the plaintiff's article was that his, the defendant's, was more healthful and nutritious. Such a statement *simpliciter* in my opinion conveys no right of action to the plaintiff. A party does not lay himself open to an action who *bonâ fide* praises his goods as better than another's and it cannot give a cause of action, because, on the trial of those competing articles, the defendant's article may be ascertained not to be better than the plaintiff's.

But it was said that, although an action for damages could not be sustained, an injunction in equity could be obtained. It would certainly be a strange and unusual chapter of equity if a party could get a perpetual injunction to restrain an act which is not an illegal act.

Lord SHAND.—I also concur in the judgment which the Lord Chancellor proposes, and in the reasons in support of it which have been stated by your lordships. I only desire to add that, for my part, I should be quite content with the ground of judgment which Romer, J., expressed in dismissing the case after the evidence of the plaintiff had been led. The learned judge then said: "No doubt, on the evidence of the plaintiff's side, so far as that goes, it does tend to show that the plaintiff's is the best, at any rate, for infants under six months old"; and he goes on to say: "But, as I have said, no person on seeing what the defendant has done would have read this statement put upon the plaintiff's cases as being anything more than a rival puff. Of course it is always very annoying to a man who has a good article to find a person who is puffing a rival article stating that the rival article is really the best, and it is still more annoying to find that statement upon the goods of the man who complains. But, however annoying the form of the advertisement of the defendant may be to the plaintiff, I come to the conclusion that what has been done by the defendant has not amounted, in any true sense, to a trade libel as against the plaintiff, and that the plaintiff has no legal remedy in respect of it." It appears to me that in order to constitute a trade libel there must be a statement of and concerning the plaintiff's goods, that that statement must be in disparagement of these goods, and that it must be false and injurious. But then I do not think that disparagement in a popular sense would be enough for the plaintiff's case. It must, as it appears to me, be a disparagement in such a sense as would, in point of law, be a foundation for an action for damages or an injunction, as, for example, if in this case there had been a statement that Mellin's Food was positively injurious, that it contained deleterious ingredients, and would be hurtful if it were used. But when all that is said is making a comparison between the plaintiff's goods and the goods of the person issuing the advertisement, that the plaintiff's goods are inferior in quality, or inferior, it may be, in some special qualities, I am not prepared to say that a mere comparison of that kind can be regarded as a disparagement of which the law will take cognizance. I very fully concur in the view stated at the close of the Lord Chancellor's opinion, with this addition, that, as far as my mind is concerned, I do not feel merely the doubt that his lordship expressed, because I think in point of law, in the various cases to which he referred as an illustration, an action would not lie. I think that view is supported by the reasoning, which is overpowering in the judgment of Lord Denman in the case of *Evans* v. *Harlow*.

Therefore, upon the simple ground that this really cannot be characterized as a trade libel at all, I am of opinion that this action should have been dismissed.

Lord HERSCHELL, L.C.—My noble and learned friend Lord Ashbourne, who is unable to be present to-day, has asked me to say that he entirely concurs in the judgment proposed.

Order of the Court of Appeal reversed, and that of Romer, J., restored; respondent to pay costs of appellant in this House and below.

Solicitors for the appellant, *A. W. Mills*, for *Cousins & Burbridge*, Portsmouth.

Solicitors for the respondent, *Eldred & Bignold*.

Court of Appeal.

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 14.

"THE GIPSY QUEEN." (a.)

Admiralty—Practice—Costs of appeal—Salvage action—Amount of salvage reduced on appeal.

It is the general practice of the court, where the amount awarded for salvage services is reduced on appeal, not to allow any costs of the appeal. There is, however, no fixed rule upon the subject, and the court still has a discretion in any particular case to allow the costs of the appeal.

Appeal from the judgment of Bruce, J., in a salvage action. The action was by the owners, master, and crew of the steamship *Jane Clark*, to recover for salvage services rendered to the steamship *Gipsy Queen*. The learned judge awarded £1,200 for the salvage services. The owners of the *Gipsy Queen* appealed, upon the ground that the amount awarded was excessive.

March 13.—*Raikes, Q.C., L. Batten*, and *Kilburn*, for the appellants.

Sir W. Phillimore and *Butler Aspinall*, for the respondents.

The COURT reduced the amount awarded for salvage to £800, and varied the apportionment.

Raikes, Q.C., applied for the costs of the appeal, and referred to *The City of Berlin*, 25 W. R. 793, 2 P. D. 187.

Sir W. Phillimore contended that, where the amount awarded for salvage was reduced, the practice was not to give any costs of the appeal.

Cur. adv. vult.

March 14—Lord ESHER, M.R.—We have made inquiries as to the practice with respect to costs, and the general practice of the court is that when the amount awarded for salvage services is reduced, and a smaller amount awarded, no costs of the appeal are given. That is merely the general practice of the court, and the court still has a discretion in any particular case to give the costs of the appeal. There is no fixed or rigid rule in the matter. There will, therefore, be no costs of this appeal.

LOPES, L.J.—I am of the same opinion. I agree that the general practice of the court is as stated by the Master of the Rolls. There is, however, no hard-and-fast rule in the matter, and the court has a discretion in any particular case to give costs. For instance, if the court below awards a sum very much too large, and that sum is considerably reduced on appeal, the court will probably allow the costs of the appeal.

RIGBY, L.J.—I am of the same opinion. There is no hard-and-fast rule, though there is a general practice followed by the court.

Appealed allowed, without costs.

Solicitors for the appellants, *Pritchard & Sons.*

Solicitors for the respondents, *Crossman & Prichard*, for *H. W. Bell*, West Hartlepool.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Feb. 26, 27.

In re BANK OF SOUTH AUSTRALIA (LIMITED). (a.)

*Company—Winding up—Compulsory order—Debt under agreement with voluntary liquidator—Petitioner—*Locus standi *of—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133, 145, 161.

The A. Banking Co., being unable to realize its assets and pay its debts, passed resolutions for voluntary winding up, and appointed liquidators, who were authorized to enter into an agreement with the U. Banking Co. for the transfer of its assets and liabilities to the U. Co. One of the terms of such agreement was that, in the event of the assets not being sufficient to pay the debts, the liquidators were, so far as they legally could, to make such calls as should be necessary to raise the deficiency.

Held (*affirming the decision of* Vaughan Williams, J., ante, *p.* 299), *that there was power under sections* 95 *and* 133 *of the Companies Act,* 1862, *to sell on the terms of the agreement, and that the debt, whether existing at the date of the commencement of the winding up or not, was sufficient to support a petition for compulsory winding up by the court.*

Appeal from a decision of Vaughan Williams, J. (reported *ante*, p. 299).

The facts sufficiently appear from the report of the case in the court below.

The contributories to the Bank of South Australia appealed.

Cozens-Hardy, Q.C., Buckley, Q.C., and *Ingle Joyce*, for the appellants.—There is no debt of the company in respect of which the petitioners have any *locus standi*. After the commencement of the winding up it was not competent for the company to carry on its business or create any new liability. If the liquidators had carried on business and incurred debts, they would not have been debts of the company and could not have been the subject of a petition. An agreement such as was here entered into between the two banks cannot be supported under section 161 of the Companies Act, 1862: *Clinch* v. *Financial Corporation*, 17 W. R. 84, L. R. 4 Ch. App. 117. It was not competent for the company to sell its uncalled capital. The directors' powers came to an end as soon as the company went into liquidation, and after that they could make no more calls. The liquidator can only make such calls as are necessary for the winding up; he cannot make bargains with the purchaser. An express term of the agreement was that all liabilities should be paid by the purchasing company, and therefore no calls could be made. Even if the agreement is not void as a whole, it is certainly void in the provision for payment of interest: *In re East of England Banking Co.*, 17 W. R. 18, L. R. 4 Ch. App. 14.

They also referred to *In re International Marine Hydropathic Co.*, 33 W. R. 587, 28 Ch. D. 470.

Finlay, Q.C., Phipson Beale, Q.C., and *S. Dickinson*, for the respondents.—No proposition of law to be deduced from *Clinch* v. *Financial Corporation* is applicable to this case. The voluntary winding up was commenced for the purpose of carrying into effect the agreement between the two banks, and therefore the liabilty accrued at the commencement of the voluntary winding up: *The Hire-Purchase Furnishing Co.* v. *Richens*, 36 W. R. 365, 20 Q. B. D. 387. The agreement in this case is very similar to the one

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

in *Stone* v. *City and County Bank*, 3 C. P. D. 282, 26 W. R. Dig. 42, which was upheld.

Cozens-Hardy, Q.C., replied, and referred to *In re Bank of Hindustan, China, and Japan, Ex parte Levick*, L. R. 5 Eq. 69, 16 W. R. Dig. 70.

Lord HALSBURY gave a long judgment on the somewhat difficult question of construction of the charters and the private Act of Parliament of the Bank of South Australia, and continued:—

I confess, with reference to the second part of the argument, I have had some difficulty in following it. This company was hopelessly in debt. By a special resolution sanctioned by the shareholders in general meeting—whether absent or present is immaterial, because I am of opinion that it was well within their powers—they determined to wind up, and for the purpose of paying their debts, which one sees has been accomplished to the extent of £3,000,000, they agreed to enter into this bargain; and the bargain is, as my brother Smith pointed out, practically a sale of their effects and assets upon certain terms; £3,000,000 of their debt has been in fact paid, and then, when they enter into this bargain, it is said that the payment for that sale is not a debt. I think it is. My own impression is, that the shortest mode of answering that proposition is by saying that it is a debt, and I do not think one can give a better reason for it than by saying it is a sale.

Then it is said, though a debt, it is, nevertheless, not such a debt as can be made the subject of a petition for winding up. I confess I am wholly unable to understand that position. A voluntary winding up is a winding up in which, if you please, you may bring an action against the company and recover judgment; and certainly it would be a very odd condition of the law if, when you recover judgment, the only mode in which you could proceed against a company would be by seizing its effects and not proceeding by way of winding up. It seems to me that there is no foundation at all for that contention, and I think, therefore, upon the second branch of this argument the appellants fail.

I do not intend to comment upon or to make any observations in respect of the earlier decision of my brother Williams. It is not before us, and at present I confess I have some difficulty in following what it distinctly means. If I do understand, I am not prepared to say I should follow it. But, inasmuch as it if not before us at this moment for adjudication, it is enough for me to say that it is beside the present question.

Therefore I am of opinion that this appeal should be dismissed, with costs.

LINDLEY, L.J., agreed with Lord Halsbury on the construction of the charters and the statutes, and came to the conclusion that the agreement between the two banks was not *ultrà vires*, and continued:—That leads me to the last point. There is the debt. Judging from the petition, it is considerable. I do not know how much it is, but it does not much matter. We are not discussing figures now. There is a large debt due under that agreement to the Union Bank. Now, how are they going to get it? Let us work that out. They can bring an action. Undoubtedly this was a voluntary winding up. The court might or might not stay that. If the action were not stayed, they could bring an action for that money, and recover judgment upon it. Very well: suppose they do? How are they going to get their money? execution on the assets, of course, is out of the question, because all the assets are in the hands of the Union Bank, who are the creditors. How are they going to force the liquidators to make a call for their payment, except by means of the winding-up clause in the Act of 1862? There is no other method. Then is it to be said that a person who is a creditor of a company being voluntary wound up—I do not care whether the debt occurs after the commencement of the voluntary winding up or not—could recover judgment against that company, and then be laughed at, although a call might be made? He cannot get calls made under his judgment without a winding-up order: he must, therefore, have recourse to the winding-up proceeding—present a petition for the winding up, subject to supervision. That, in fact, was what the Union Bank did at the suggestion of the liquidators.

Vaughan Williams, J., for some reason which I do not think is very satisfactory, thought he could not make an order on that petition, and now the Union Bank presents a petition for the compulsory winding up. It seems to me impossible to say that, because the debt has accrued in the course of the winding up, or, if you like to use that expression, since the commencement of the voluntary winding up—because a man has a preferential debt, which I suppose he has (I do not know whether he has or not)—therefore he is not in a position to enforce his debt at all. Because that is what it comes to. Now, if you look at section 145, which is put into the winding up provisions on purpose to prevent creditors from being defeated, that says, any creditor in a voluntary winding up of a company may petition—that is to say, any creditor—I do not care when his debt accrues—if he cannot get payment, is not to be laughed at. He is to go to the court and ask that a winding-up order should be made, in order that the assets may be realized for the purpose of his payment, if, as in this case, there is not a brass farthing to be got elsewhere. It appears to me that the course taken by the Bank of South Australia is one which is defensible possibly from a lawyer's point of view, but it is utterly unsuccessful, and the appeal ought to be dismissed, with costs.

A L. SMITH, L.J., concurred

Appeal dismissed, with costs.

Solicitors for the appellants, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the respondents, *Murray, Hutchins, Stirling, & Murray.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 20.

BOOTH *v.* ARNOLD. (*a.*)

Defamation—Slander—Imputation of misconduct in office—Office of honour—Words actionable without special damage—Amotion, power of—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50).

Words spoken of a person imputing to him misconduct in an office of honour are actionable per se, *without proof of special damage.*

Hence an action for slander will lie, without proof of special damage, where the words impute to the plaintiff want of integrity or dishonesty in his office of alderman of a town council.

Per Lopes, L.J.—*The action was also maintainable upon the grounds* (1) *that a corporation has the power of removing a member from office for corrupt or dishonest*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

conduct in that office; and (2) *that the words imputed a criminal offence.*

Application for judgment or a new trial in an action for slander tried before Charles, J., and a jury.

The plaintiff was an alderman of the borough of Halifax, and chairman of the improvement committee of the council of the borough, and the words complained of were spoken by the defendant, also a member of the council, at a meeting during a municipal election contest. The facts are fully set out in the judgment of Lopes, L.J. It is sufficient to state here that during the course of his speech the defendant, speaking of the purchase of certain land by the corporation for a public improvement, and the price paid for it, said: "Now that land belonged to the Bradford and District Dye Works Co., and no doubt the purchase was arranged by the chairman of the improvement committee and the chairman of the company. Doubtless those chairmen had a long fight and much wrestling over the matter. Indeed, you may just fancy how intent the fight was when I tell you that both gentlemen happened to be the same person, Alderman James Booth."

The plaintiff, in his statement of claim, alleged that the meaning of these words was that he, as chairman of the committee, had purchased the land, in which he was interested as a vendor, for the corporation at an exorbitant and unfair price, and that he was guilty of a breach of trust and was wanting in honesty and integrity as chairman of the committee and as a member of the council. Special damage was not alleged or proved. The jury found a verdict for the plaintiff for £85.

Tindal Atkinson, Q.C., and *Scott Fox*, for the defendant.—The office of alderman is an office of honour and credit, and not an office of profit. An imputation of misconduct in such an office is not actionable without proof of special damage, unless the words would, if true, render the man liable to removal from the office: *Alexander* v. *Jenkins*, 40 W. R. 546, [1892] 1 Q. B. 797. [They also cited *Stuckley* v. *Bulhead*, 4 Co. Rep. 299; *Onslow* v. *Horne*, 2 W. Bl. 750; *Dod* v. *Robinson*, Aleyn, 63.] They also contended that a municipal corporation had not the power of amotion. It was not given by the Municipal Corporations Acts, 1835 or 1882. Even if the power of amotion existed in ancient corporations it did not exist in the corporation of Halifax, which was created a corporation in 1848 under the Municipal Corporation Acts.

They referred upon this point to *Baggs' case*, 11 Co. Rep. 93b, 98a; *Rex* v. *Richardson*, 1 Burr. 517; *Reg.* v. *Mayor, &c., of Ryde*, 28 L. T. N. S. 629, 21 W. R. Dig. 156; Grant on Corporations, p. 243.

Waddy, Q.C., and *W. J. Waugh*, for the plaintiff.—The words impute to the plaintiff misconduct in his office, and are actionable without special damage, whether the power of amotion exists or not: *Wright* v. *Moorhouse*, Cro. Eliz. 358; *Masham* v. *Bridges*, Cro. Car. 223; *Aston* v. *Blagrave*, 2 Ld. Raym. 1369. They also contended that the corporation had the power of amotion, and referred to *Rex* v. *Heaven*, 2 T. R. 772; *In re Norton*, *Times*, June 10, 1872; Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), ss. 1, 28, 31, 52; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 12, 22 (3), 260 (1c), and, further, that the words were actionable *per se* as imputing to the plaintiff an indictable offence.

Tindal Atkinson, Q.C., replied.

Cur. adv. vult.

Feb. 20.—Lord ESHER, M.R.—This is an action of slander, and the defendant contended that there was no evidence to go to the jury to sustain the action, because there was no evidence of special damage, none being pleaded or proved, and the words were not actionable *per se*, inasmuch as what was said could not possibly cause any damage in the legal sense to the plaintiff, the words being spoken of the plaintiff in relation to his office, which is an office of honour and credit, and not of profit, and the charge, if true, not being such as to cause his removal from the office. The plaintiff, on the other hand, contended that the words were actionable *per se*, because they imputed to him want of integrity and honesty in his office; and, further, that the conduct charged against him was such as would render him liable to removal from the office, the corporation having still the power of amotion, and that on that ground the action was maintainable; and, further, that the words charged him with an indictable offence. In my opinion the question of amotion does not arise in this case, and it is unnecessary to express any opinion upon it. The case may be decided upon this ground—that the words complained of might fairly be interpreted by the jury to mean that the plaintiff had used his office in the corporation to obtain an improper advantage for himself, and therefore amounted to a slander imputing misconduct to him in his office. In my opinion that is a slander which is actionable without proof of special damage. Without, therefore, going into the other questions which were raised, this is sufficient to dispose of the case, and the application must be dismissed.

LOPES, L.J., read the following judgment:—There are questions affecting corporations of great importance raised in this case, which is my reason for delivering a rather long judgment I will only state so much of the facts of this case as is necessary to make my judgment intelligible. The plaintiff was an alderman and the defendant a councillor of the county borough of Halifax. About a year and a half before the occurrence of the slander complained of some land, the property of a company, of which company the plaintiff was managing director and chief shareholder, had been purchased by the corporation. There was also some property of the defendant's which the corporation had also purchased. The negotiations for both these purchases were conducted by the improvement committee, of which the plaintiff was chairman. The plaintiff, feeling a difficulty in negotiating with regard to the sale of land to the corporation in which he had a large interest, thought it desirable that the transaction of the business should be entirely left to the sub-committee, consisting of three aldermen, who accordingly did transact the business and arrange the price to be paid by the corporation to the plaintiff and defendant respectively. The matter had been finally arranged and completed in March, 1893. Previously to the 19th of October, 1894, Frith, a town councillor of the Northowram Ward, had made certain observations about the defendant and the sale of his land to the corporation. About the 19th of October, 1894, Joseph Taylor was seeking to be elected a town councillor of the South Ward, and the defendant, at a meeting held on the 19th of October, 1894, at the Constitutional Club, King's-cross, Halifax, when a large number of persons were present, made a speech advocating the candidature of Joseph Taylor. In the course of his speech the defendant said, speaking of the sale of the plaintiff's land to the council: "No doubt the purchase was arranged by the chairman of the improvement committee and the chairman of the company. Doubtless those chairmen had a long fight and much wrestling over the matter. Indeed, you may just fancy how intent the fight was when I tell

you that both gentlemen happened to be the same person, Alderman James Booth." This is the slander complained of, and the jury found the words defamatory as imputing to the plaintiff malversation and misconduct in his office of alderman and town councillor. The propriety of the verdict is not sought to be impeached. But it is said that the words are not actionable *per se*, that the offices of alderman and councillor are offices of credit and honour, and that the words imputing misconduct in such offices are not actionable without special damage—that is, unless, if true, they might have a tendency to cause the plaintiff to be removed from his office. In my judgment, words imputing want of integrity, dishonesty, or malversation to anyone holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se*. On the other hand, when the words merely impute unsuitableness for the office, incompetency, or want of ability, without ascribing any misconduct touching the office, then no action lies, when the office is honorary, without proof of special damage. It is said that this view is contrary to the recent case of *Alexander* v. *Jenkins*, but a careful perusal of that case leads one to a different conclusion. In the course of his judgment Lord Herschell lays down the rule "that where the imputation is an imputation, not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie unless the conduct charged be such as would enable him to be removed from or deprived of that office." It was accordingly held that, without proof of special damage, no action lay where the plaintiff had been elected to the office of town councillor for a borough, and the words complained of were: "He is never sober, and is not a fit man for the council; on the night of the election he was so drunk that he had to be carried home." Lord Herschell draws a marked distinction between an imputation of misconduct in an office and unfitness for it. At the commencement of his judgment he says: "The charge is not one made against him of any misconduct in his office, or any acts done by him as an officer which he ought not to have done, but it is simply a charge of unfitness to hold the office to which he had been elected, on account of moral misconduct." Again, towards the close of his judgment, he says: "It is not necessary to go so far to-day as to deal with the case of an imputation on a man of misconduct in his office." Lindley, L.J., says: "What the plaintiff complains of here is a slander which is to the effect that by reason of his drunkenness he is unfit for the office which he aspires to fill and to which he has been elected. He is not charged with any malversation in his office; we have not to consider that." Kay, L.J., expressly reserves his opinion upon what the decision of the court would have been had there been a charge of misconduct in the office, and not a mere general charge of unfitness for the office, two obviously very different things. *Alexander* v. *Jenkins* is, therefore, no authority for the contention of the defendant, and in the absence of authority I should hesitate long before I held that words imputing gross misconduct in the discharge of the duties of a public office were not actionable *per se* even when that office was an office of credit or honour.

Another ground was taken by the plaintiff with which I feel I ought to deal. It was said that, assuming the words not to be actionable *per se*, and assuming that it is necessary, in order to maintain the action, that a tendency to possibility of damage should be shown, such requirement in this case is satisfied, because the imputation complained of is such that the plaintiff, if it were true, might be deprived of his office. The imputation, it was said, is a charge of corrupt and dishonest conduct in a public office, and that was always, and still is, a cause of amotion from the office. That this was the case before the passing of the Municipal Corporations Acts is beyond question, but the defendant contends that the power of amotion no longer exists now that municipal officers are elected under statutory provisions and hold their offices, not for life, as heretofore, but for limited periods—viz., six years in the case of aldermen and three years in the case of councillors. Section 39 of 45 & 46 Vict. c. 50 provides for the avoidance of the office of mayor, alderman, or councillor in the case of bankruptcy, insolvency, compounding with creditors, or temporary absence from the borough. These causes of loss of office are expressly provided for; but none of them, it is to be observed, would have afforded the corporation at common law ground for the removal of any of its members: see 2 Kyd on Corporations, p. 65. The power of amotion for reasonable cause is incident to every corporation, unless it has been taken away by statute. I can find nothing in any statute taking it away, nor anything in any statute inconsistent with its existence. In 1872 a town councillor was removed by the corporation of Penzance for misconduct on various occasions; he was called upon to answer for his behaviour on one public occasion, but the resolution which was passed to remove him was not for that only, but for misconduct on other occasions. On a *mandamus* to restore him, the court, without seeming to doubt that the power of amotion still continued, made the rule absolute, on the ground that he had only been called upon to answer for his misconduct on one occasion, and not on the others for which he was removed, and, therefore, his amotion was invalid, Cockburn, C.J., observing that "he was far from saying there was not a power of removal, or that such misconduct as was imputed was not sufficient": *In re Norton*. I was counsel in that case, and, so far as I can recollect, the power of amotion was never questioned. As to rescinding an invalid amotion, see *Reg.* v. *Mayor, &c., of Ryde*. In this case, too, the power of amotion seems recognised. In my judgment the power of amotion for reasonable cause, such as corrupt or dishonest conduct, still exists, and if I am right in this view the objection of the defendant fails, and the action is sustainable, even if possible damage is necessary. It is a power essential to the good order and management of a corporation, and without it I do not see how the business of a corporation could be satisfactorily carried on. The learned counsel for the defendant admitted that, but for such power, a member of a corporation could not be removed for corrupt and dishonest conduct in his office of the most flagrant kind.

But it appears to me that there is another ground upon which this action may be maintained, and that is because the words impute to the plaintiff a criminal offence. This ground was not taken in the court below. The plaintiff is a public officer, and it is imputed to him, as such public officer, that he has acted dishonestly and corruptly in his office. If the charge is true, why is the plaintiff not indictable at common law? In *Bembridge's case*, 22 State Tri. at p. 156, Lord Mansfield says: "There is another principle, too, which I think applicable to this prosecution, and that is this—where there is a breach of trust, a fraud, or an imposition in a subject concerning the public which, as between subject and subject, would only be actionable by a civil action, yet, as that concerns the King and the public (I take them as synonymous terms), it is indictable." *Anon.*, 6 Mod. 96, the court says: "If a man

made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office." If I am correct in this view of the law, the words complained of would be actionable *per se* as imputing a criminal offence. That they did impute misconduct in a matter touching the plaintiff's office was found by the jury. In the result I agree with the learned judge in the court below on all points, and think that the application should be dismissed, with costs.

RIGBY, L.J.—I also agree that the application should be dismissed, and I do so upon the ground stated by the Master of the Rolls. I agree with him that we should reserve our opinion upon the question of amotion. I may add that, as the office of alderman is a renewable office, and it being an ordinary incident that the holder of the office should seek re-election, it may be that the effect on the electors of such a charge would supply a possibility of damage in tending to imperil his chance of being re-elected.

Application dismissed.

Solicitors for the plaintiff, *Van Sandau, Cumming, & Co.*, for *Mills & Co.*, Huddersfield.

Solicitors for the defendant, *Firth & Co.*, for *Godfrey, Rhodes, & Evans*, Halifax.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Dec. 15.

In re ODDY. (*a.*)

Practice—Appeal—Costs—Taxation — Order of judge in chambers—Divisional court — Court of Appeal —Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (1) (4) (5)—*R. S. C.*, 1883, *ord.* 55, *r.* 23.

A summons to review the taxation of a bill of costs is a matter of "practice and procedure," and, consequently, an appeal from an order on such a summons lies to the Court of Appeal by virtue of section 1 (4) *of the Supreme Court of Judicature (Procedure) Act*, 1894, *and not to the Divisional Court.*

This was an appeal from an order of Day, J.

The question arose out of a bill of costs of H. F. Oddy, a solicitor, against one Dudson, his client. Upon the taxation of this bill the taxing master disallowed certain items as not being within the terms of Oddy's retainer. Oddy then took out a summons for review of the taxation, and Day, J., in chambers, made an order allowing Oddy's objections to the taxation as to these items, and referring the taxation back to the master, giving leave, "if necessary," to appeal.

Dudson appealed.

E. T. Holloway, for the solicitor.—There is a preliminary objection to this appeal. A summons to review the taxation of a bill of costs is not a matter of "practice and procedure," and therefore the appeal should have been brought to the Divisional Court in accordance with ord. 54, r. 23, and section 1 (5) of the Supreme Court of Judicature (Procedure) Act, 1894.

Ernest M. Pollock (*T. Willes Chitty* with him), for appellant. — Sub-section 5 of section 1 of the Act of 1894 applies only to cases where there is a right of appeal. Here the order appealed from was an interlocutory order, and there was consequently no right of appeal from it except by leave. Sub-section 5, therefore, does not apply, and the case comes within sub-section 4.

LINDLEY, L.J.—One objection to this appeal is that there was no appeal to this court, but that the appeal should have been brought to the Divisional Court. It is unnecessary to consider that objection, because we are against the appeal on its merits; but I think that summonses to review taxation are "matters of practice and procedure." If necessary I may have to reconsider this question, but that is my present impression.

A. L. SMITH, L.J.—The question is whether summonses to review taxation are "matters of practice and procedure." I think they are. Mr. Pollock pointed out that the order made on the summons was an interlocutory order, and that, therefore, as sub-section 5 of section 1 of the Act of 1894 did not apply unless the case came within sub-section 4, there was no appeal at all in a case like the present. That is not the meaning of the Act.

[Their lordships considered the appeal on its merits and dismissed it, with costs.]

Appeal dismissed.

Solicitors, *Morten, Cutler, & Co.; H. F. Oddy.*

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Kekewich, J. — Feb. 1.

FARMER v. WATERLOO AND CITY RAILWAY CO. (*a.*)

Railway company — Underground railway — Subsoil taken for tunnel—Right to appropriate and use—Purchase—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18).

Where a railway company is authorized by its special Act to appropriate and use the subsoil and under-surface of lands without taking the surface the company must comply with the provisions of the Lands Clauses Consolidation Act as to the purchase of land.

Motion.

This was an action to restrain the defendant company from entering on the plaintiff's land situate in Southwark, and it raised the question how far railway companies, under powers usually inserted in the special Acts of underground railway companies, are entitled to tunnel through the subsoil under houses without purchasing the property over it.

Under the Waterloo and City Railway Act, 1893 (with which was incorporated the Lands Clauses Act, 1845), the defendant company was authorized to construct an underground railway from Waterloo into the City, and the company was empowered to enter on, take, and use certain lands.

Section 85 of the Act provided as follows:—"With respect to the lands described in the 2nd schedule to this Act, which the company are, by the provisions of this Act, authorized to enter on, take, and use for the purposes of the railway and works, the company shall not be required wholly to take those lands, or any part of the surface thereof, or any houses, buildings, manufactories, and premises thereon, or any

(*a.*) Reported by F. T. DUKA, Esq., Barrister-at-Law.

cellar, vault, or other construction held or connected therewith, but the company may appropriate and use the subsoil and under-surface of any such lands; and if the company require to take, use, pull down, or open any such vault, cellar, or arches as aforesaid, they may purchase, take, and use, and the owners of and other persons interested in any such vault, cellar, or arches shall sell, the same for the purposes of the railway and works, and the purchase of any such cellar, vault, or construction shall not in any case be deemed the purchase of a part of a house or other building or manufactory within the said 92nd section of the Lands Clauses Consolidation Act, 1845. But nothing in this section contained nor any dealing with the lands in pursuance of this section shall relieve the company from the liability to compensation under the 68th section of the Lands Clauses Consolidation Act, 1845, and every case of compensation to be ascertained under this Act shall be ascertained according to the provisions contained in the Lands Clauses Consolidation Acts."

The 2nd schedule, referred to, described "lands, &c., in respect of which easements only may be taken."

The plaintiff was owner of some of the lands so referred to, with houses on them. Notice had been served by the company to appropriate and use the subsoil under the houses at a considerable depth below the cellars, but the company had not served any notice to treat, nor made any deposit, nor given a bond in accordance with section 85 of the Lands Clauses Consolidation Act, 1845.

The company having commenced boring operations under the plaintiff's land, the plaintiff moved for an injunction.

Channell, Q.C., and *Methold*, for the plaintiff.

Cripps, Q.C., and *Ingle Joyce*, for the defendants.

KEKEWICH, J.—Provisions which are drafted by way of exceptions on the Lands Clauses Act are sure to give rise to difficulties which require more than our decision to settle them. The defendant railway company is incorporated by a special Act incorporating the Lands Clauses Act, and is authorized to take certain lands, including lands of which a lateral stratum only is, as in the present instance, required by them. Instead of leaving the rights of the company and the landowner to the operation of the Lands Clauses Act, a special provision was introduced into the special Act, which, in my opinion, must have reference to the general provisions, which are none the less applicable because of the special provision. If the company desired to enter upon any part of these lands in the ordinary way it must proceed in the ordinary way by notice to treat, to be followed by agreement or otherwise. But the 85th section of the company's special Act goes on to say that the company is to be entitled, for its benefit, not to take lands in that way, notwithstanding that it requires to use those lands for the purposes of its undertaking. There is no provision in the section as to what the company is to do if it does less than "take and use."

It was suggested that this was a question of procedure. In my opinion the procedure is precisely the same whether the company entered on and took and used the lands, or whether it took any part of the lands under the provisions of this section. The provisions of the Lands Clauses Act must be treated as incorporated into the special Act as much for the one purpose as the other.

Another question on the section arises as to what is the meaning of the words "appropriate and use" in the power given to the company to "appropriate and use the subsoil and under-surface of any such lands." Independently of that provision the company could not take any part of the subsoil and under-surface from an unwilling landowner. Now the word "appropriate" is defined by Lord Watson, in *Metropolitan Railway Co.* v. *Fowler*, 42 W. R. 270, [1893] A. C., at p. 426. In taking so much of the subsoil as it requires the company excludes all other persons and make it its own; and no one is entitled to take another man's property without paying for it, notwithstanding that it may be required for a public undertaking. Unless the Legislature has distinctly said that the company may take the subsoil without paying for it the company could not be allowed to do so, and the company must pay money into court before in any way dealing with this property.

I shall make a declaration that the company is not entitled to appropriate and use the subsoil under the plaintiff's property, or any part thereof, until the company has complied with the provisions of the Lands Clauses Act in reference to the compulsory purchase of land, and that the company pay the costs of the action.

Solicitors, *Walters, Deverell, & Co.; S. Bircham.*

Chan. Div.
Vaughan Williams, J. } Nov. 21.

In re BLAZER FIRE LIGHTER (LIMITED). (a.)

Company—Winding up—Rates—Liability for—Beneficial occupation of premises—Caretaker's possession—Companies Act, 1862 (26 & 27 *Vict. c.* 89), *ss.* 85, 87, 138, 163.

A liquidator of a company who deliberately chooses to occupy premises belonging to the company because he thinks he may get a better price by waiting before selling, and a loss to the company would be avoided by his so waiting, must pay the rates in respect of his occupation in full.

A company which has ceased to carry on business went into voluntary liquidation. The company possessed certain leasehold premises and plant. The liquidator put a caretaker in possession of the premises and plant until the same should be sold. No profits were made by reason of the occupation of the liquidator, but, on the contrary, expense was incurred. After the commencement of the winding up the vestry made a rate and threatened to distrain on the company's premises for the amount assessed thereon.

Held, that the liquidator ought to pay the rates in respect of his continued occupation of the premises.

The true test to be applied in such a case is the test approved by Bowen, L.J., *in* National Arms and Ammunition Co., 33 *W. R.* 585, 28 *Ch. D.* 476, *doubting the test applied by* Bacon, V.C., *in* In re West Hartlepool Iron Co., 34 *L. T. N. S.* 568, 24 *W. R. Dig.* 68.

After National Arms and Ammunition Co., the *case of* Watson, Kipling, & Co., 31 *W. R.* 574, 22 *Ch. D.* 500, *cannot stand as an authority so far as it distinguishes rent from rates.*

This was an application by the Vestry of St. Mary, Islington, that an order made on the 20th of June 1894, on the application of the liquidator of the above-named company, which was in voluntary liquidation, whereby it was ordered that the applicants should be restrained until further order from levying a distress upon the property of the

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

company for payment of rates made subsequent to the 2nd of March, 1894 (the date of the commencement of the voluntary winding up of the company), might be discharged, and that the liquidator might be ordered to pay a sum of £6 odd, or such damages as the court should be of opinion that the applicants had sustained by reason of the order. The company occupied for the purposes of their business certain leasehold premises, consisting of a workshop and yard situate at No. 232A, York-road, in the parish of St. Mary, Islington, in respect of which the company had paid rates since March, 1891. On the 24th of March, 1894, the vestry duly made rates for the half-year ending the 29th of September, 1894, payable in two portions—namely, on the 2nd of April and the 2nd of July respectively, and such rates were afterwards duly confirmed and allowed. In the month of April, 1894, a collector on behalf of the vestry called at the premises for the purpose of leaving the usual demand-note for £3 odd, being the first portion of the rates for the half-year. The company were then in occupation of the premises, and there was a considerable quantity of plant. The collector left the demand-note with a caretaker whom he found in charge of the plant and premises. The collector said that he again called and found that the plant belonging to the company was still on the premises, and he believed that the plant remained on the premises as well as the caretaker up to the 6th of September, when the whole of the property was sold by the liquidator. In July the collector served another demand-note for £3 odd, being the second portion of the rates. It was stated that the plant on the premises would have been sufficient, if distrained on, to raise the amount of the rates. The liquidator stated in his affidavit that the business had ceased to be carried on for some time before the winding up commenced, and no business had been carried on since. He further alleged that shortly after his appointment as liquidator he had taken possession of the premises, and placed them in charge of the caretaker, who remained in possession solely with the view to prevent trespass upon and injury to the property; that he derived no profit or benefit whatever on behalf of the company or as liquidator from retaining possession of the premises, but on the contrary, he said he had incurred costs—i.e., the costs of preservation of the property, that it was impossible to sell the business of the company as a going concern, and that he had never intended to do so, but that he intended as soon as possible to sell the premises and such of the company's plant as was thereon, and was taking the necessary steps for that purpose.

On the 29th of May, 1894, the liquidator was served with a magistrate's summons for the amount of the rates. The liquidator opposed this summons, but an order was made for the payment of the rates forthwith, and the vestry threatened to distrain for the amount thereof on the company's premises. The present application was a summons adjourned into court to be treated as a motion.

Chester Jones, for the vestry.—The question is whether the occupation of the liquidator was a beneficial occupation or not by the company.

He referred to *In re International Marine Hydropathic Co.*, 33 W. R. 587, 28 Ch. D. 470; *In re National Arms and Ammunition Co.*, 33 W. R. 585, 34 Ch. D. 474; *Hicks* v. *Dunstable Overseers*, 48 J. P. 8; *In re West Hartlepool Iron Co.*, 34 L. T. N. S. 24; W. R. Dig. 68; *In re Watson, Kipling, & Co.*, 27 W. R. 574, 23 Ch. D. 500.

G. Wood, for the liquidator.—There has not been a beneficial occupation as would entitle a landlord to distrain: A distress will not be allowed by the court to be issued after a winding up, but the applicants must come in and prove with the other creditors: Companies Act, 1862, ss. 85, 87, and 163. In the exercise of its discretion the court does not permit a distress after a winding up. This case is within *In re Watson, Kipling, & Co.* The liquidator never retained possession of the premises for the purpose of carrying on the business of the company as a going concern; if he had, the case would have been different. [VAUGHAN WILLIAMS, J., referred to *In re Lundy Granite Co.*, 19 W. R. 609, L. R. 6 Ch. App. 462; *In re Oak Pits Colliery Co.*, 30 W. R. 759, 21 Ch. D. 322.]

Chester Jones replied.

VAUGHAN WILLIAMS, J.—I think that the vestry are entitled to have these rates paid in full. That is, in other words, I think they ought to be allowed to distrain for them, and that I ought under the circumstances to discharge the order restraining them from so doing, and to leave them to their rights on that basis. There has been a considerable difference of opinion in the various cases cited, and I do not think that any amount of legal ingenuity could maintain the proposition that all the judgments can stand together. I certainly give up that task. I am going to adopt the view of Bowen, L.J., in *In re National Arms and Ammunition Co.* No later case than that has been cited to me. I do not say that that is a decision of the Court of Appeal in favour of the view I am about to take; but Bacon, V.C., had suggested in *In re West Hartlepool Iron Co.* that the test of whether the rates were payable in full was whether there had been a beneficial enjoyment by the liquidator, mere possession or occupation not being sufficient. Upon that Bowen, L.J., says: "I wish to add that I am not satisfied that the test given by Bacon, V.C., in *In re West Hartlepool Iron Co.* is the true one. I am disposed to think that the true test is, whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open in case it should ever call for decision." I intend to adopt that view. The Companies Acts take away the power of distress upon the property of a company after the commencement of a winding up; but they give the court a discretion to allow the distress to go on. The question, therefore, is, whether the court should in its discretion allow it to go on in this case. It is admitted that the rate, in so far as it constitutes a debt, constituted a debt which was incurred after and not before the liquidation, so that it is not a case in which it can be said that the persons to whom the rate is due ought to come in and prove *pari passu* with the other persons who were creditors at the date of the liquidation. The vestry are creditors; they have become so since the commencement of the liquidation. I cannot see why a debt for rates should not be paid just as much as a debt for rent of premises or in respect of anything else which a liquidator acquires or uses after the commencement of the liquidation. He may have to hire new premises, in which case he would have to pay the rent in full; or he may have to occupy the old premises, and keep the landlord out of possession. If he does that he would have to pay also. In either case, whether he acquires new premises or continues to hold the old ones, he would have to pay the rates in respect of the occupation which he has. In these circumstances I think that the test proposed by Bowen, L.J., is much the plainest and simplest, namely, has there been a beneficial occupation by the liquidator of these premises within the ordinary meaning of the words in the rating

statutes? and it cannot be disputed that in this case there has been such occupation. Having said that, I wish to make one observation about the effect of the decision of the court as distinguished from the observations of the judges in *In re National Arms and Ammunition Co.* It seems to me that, after the decision in that case, it is impossible to say that the decision in *In re Watson, Kipling, & Co.* can stand, in so far as it draws any decision between rates and rent. I think that all the Lords Justices in *In re National Arms and Ammunition Co.* decide that case on the basis that rents and rates must for this purpose be dealt with as being upon the same footing; but even if this were a case of rent, Mr. Wood could not be heard to say that the rent would not be payable in full if there was only an occupation for the purpose of obtaining a good price, even though the premises might be used in the meantime for the storage of the plant and machinery of the company. Certainly, that does not seem to be warranted by anything laid down by Kay, J., in *In re Watson, Kipling, & Co.* He says there: "I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. Rigby, and I agree that it is a substantial distinction: in the case of a landlord the company occupying his property are keeping him out of possession, and if the company have, and deliberately exercise, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full." I should say that he means by that that, if the liquidator chooses to occupy premises while waiting to get a good price, he would have to pay the rent in full, and I do not think that Mr. Wood can rely upon that judgment in support of his argument. This case is really unarguable unless one is to fall back upon the test laid down by Bacon, V.C. According to that, mere possessory occupation is not sufficient to make the liquidator liable; but there must be some beneficial enjoyment also. It seems to me that, having regard to the subsequent cases, that case can no longer stand. In *In re Oak Pitts Colliery Co.* Lindley, L.J., says: "No authority has yet gone the length of deciding that a landlord is entitled to distrain for, or be paid in full, rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee." He does not, however, go the length of affirming the test laid down by Bacon, V.C. It seems to me that, if the liquidator deliberately chooses to occupy the premises because he thinks he may get a better price by waiting before selling them, and a loss to the company would be avoided by his so waiting, he must pay the rates in respect of his occupation in full. The order of the 20th of June must therefore be discharged.

Solicitors, *William Lewis; H. & W. Priest.*

Q. B. Div. (Divisional Court) (Wright and Collins, JJ.) } Nov. 3.

ATTORNEY-GENERAL v. CONDUIT COLLIERY CO. (a.)

Highway—Local government—Local board—Right of local board to have old level of highway maintained—Obstruction by third party—Highways Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 27—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 149.

A local board had vested in them a highway across which a railway company carried its line on the level of the highway. The defendants, by mining operations, caused a subsidence in the highway and surrounding country without damaging the surface. The railway company, to keep their line at the original level, placed ballast under the rails as the highway subsided, so that an embankment was created which effectually obstructed the highway.

Held, that, as there was no evidence that the defendants intended to further work the mines, there was no right to an injunction; and, also, that the damage to the highway flowed from the railway company, and not from the defendants.

Semble (per Collins, J.), *that the local board had a cause of action for infringement of their right to have the highway kept at its original level.*

Motion for judgment on admissions and the report of a referee.

The action was an information by the Attorney-General on the relation of the Brownhills Local Board, and by it an injunction was claimed to restrain the defendants from causing a nuisance upon, and damage to, the highway by letting down the surface; and a sum of £1,400, being the alleged estimated costs of making a subway under the railway to render the road passable, was claimed as damages.

The defendants, a colliery company, had, by mining operations, caused a subsidence in Lion-lane (a highway) and the neighbouring district. The London and North-Western Co.'s line crossed Lion-lane on the level of the highway. In order to maintain the level of the line, the railway company, as the highway subsided, placed ballast under the rails, creating thereby an embankment which obstructed the highway and prevented the public from using it.

The facts and arguments appear fully in the judgments.

Jelf, Q.C., and *Disturnal,* appeared for the plaintiffs.

Moulton, Q.C., and *McIntyre,* for the defendants.

Cur. adv. vult.

Nov. 19.—The following written judgments were delivered:—

WRIGHT, J.—This is a motion for judgment on admissions and on the report of a referee. The relators are a local board, in whose district is a road called Lion-lane, across which the London and North-Western Railway Co. about 1854 carried a railway on the level in the ordinary way, but, so far as at present appears, without any specific authority. At some subsequent time the defendants worked the coal in the usual and proper manner under and in the neighbourhood of Lion-lane, with the result that a gradual and uniform subsidence of a large area of ground occurred, and altered the level of the lane and of the railway, together with the rest of the surrounding land.

There is no admission or finding that any actual damage has been caused to the roadway itself by the subsidence, or that it has been thereby rendered less convenient in itself, or that the relators have been or will be thereby put to any expense. What has happened is this. The railway company from time to time, as the country and the line gradually subsided, have placed ballast under their rails so as to maintain the original level of the line, with the ultimate result that, in place of a level crossing, there is now an embankment some ten feet high barring the use

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

the lane. The relators claim that the lane is vested in them as the urban sanitary authority, and they bring this action for the purpose of obtaining some relief against the defendants. In the first place they claim an injunction to restrain the defendants from causing further subsidence; but, as to this part of the claim, it is enough to say that there is no admission or finding that further subsidence is likely to occur without further working of the coal, or that any further working of the coal is threatened or intended by the defendants; and we cannot, on the materials before us draw any such inference.

The only other claim is for £1,400 as the "cost of making road passable by construction of subway underneath the railway." As to this, again, it may be enough to say that no such expenditure has been incurred, or is to be incurred, by the plaintiffs, nor, probably, have the plaintiffs any power to construct such a subway, unless by the consent of the railway company. The real object of the action is to obtain as damages such a sum as will provide funds for the construction of a subway.

The defendants are not under any such liability to the relators. It is not the defendants who have placed, or who maintain, the obstruction which is the real ground of complaint. The remedy, if any, is against the railway company. They have special statutory power to make a proper subway, and, assuming that the lane was dedicated to the public before the construction of the railway, it may be that, on the doctrine applied in *Geddis* v. *Bann Reservoir Co.*, 3 App. Cas. 430, 26 W. R. Dig. 259, and in *Oliver* v. *North-Eastern Railway Co.*, L. R. 9 Q. B. 409, 22 W. R. Dig. 208, they can be compelled to abate the nuisance, or, indeed, that apart from that doctrine they are liable to indictment.

But although the action fails so far as regards its only substantial objects, it is suggested in argument that the relators are entitled to nominal damages and costs of action on the ground that the soil of the highway is vested in them by the Public Health Act, and that any alteration in the level is an infringement of that proprietary right. I doubt whether, assuming the highway to be repairable by the inhabitants at large, and, therefore, vested in the relators, the decision in *Coverdale* v. *Charlton*, 27 W. R. 257, 4 Q. B. D. 104, is applicable so as to give a right of action where there is no real damage, but I do not think it necessary to decide this important question, in relation to which *Smith* v. *Thackerah*, 14 W. R. 832, L. R. 1 C. P. 564, may have to be considered.

The defendants claim to be entitled under the provisions of an inclosure award as against the surface owners to let down the surface by proper mining, and if they are so entitled, then it appears to me that the provisions of the Highway Act, 1878, s. 27, control the operation of the Public Health Act, 1875, and, in my opinion, under that section no action could be maintained except for actual damage. It may even be arguable that the case of *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59, and not *Knowles* v. *Lancashire and Yorkshire Railway Co.*, 14 App. Cas. 248, 37 W. R. Dig. 121, applies, and that negligent or improper working must be shown. But it seems to me that the case comes before us in a way which does not enable us to deal satisfactorily with these questions. The attention of the parties has never been directed even to the initial question whether Lion-lane is a highway repairable by the inhabitants at large. It is said to be doubtful whether it was a highway at all in 1854, but, unless it was a public highway before 1835, it cannot have been a highway repairable by the inhabitants at large unless by virtue of proceedings as prescribed by the Highways Act, 1835, or by the Public Health Act, and no such proceedings are alleged. Nor are there any admissions or findings which enable us to say whether the defendants have not, under the inclosure award, a right as against the surface-owners to let down the surface. It seems to be admitted that they have, unless the soil of the roadway is to be taken to be excepted, but it is at least arguable that they have the same rights in respect of the adjoining lands, subject to the provisions of the Public Health Act as altered by the Highway Act, 1878.

The attention of the parties not having been directed to these points, and the admissions and findings not being sufficient to enable us to come to any satisfactory conclusions upon them, and the relators having clearly failed on the only real point which they came here to argue, I think that the motion for judgment must be dismissed, leaving it open to either party to bring the action on for trial, if they think it worth while, on the question of nominal damages.

COLLINS, J.—In this case the plaintiffs, a loca authority, in whom a highway, being, as I assume (for the defendants did not dispute it), a highway repairable by the inhabitants, is vested under the Public Health Act, seek to recover damages from the defendants, who are mineowners, for the withdrawal by them of vertical and lateral support, which has had the effect of letting down the highway to the extent of about 10 feet. The subsidence of the highway is part of a general subsidence of a large tract of country brought about by the defendants' workings, and no inconvenience would be caused to the public and no expense to the plaintiffs but for the fact that a railway crossed the highway at its original level, and while the highway has been allowed to subside the railway has been maintained at its old level. The consequence is that the railway now crosses the road on a solid wall or embankment 10 feet high, forming an absolute bar to the passage of traffic. Before beginning the workings which caused the subsidence the mineowners gave to the railway company notice, pursuant to the Railways Clauses Act, but the latter declined to purchase, preferring to bear the expense of such works as should be necessary in order to maintain the line at its old level. This case comes before us upon admissions and upon the finding of a referee, and it is found as a fact that the road in question was an ancient highway and public carriage-way at the date when the railway was made; and though this admission in no way binds the railway company, the rights of the parties to this action must be ascertained on the basis of such being the fact. There is no special provision whatever in the railway company's Act providing for the crossing of this road. There is merely a general power authorizing the undertakers to make and maintain the railway in the lines and at the levels shown on the plans; and it is admitted that the rails are now at the level shown on such plans. The plaintiffs contend that they can recover from the mineowners the estimated cost of making a subway under the railway as part of the damages flowing from the subsidence brought about by his acts. The mere statement of this proposition seems to carry with it its refutation. In what sense can the railway embankment be said to be caused by or legally consequent upon the subsidence? On the assumption that the road was a public highway the railway company had no right to cross it otherwise than as provided by section 46 of the Railways Clauses Act, that is to say, over or under it if it was a carriage-way, or, with the consent of justices, on a level if it was not a carriage-way; but it took no power to obstruct the road by erecting a wall across it. It was

argued that the railway have a right to maintain their line at the original level, and so they have; but this could not justify their committing a nuisance by obstructing a highway, nor can the defendants be made responsible for the independent wrong of the railway company.

Suppose, after the Bill had passed and before the railway was built, the road had sunk, would the railway company have been justified in building a solid wall across it? If not, what difference can it make that the wall has been built by degrees, and not all at once?

I am clearly of opinion, therefore, that the defendants cannot be made responsible for the costs of removing the obstruction placed on the road by the railway company.

These considerations suffice to determine the real question in the action against the plaintiffs; but it was contended by Mr. Moulton that the plaintiffs, being only owners *sub modo* of the surface of the highway, cannot maintain an action even for nominal damages, as, but for the existence of the railway, the subsidence has caused them, and will cause them, no pecuniary loss, nor in any way interfere with their user of the road under their various powers. It seems to me, however, that to take this view would be to adopt the contention which was rejected in *Coverdale* v. *Charlton*. In that case it was held that the local authority took such an interest in the soil of the road as to enable them to confer a right upon a grantee to maintain trespass. I think the limitations placed upon their interest in air above the surface in the subsequent case of *Wandsworth Board of Works* v. *The United Telephone Co.*, 32 W. R. 776, 13 Q. B. D. 904, and upon the duration of their interest, in *Rolls* v. *The Vestry of St. George the Martyr, Southwark*, 28 W. R. 867, 14 Ch. D. 785, in no way modify the effect of the former decision as to their right in the soil of the street itself.

Those cases seem to me clearly to establish that a property, as distinguished from an easement, in that which constitutes the street is vested in the authority, and I think it would be to put an anomalous limitation upon ownership to hold that the persons in whom such property is vested cannot maintain an action for an invasion of their proprietary rights on proof of a substantial subsidence, such as I think is shown in this case, even though unaccompanied by proved pecuniary damage.

"I think," says Brett, L.J., in *Coverdale* v. *Charlton*, 4 Q. B. D., at p. 121, "that the local board had to a certain depth of the land, and to the whole of the surface, the ordinary rights of proprietors."

Mr. Moulton did not contend that an ordinary owner would not have this right (nor did he suggest that there were any special limitations in this case placed on the rights of the owner of the surface unless they were to be found in the provisions of the Inclosure Act referred to in the admissions, as to which, however, he did not contest the authority of *Benfieldside Local Board* v. *Consett Iron Co.*, 26 W. R. 114, 3 Ex. D. 54); but in consequence of an observation from the bench the point was raised and discussed, and as the plaintiffs' rights are certainly not higher than those of a private owner it is necessary to decide it.

I have no doubt whatever that such an action would lie without proof of pecuniary loss. I think the principle at the root of the matter is "that the owner is entitled to the support of the adjoining land for his own land in its natural state unaffected by any act done in the neighbouring land," see *per* Willes, J., delivering the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse*, 7 W. R. 667, E. B. & E., at p. 657, and that as soon as the condition of the plaintiffs' land has been in fact changed to a substantial extent by the withdrawal of lateral support the plaintiffs have sustained an *injuria* for which he may maintain an action without proof of pecuniary loss. In the same case Willes, J., compares the right to that in the flow of a natural river—a right which is unquestionably invaded where a sensible alteration has been produced in the character of the water where it passes the plaintiffs' land although there is no money damage: see *Ormerod* v. *Todmorden Mill Co.*, 31 W. R. 759, 11 Q. B. D. 155, and *Crossley* v. *Lightowler*, 15 W. R. 801, L. R. 2 Ch. App. 478.

That such is the true principle—*i.e.*, that it is the subsidence, and not the pecuniary loss, which grounds the cause of action—is, I think, apparent from those decisions which establish that, on proof that the weight of a newly-erected house has not contributed to the subsidence, its value may be recovered by way of damage, consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land: *Brown* v. *Robins*, 4 H. & N. 186, 7 W. R. Dig. 89; *Hamer* v. *Knowles*, 9 W. R. 615, 6 H. & N. 454. In these cases the fall of the house itself could give no cause of action, for there was no right to have it supported, therefore an *injuria* giving a right of action had to be shown before the consequential damage by reason of the falling house could be claimed, and such an *injuria* was shown on proof that the unincumbered soil would have subsided although no pecuniary damage even to the extent of a farthing was suggested or proved had not the house been there.

The judgments in the *Darley Main Colliery Co.* v. *Mitchell*, 32 W. R. 947, 14 Q. B. D. 125, 11 App. Cas. 127, 34 W. R. Dig. 108, which, it was suggested, countenanced the contrary view, seem to me to be entirely opposed to it. In the Court of Appeal Lord Esher throughout treats the subsidence itself as the cause of action, and Bowen and Fry, L.JJ., both express their preference for that view. In the House of Lords nothing to the contrary of this is said by any of the learned lords, and it is formulated in most distinct terms by Lord Fitzgerald in four propositions, of which the first and fourth are as follows:—

1. The owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

4. When, in consequence of (the owner of the minerals) not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action.

I do not think the words of Lord Cranworth in *Bonomi* v. *Backhouse* in any way conflict with this view. He says, "His (*i.e.*, the plaintiff's) right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with he has nothing of which to complain." I think he merely means that there must be some real sensible interference with the land, and that he did not mean to suggest that the ordinary enjoyment of the land was not interfered with wherever the damage caused by such interference was not measurable in money. He is merely excluding as causes of action interferences so slight as to come under the rule *de minimis*. No doubt learned judges have not always used the words damage and injury in their strictest technical sense in dealing with such questions. It was frequently quite unnecessary to do so, as there was pecuniary damage as well as injury.

Another source of some confusion is that damage not measurable in money, has been treated as

equivalent to a physical alteration so small as to amount to nothing in contemplation of law, an observation which may, perhaps, explain *Smith* v. *Thackerah*, which is the only case, so far as I know, which might seem to throw doubt on the principle which I have stated. The report, too, of that case in 35 L. J. C. P. 276 gives some ground for supposing that the weight of the buildings may have contributed to the subsidence; see the judgment of Byles, J., and the argument of defendant's counsel.

On the whole I am clearly of opinion that an ordinary owner could maintain an action for nominal damages on the facts in this case, and, as I have already said, I think the local authority stands in no worse position, subject to another point, which was not, indeed, taken by counsel, but which was raised during the argument, and must be decided, viz., the effect of section 27 of the Highway Act, 1878, which permits the mineowner to mine just as he might do if the road had not become vested in the authority, "but so, nevertheless, that in such working or getting no damage shall be done to the road or highway." "Road or highway" in this connection cannot mean the right of passage only as distinguished from that which constitutes the street, and I do not think the word "damage" is used to denote only damage measurable in money, or that the section was intended to give the miner larger rights against a local authority than he would have had against any other owner of the surface only, so as to debar the former from suing without showing pecuniary loss where the latter might sue for the *injuria* only.

The argument which might be urged against the view which I have taken, based on the absence of any provision for compensation to the mineowner, is to some extent met by the observations of Brett, L.J., in *Coverdale* v. *Charlton*, and when it is remembered that the origin of highways is dedication, which is *primâ facie* a renunciation by the grantor of the right to derogate from his grant by interfering with the enjoyment of the highway, the alleged injustice could hardly in most cases amount to a real grievance. As against the adjoining mineowner, in the absence of some contract between him and the dedicating owner, there is no alteration of rights, and, therefore, nothing to compensate. What would be the position of the local authority if at the time of the dedication there were rights subsisting for third persons against the grantor, it is not necessary to determine, as there is no suggestion that any such rights existed in this case.

Lastly remains the claim for an injunction. Upon this part of the case I think the plaintiffs have not made out such a case of probable continuance by the defendants of workings likely to affect the highway as to warrant us in granting an injunction.

In the result, I think the plaintiffs are entitled to judgment, with nominal damages against the defendants, but as they have failed in the real claim in the action, I think it should be without costs.

Motion refused.

Solicitors for the plaintiffs, *F. Needham*, for *Stanley & Jackson*, Walsall.

Solicitors for the defendants, *Smiles, Ollard, & Yates*, for *Duignan & Elliot*, Walsall.

Lunacy.

(Lindley and A. L. Smith, L.JJ.) Jan. 21; Feb. 4.

In re H. W. STRACHAN (DECEASED). (*a*.)

Lunacy—Practice—Documents filed upon a petition for an inquiry—Inspection.

By two wills a testator bequeathed all his property to E. S. In April, 1894, a petition for an inquiry as to the sanity of the testator was presented by J. A. S., and with it certain affidavits were filed in the Lunacy Office. The testator died in June, 1894, without having been found a lunatic.

An action was commenced in the Probate Division by J. A. S. against E. S. to set aside the wills of the testator on the ground of want of testamentary capacity and undue influence. E. S. applied for liberty to inspect the above-mentioned petition and documents filed therewith.

Held, that, under the circumstances, such liberty ought not to be given.

The practice as to the inspection of documents filed in Lunacy considered.

This was an appeal from an order, dated the 15th of January, 1895, of Rigby, L.J., sitting in Lunacy, whereby leave was given to Mrs. E. Sandford to inspect certain documents filed in Lunacy.

H. W. Strachan was a person of unsound mind, though not so found by inquisition. In the months of February and March, 1894, he made two wills, each in favour of Mrs. E. Sandford. In the month of April, 1894, a petition for an inquiry in Lunacy was presented by his brother, J. A. Strachan, and certain affidavits were filed therewith. The said H. W. Strachan died on the 13th of June, 1894, without any order having been made upon the lunacy petition. Thereupon an action was commenced in the Probate Division by the said J. A. Strachan against Mrs. E. Sandford, whereby it was in effect sought to avoid the said wills of H. W. Strachan upon the ground of want of testamentary capacity and undue influence. Mrs. E. Sandford obtained discovery in the probate action, but J. A. Strachan successfully claimed privilege in respect of copies of the lunacy petition and the affidavits filed therewith.

Mrs. E. Sandford then petitioned in Lunacy asking that she might be at liberty to inspect the petition, affidavits, and all other documents in the lunacy proceedings in order to ascertain what allegations as to the mental incapacity of H. W. Strachan were intended to be made in the probate action.

The master in Lunacy made an order giving to Mrs. E. Sandford the liberty she sought, and his order was affirmed by Rigby, L.J., on the 15th of January, 1895.

From that decision J. A. Strachan appealed.

Oswald, Q.C., and *Pritchard*, for J. A. Strachan, argued that the documents in question came into existence solely for the purposes of the lunacy proceedings, and that they were privileged: *Pearce* v. *Foster*, 33 W. R. 919, 15 Q. B. D. 114; *Nordon* v. *Defries*, 30 W. R. 612, 8 Q. B. D. 508; *Bullock* v. *Corry*, 26 W. R. 330, 3 Q. B. D. 356. They urged, further, that, the deceased having never been found a lunatic, the documents in question were privileged, as they really belonged to J. A. Strachan [LINDLEY, L.J.—Is it not really a question as to the rule in Lunacy?]; that the matter was concluded by the result of the application for discovery in the probate action;

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

and that to grant the inspection sought would, in effect, be to permit the defendant in the probate action to see the plaintiffs' brief; and that, in any event, to grant the inspection sought was a matter within the discretion of the court: *In re Wood*, 12 W. R. 293, 4 De G. J. & S. 134; *In re Smyth*, 29 W. R. 585, 16 Ch. D. 673.

Bucknell, Q.C., and *English Harrison*, for Mrs. E. Sandford, argued that, as Mrs. Sandford was the universal legatee of the alleged lunatic, she was entitled to inspect the documents.

They referred to *In re Silcock*, 1 N. R. 4, 11 W. R. Ch. Dig. 56; *In re Campbell*, 28 W. R. 480, 13 Ch. D. 323; *Vivian* v. *Little*, 31 W. R. 891, 11 Q. B. D. 370; *Carrow* v. *Ferrior*, 16 W. R. 922, L. R. 3 Ch. App. 719.

Oswald, Q.C., in reply, referred to *Lord Salisbury* v. *Nugent*, 32 W. R. 221, 9 P. D. 23, and *In re Scarlett*, 21 W. R. 717, L. R. 8 Ch. App. 739.

LINDLEY, L.J.—Before I deal with the objections raised to the inspection of the documents in question by Mrs. Sandford, who desires to see them, I will consider the right of anyone to inspect documents under the control of the judges in Lunacy.

It is not the practice in Lunacy to produce documents in the office to anyone who wants to see them. No one is allowed to see them without an order of one of the masters or of a judge in Lunacy: see *In re Silcock* and *In re Wood*. A person who has no interest, except curiosity, to see such documents is not allowed to see them. On the other hand, anyone who can satisfy the master or judge that he desires to see such documents for any reasonable and proper purpose is allowed to see them, provided always, if the lunatic is living, that he is not prejudiced thereby. If the lunatic is dead, the cases of *In re Wood*, *In re Ferrior*, and *In re Smyth* show that if the applicant wants to see documents in the custody of the court in order to make good a claim to the lunatic's property, such a purpose is *primâ facie* sufficient to induce the court to allow inspection, even although the request is opposed by a rival litigant. Nor have I found any case in which an application by such a person for such a purpose has been made and refused. But it is obvious that there are some exceptions to the general rule. The court would not, under any circumstances, make an order for the inspection of the reports which are confidentially made to the court by its own medical advisers. But with this exception, and possibly with some others which do not occur to me at the moment, the general rule is to allow inspection by any person person claiming an interest in the property of a deceased lunatic or alleged lunatic who can satisfy the court that he wants inspection for some reasonable and proper purpose.

The fact that the documents are of such a kind that a litigant who had them could not be compelled to produce them does not, as a matter of law, disentitle his opponents from seeing them. As a matter of law, as distinguished from a matter which the court ought to consider in the exercise of its discretion, privilege is no bar to inspection in such a case as I am now considering.

The privilege which exists in the case of confidential communications rests on the grounds explained in *Greenough* v. *Gaskell*, 1 My. & K. 98; *Reid* v. *Langlois*, 1 Mac. & G. 627; and *Anderson* v. *Bank of British Columbia*, 24 W. R. 624, 2 Ch. D. 644, 649.

In order to insure freedom of consultation a party to the litigation is not bound to disclose what passes verbally or in writing between himself and his solicitor. The privilege extends to documents and information obtained by the party or his solicitor, or persons employed by them, to get up the party's case in a litigation which is pending or with a view to litigation. But before trial the privilege simply entitles the litigant, upon making a proper affidavit, to withhold production of documents in his possession. That is all.

When documents are not in the possession or power of a litigant no question of discovery by him before trial or of privilege from such discovery can arise. Documents in the custody of the masters in Lunacy are not in the possession or power of a litigant: *Vivian* v. *Little*; he has not to produce them or to make any affidavit about them, and if a judge in Lunacy is applied to for inspection, privilege from discovery is an irrelevant topic for discussion, except so far as it may bear upon the exercise by the court of the discretion which it has in the matter. The duty of the court is to act with perfect impartiality between the parties before it, not assisting either against the other or more than the other where neither can establish any right to such assistance against the other. Now, in the present case, if inspection is allowed Mrs. Sandford will see her adversary's hand, which she cannot do without the assistance of the court; whilst, if inspection is refused, the court will not confer on her opponent any advantage which he has not already got. Mrs. Sandford has no right to this advantage, and I see no reason why she should have it. Her own petition shows that does not want to see the documents in order to support her own case. She wants to see how her opponent hopes to prove his case, and what she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes.

In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him: see *Benbow* v. *Low*, 29 W. R. 265, 16 Ch. D. 93. It is considered that so to do would give undue advantages for cross-examination and lead to endless side issues, and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous.

It is very true that an honest and fair dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse. Moreover, courts act upon this view when asked to allow inspection of documents under their control. In *North Australian Territory Co.* v. *Goldborough, Mort, & Co.*, 41 W. R. 501, [1893] 2 Ch. 381, inspection of an examination under the Companies Acts was refused on this very ground.

Such being the view of what justice requires, I feel constrained to say that, notwithstanding the general rule laid down in *In re Wood*, and followed in *In re Smyth*, this case is one in which the order for inspection ought not to have been made. It is true that the documents have been used for the purpose for which they were obtained, and that the deceased could at any time have seen them. It is also true that Mrs. Sandford claims under him. But she has not seen them, and the considerations to which I have alluded are not deprived of their force by the fact that the documents have been used already in the lunacy proceedings.

The order, therefore, must be discharged, with costs, but without prejudice to any fresh application which Mrs. Sandford may make after the trial of the pending probate action.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitors, *J. B. Churchill; Edmonds & Jubb.*

Court of Appeal.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Feb. 20.

TREGO *v.* HUNT. (*a.*)

Partnership—Goodwill property of one partner—Right of partners to make copies of customers' names and addresses for use after expiration of partnership—Injunction—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-section* 3.

Articles of partnership for a term of seven years between A., B., and C. provided that, on the expiration of the term, the goodwill of the business should belong to A. alone.

Held (*affirming* Stirling, J., ante, *p.* 263), *that C. could not be restrained from copying from the partnership books a list of the customers of the firm, in order that, as he admitted, after the expiration of the term he might solicit those customers to transfer their custom to a new business to be started by himself in competition with the original business.*

Appeal from a decision of Stirling, J. (reported, *ante*, p. 263), where the facts are fully set out.

Hastings, Q.C., Cozens-Hardy, Q.C., and *O. L. Clare*, for the plaintiffs.—The goodwill of the business is expressly stated to belong to Mrs. Trego, who brought the books in merely for the purposes of the partnership. Mrs. Trego, being the owner of the property, brings the books in, having implicit trust in her partners that they will not abuse the trust reposed in them. The respondent is exceeding his rights in using those books for any other than partnership purposes: see *Lamb* v. *Evans*, 41 W. R. 405, [1893] 1 Ch. 218.

Buckley, Q.C., and *Geo. Henderson*, for the defendant.—The question is purely one of law. The articles say the partners are entitled to make copies of the entries in the books, and the Partnership Act also allows it. Until *Pearson* v. *Pearson*, 32 W. R. 1006, 27 Ch. D. 145, is overruled the defendant is clearly entitled to act as he has done. [They were stopped by the court.]

Lord HALSBURY.—I am of opinion that this appeal must fail. What is really sought to be restrained is the knowledge which has been obtained by the one partner, so that he shall not avail himself of that knowledge hereafter, when he becomes an independent trader. But it is hardly susceptible of argument that if he may use that knowledge which he has got and retain it in his memory, he is not now entitled to look at the books, which at present are his just as much as they are the books of each of the other partners. The limitation sought to be placed on that rule, namely, that it must be for partnership purposes, seems to me to be entirely alien to the whole question before us. They are, as partners, all entitled to every right and to every piece of information for any purpose that those books may give them, and the right to that knowledge is hardly contested; but it is said, although you may have a right to the knowledge, and though we could not restrain you if by an effort of your own memory you were able to retain in your mind the names of all the customers, and although you got that knowledge and applied your memory for the express purpose of carrying on the business after the partnership had come to an end, yet you shall not assist that memory by copying out that knowledge which you have a right to possess, but which is in the books of the firm. It seems to me that once you give up the principle which was laid down by Lord Romilly in *Labouchere* v. *Dawson*, 20 W. R. 309, L. R. 13 Eq. 322, and which now is no longer law, you are obliged to say that it is perfectly lawful, after the partnership has come to an end, to start as a rival trader; and, starting as a rival trader, it is perfectly lawful for you to solicit anybody who was a customer of the old firm. Under those circumstances I agree with the judgment of Stirling, J., and I think this appeal ought to be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. What the plaintiff wants is an injunction to restrain the defendant from making, or causing to be made, any copy or extract of or from the books of the partnership existing between the plaintiff and the defendant for any purpose other than the purpose of the business of the partnership, and from otherwise committing any breach of the articles. Now clause 15 of the partnership articles says this: [His lordship read the clause, and continued:] I agree that that is only expressing what I think is the ordinary law of partnership, whether expressed or not. The essence of it is this, that the partners had their attention called to this, and have agreed to embody that clause in the partnership articles. We have been referred to clause 20 as controlling or affecting that. Clause 20 runs thus: [His lordship read the clause, and continued:] Taking these two clauses together, I cannot possibly read clause 20 as preventing a partner reading the books or taking extracts from the books. He has the right to see them for any purpose which is not an illegitimate or illegal purpose. If it could be proved that the use he was going to make of these copies was adverse to the interests of the firm, or if it could be proved that the use he was going to make of the copies was an infringement of the rights of the partners, I could understand this application; but neither of those propositions can be made out. It is not pretended that he is going to make any use whatever of these extracts which is detrimental to the firm. The reason is obvious: he is not going to make use of them at all until the firm comes to an end. It is too late now to say, and it cannot be said with truth, that he is going to use this in a way which infringes the rights of the other partners. So long as *Labouchere* v. *Dawson* stood, infringement might have been established; but that has gone. I regret it, and I always have regretted it, but so it is. That being so, it appears to me that the groundwork of this application is entirely cut away, and I do not see how we can, consistently with established principles, differ from the view taken by Stirling, J. In my opinion the appeal fails, and must be dismissed, with costs.

A. L. SMITH, L.J.—I am of the same opinion. I think it has been established that a partner, as long as he remains a partner, is entitled to information contained in entries in the partnership books. That, *primâ facie*, is his right. If he wanted that information for the purpose of doing an injury to the firm or for an illegal purpose, other considerations would arise, but neither of those conditions arises in this case, because in *Pearson* v. *Pearson* the object for which the information is sought has been held to be a legal one, and not an illegal one, and there is no pretence for saying that so long as the partnership exists he will do anything which will injure the partnership as between the partners. It seems to me, therefore, that he is doing in this case what the law permits him to do. What he wants to do is, undoubtedly, when the partnership comes to an end,

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

to solicit the old customers so that he may obtain them as customers of the business which he is going to start himself. As I have already pointed out, in the case of *Pearson* v. *Pearson* that is not prohibited. It seems, therefore, that the ground of this appeal fails, and that the judgment of Stirling, J., is correct.

Solicitors for the plaintiffs, *Miller, Wiggins, & Co.*

Solicitor for the defendant, *H. J. Mannings.*

From Chan. Div. (Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ.) — Nov. 12, 14.

BARRY RAILWAY CO. *v.* TAFF VALE RAILWAY CO. (*a.*)

Railway — Railway Commissioners — Jurisdiction — Ouster of—Railway and Canal Traffic Act, 1888 (51 *&* 52 *Vict. c.* 25), *ss.* 9, 10—*Railway and Canal Traffic Act,* 1854 (17 *&* 18 *Vict. c.* 31), *s.* 6.

The exclusive jurisdiction conferred upon the Railway Commissioners by section 6 *of the Railway and Canal Traffic Act,* 1854, *applies only to enactments prior to the date of that Act, and not to any later enactments.*

The Barry Dock and Railways Act, 1888, *provides that the Taff Vale Railway Co. shall afford reasonable facilities for goods and mineral traffic coming from the undertaking of the Barry Co. at certain specified rates; and that if at any time, on application made by the Barry Co. to the Railway Commissioners, sitting as arbitrators, the commissioners shall decide that the Taff Vale Railway Co. have failed to give such facilities, then certain remedies are specified.*

Held, that there was nothing in the special Act or in the Railway and Canal Traffic Act, 1888, *to confer exclusive jurisdiction on the Railway Commissioners so as to oust the jurisdiction of the High Court to hear an application under the special Act.*

Appeal of the plaintiffs from a decision of Chitty, J.

By the Barry Dock and Railways Act, 1888 (51 & 52 Vict. c. clxxxii.), s. 23, it is provided: "(1) The Taff Vale Railway Co. shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company—*i.e.*, the Barry Dock and Railways Co.—from or to Treforest or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Co. for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the company's sidings as regards all traffic coming from or destined for Hafod or any place westward thereof at Hafod, and as regards other traffic at Treforest, without any terminal or other charge in respect thereof, but with such bonus (if any) in respect of traffic exchanged at Hafod as, in default of agreement between the Taff Vale Railway Co. and the company, shall be from time to time determined, on the application of either of them, by the Railway Commissioners sitting as arbitrators, having regard to all the circumstances of the case and to the following proviso: Provided that, where any such traffic shall be carried on the Taff Vale Railway for a less distance than four miles, the Taff Vale Railway Co. shall be entitled to charge in respect of such traffic as if it were carried on their railway for a distance of four miles, and the company shall in all respects be placed on at least as favourable a footing as any other company with regard to traffic exchanged with the Taff Vale Railway Co.

"(2) The Taff Vale Railway Co. shall not (except with the consent of the company under their common seal) use the railway authorized by the Cardiff, Penarth, and Cadoxton-juxta-Barry Junction Railway Act, 1885, for mineral traffic other than local traffic.

"(3) If at any time, on application made by the company to the Railway Commissioners sitting as arbitrators, the said commissioners shall decide that the Taff Vale Railway Co. have failed to give any of the facilities herein provided for, and shall not within reasonable time after notice have remedied such failure, or if the Taff Vale Railway Co. use the Cardiff, Penarth, and Barry Railway contrary to the provisions of this Act, or in case the Cardiff, Penarth, and Barry Junction Railways Co. shall use, or permit to be used, their railway for the conveyance of mineral traffic other than for local traffic, then the company may run over and use with their engines, carriages, and wagons, and officers and servants, whether in charge of any engines or trains, or for other purposes, and for the purposes of their traffic of every description, the railways and stations following [specifying certain portions of the Taff Vale system]. Provided always that, if and whenever the company shall exercise the running powers by this section conferred, the Taff Vale Railway Co. shall, during the period of such exercise, be relieved and discharged from any obligations under this section to deliver traffic to the company at Hafod or Treforest, and from any restrictions as to the use of the Cardiff, Penarth, and Barry Railway."

By their statement of claim the plaintiffs alleged that, notwithstanding section 23, the defendants had charged, and were continuing to charge, rates per mile for the conveyance of goods and mineral traffic destined for and coming from the undertaking of the plaintiffs between the points of junction at Hafod and Treforest and the collieries, greater than the lowest rate per mile which they had from time to time charged, and were still charging, for like traffic conveyed by them to and from the said collieries from and to the said docks at Cardiff and Penarth, and the plaintiffs alleged that in this way they had suffered, and were suffering, great damage. The plaintiffs claimed an injunction and damages.

The defendants, by their defence, denied any breach of section 23; further, if there had been any, the only remedy available to the plaintiffs was provided by the section—viz., by the exercise of their running powers. They further submitted that, both by reason of section 23, and also by the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), the Railway and Canal Commissioners alone had jurisdiction to deal with or give any remedy for an alleged breach of section 23, and that the court had no jurisdiction to entertain the action, or to give any of the relief which the plaintiffs claimed.

Chitty, J., gave no independent judgment, but followed the decision of Day, J., in *Taff Vale Railway Co.* v. *David,* 42 W. R. 215, [1894] 1 Q. B. 43.

Sir Richard Webster, Q.C., Moulton, Q.C., and *Joseph Shaw,* for the appellants.

Balfour Browne, Q.C., and *Noble,* for the respondents.—By section 8 of the Railway and Canal Traffic Act, 1888, the jurisdiction of the Railway Commissioners is made exclusive; further, the Legislature never intended any damages to be given for the user of the railway contrary to the agreement.

Sir R. Webster, Q.C., replied.

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

HERSCHELL, L.C., after dealing with the appeal on the questions of fact, proceeded:—There is one matter I ought to have mentioned, which was dealt with in the course of the argument, and that is the suggestion as to the effect of the Railway and Canal Traffic Act, 1888. It was said that the Railway and Canal Traffic Act, 1888, at all events in this matter, now conferred exclusive jurisdiction upon the Railway Commissioners.

Well, the Railway and Canal Traffic Act, 1888, was not actually passed until after, and did not come into operation until some months after, this Bill (the Barry Dock and Railways Act, 1888) became an Act, and I do not think it would be according to sound principles to look at the Railway and Canal Traffic Act, 1888, for the purpose of construing the 3rd sub-section of section 23 of this Act. It was said—and it is one of the arguments which I admit has force, although I did not previously allude to it—that under the 3rd sub-section there was no power to award damages, and that they must wait a reasonable time before they could get any remedy, and that during that reasonable time the contract with them would have been violated, and they would have been sustaining injury. That was used for the purpose of showing that the 3rd sub-section could not have been intended to oust the jurisdiction of the courts. The answer sought to be given to that was that the Railway Commissioners had jurisdiction now to give damages under the Act of 1888. As I have said, the Barry Dock Act of 1888 must be construed as it would have been construed on the day it was passed, without reference to a public Act coming later into operation. But then it was said that the Act itself, because of the provision in the special Act as to facilities, gave the Railway Commissioners exclusive jurisdiction. There are two matters upon that—first, that the 10th section of the Act seems to treat a dispute as to a rate, or a toll, or a charge as something different from a dispute as to facilities—which is dealt with in the 9th clause; and next that, as regards the 9th clause, it does not provide that the commissioners shall have exclusive jurisdiction. They are to have the like jurisdiction to hear and determine a complaint of a contravention as the commissioners have to hear and determine a complaint of a contravention of section 2 of the Railway and Canal Traffic Act; it only gives them the same jurisdiction as to the contravention of section 2. The only provision giving exclusive jurisdiction is found in the Railway and Canal Traffic Act, 1854, s. 6, and that only provides that the jurisdiction shall be exclusive "in any proceeding for a violation or contravention of the above enactments."

Now, it seems to me impossible to enlarge section 6 of the Act of 1854 and make it apply—not to the enactments to which it in terms applies, but to later enactments. Probably most of the things (or many of them at all events) mentioned in the 9th clause are matters in which the Railway Commissioners would have exclusive jurisdiction, because they are matters in which no other court had jurisdiction, or would have jurisdiction, at common law. That may be so, just as it has been held that in the case of the Railway and Canal Traffic Act there was no action at common law, and that the only remedy was before the commissioners; but it seems to me impossible to say that if, at the time it passed, the 3rd sub-section of section 23 did not make the jurisdiction of the Railway Commissioners exclusive in the matter with which we are dealing, that effect was produced by the public Act which was passed in the same year.

LINDLEY, L.J.—I have come to the same conclusion. Chitty, J.'s judgment simply follows the judgment of Day, J. Day, J., in his judgment expressed the opinion that the remedy had been misconceived, and, if it existed at all, that it should have been sought for by an application by the Barry Co. to the commissioners, which I take to be an indication that in the opinion of that learned judge a dispute of this kind cannot be settled by an action at law, but must be settled by proceedings before the Railway Commissioners.

Now I must say I cannot read this Act of Parliament—the Barry Dock and Railways Act, 1888—as excluding the jurisdiction of any court of law. Whether the expression in clause 3 of section 23 —"facilities herein provided for"—would include the granting of "facilities at the rate before mentioned," or whether it is confined to facilities apart from the rate, is by no means an easy question to answer; but I will assume that "the facilities herein provided for" would include "the facilities at the rate"—still, what one must look for and find in order to support Mr. Balfour Browne's argument is something which would exclude the jurisdiction of the court.

Now, I cannot find anything approaching that. There is no agreement to refer to arbitration; there is no obligation to go to the commissioners at all; it is a mere option given to one of the parties to this statutory agreement to go before the commissioners if they like. If they do not like they are not obliged to go; and before you can say that an Act of Parliament prevents a person who is aggrieved having recourse to the ordinary remedies open to the subjects of the country in general, you must find some negative words, or some clear and distinct enactment to that effect. Construe it as you will you cannot find that here. And that appears to me to be the answer to that part of the argument, that this remedy is misconceived altogether.

A. L. SMITH, L.J.—I have but little to add after the manner in which this case has been dealt with by the Lord Chancellor and my brother Lindley. As to the first point—namely, whether an application to a court of law can be now maintained—it seems to me that in this case it very clearly can. It is not disputed that, prior to the passing of the Barry Act, 1888, if a person or company complained—as the Barry Co. do complain here—of having had excess charges put upon them, an action at law would have lain for that excess; and the question is whether or not, under section 23, sub-section 3, of this Barry Act, you find an indication that that action at law which the Barry Co. might have entertained is excluded, and that they are driven by that Act of Parliament to an application to the Railway Commissioners—whether sitting as arbitrators or not. It appears to me, without reading that sub-section 3 again, that all that that sub-section does is to provide that—the Barry Co. having the right of action, as undoubtedly they had when the Act was passed—if the Barry Co. liked they might make the application to the Railway Commissioners, and then they might get the benefit resulting from that jurisdiction. To say that that is ousting the jurisdiction of the court is, in my judgment, to say that which is not accurate; and therefore that point fails.

Appeal allowed.

Solicitors for the plaintiffs, *Downing, Holman, & Co.*, for *Downing & Handcock*, Cardiff.

Solicitors for the defendants, *Ince, Colt, & Ince*, for *Ingledew & Sons*, Cardiff.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Jan. 11, 12, 15.

In re An Arbitration between Lord Gerard and the London and North-Western Railway Co. (*a.*)

Railway company—Compensation—Coal mines lying under railway—Purchase by company of subjacent strata except coal—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77-85

The provisions of sections 77-85 *of the Railways Clauses Consolidation Act,* 1845, *are not restricted to the case of a company purchasing the surface of land only. Where the company include in their notice to treat certain subjacent minerals, but not the subjacent coal mines, the landowner cannot obtain compensation in respect of his coal mines in the arbitration under the notice to treat, but he must follow the provisions of sections* 77-85.

Judgment of Mathew *and* Kennedy, JJ., ante, *p.* 9, *affirmed.*

Appeal from a judgment of Mathew and Kennedy, JJ., revoking a submission to arbitration under the Railways Clauses Consolidation Act, 1845, reported *ante*, p. 9, where the facts of the case are sufficiently stated.

The question was whether the appellant, Lord Gerard, was entitled to immediate compensation in respect of his coal mines lying under lands and minerals which had been taken compulsorily by the London and North-Western Railway Co., or whether his right to such compensation ought to be left to be dealt with under sections 77-85 of the Railways Clauses Consolidation Act.

Sir R. E. Webster, Q.C., Moulton, Q.C., and *Pollard,* for the appellant.—The appellant is entitled to present compensation for the interference with his power of working his mines. He is not bound to wait until he is actually about to work the mines, and then follow the procedure laid down in sections 77-85 of the Railways Clauses Consolidation Act. Those sections only apply where the company have taken the surface of the land alone. Here the company have taken the subjacent minerals except the coal, and they are entitled to subjacent and adjacent support for those minerals. The result is that the appellant is prevented from being able to work his coal, and for that interference he ought to be compensated now. A complete vertical severance has already been effected; it will henceforth always be impossible for him to work from his coal on one side of the line to his coal on the other side without either passing through or running the risk of letting down the minerals which have been purchased by the company.

They cited, besides the cases referred to in the court below, *Midland Railway Co.* v. *Miles*, 34 W. R. 136, 30 Ch. D. 634, and *Great Western Railway Co.* v. *Cefn Cribbwr Brick Co.*, 42 W. R. 493, [1894] 2 Ch. 157.

Sir Henry James, Q.C., H. D. Greene, Q.C., and *Page,* for the respondents.

Lord Esher, M.R.—In this case the London and North-Western Railway Co. resolved to widen their line where it runs through the land of Lord Gerard, and they served notices upon him for the compulsory taking of certain portions of his property. They proposed to take, not only the surface of the land, but also a portion of the land under the surface, viz., the strata of stone, sand, clay, and gravel which lay beneath. Under these strata there lay a long seam of coal; that, however, they did not propose to take. Now, whatever they proposed to take was land, and not the less land because part of it was mines and minerals. It has been determined that the word "land" in the Railways Clauses Consolidation Act means, not only the surface, but everything, including mines and minerals, which it is proposed to take. Here the company proposed to take the surface and the underlying mines and minerals except one mine, which was a coal mine. That mine, therefore, was a mine lying under land which they took. It follows that, on the construction of the Act, as between railway company and owner, the company having resolved to take the land without this mine, the case is governed by the group of sections commencing with section 77. I am of opinion that this group of sections is intended to be the sole and complete code of the law determining the mutual rights of a company and a landowner under such circumstances as the present. That would be my view without any authority to guide me; but I think that the case of *Holliday* v. *Mayor of Wakefield*, 40 W. R. 129, [1891] A. C. 81, shows that that view has the approval of the House of Lords. Therefore, the company having taken the land, including some of the mines and minerals, and having left the coal untaken, any dispute as to compensation of any kind to which Lord Gerard may be entitled with regard to the coal must be determined under those sections, and under those sections alone. Although the coal mine remains his, a right which he had before at common law is by these sections taken away from him; he cannot work the mine without first giving notice to the railway company. This notice has to be given for a particular purpose. Although he may be desirous of working the mine, he is bound to give the company notice, in order that they may have an opportunity, if they think fit, of buying the mine against his wish. The compensation for that must then be determined in accordance with the provisions of the Act, but it must not be determined till them. The argument has been that that is not so in this case, because here the company have purchased, not only the surface, with the ordinary earth beneath it, but some of the mines and minerals also. It is suggested that the sections only apply where the surface alone is purchased, and do not apply where any of the mines and minerals are purchased together with the surface. But the Act does not draw any such distinction, and we cannot countenance such a suggestion.

Then another point was taken; it was said that the compensation to which Lord Gerard was entitled with respect to this coal mine ought to be determined at once, because it was now absolutely impossible that he would ever be able to work the coal. But if we look at the sections we find nothing in them which says that compensation with respect to a coal mine must be determined at once if it is impossible that the coal should ever be got. It may be that the owner of the coal will never want to get it, and, if so, why should he be paid a large sum now? The sections say that the compensation is to be determined only when the owner proposes to try to work the coal. But it is not true to say that Lord Gerard never could work this coal. At common law, if by agreement between parties the surface of land was sold and the mines underneath were reserved, a necessary implication would arise in favour of the vendor, that if he could not get to his mines in any other way he might go through the land which he had sold for that purpose. Ueder the statute a similar sale and reservation is effected against the will of the owner; and he ought not to be in a worse position than if he had been a consenting party to

(*a.*) Reported by F. G. Rucker, Esq., Barrister-at-Law.

the transaction. Neither can it make any difference whether the obstacle interposed between him and his mine is horizontal or vertical; in either case the same implication arises. I think that the sections by necessary implication leave Lord Gerard the power, in case he cannot otherwise work this coal mine, to pass for that purpose through the mines and minerals which have been compulsorily taken from him. That seems to me to be clear on principle, and also to have been decided in *Ruabon Brick and Terra Cotta Co.* v. *Great Western Railway Co.*, 41 W. R. 418, [1893] 1 Ch. 427. The appeal therefore wholly fails, and must be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *Meynell & Pemberton.*

Solicitor for the respondents, *C. H. Mason.*

High Court of Justice.

Chan. Div. Stirling, J. } Feb. 13, 20.

In re WILLIAMS.
WILLIAMS *v.* WILLIAMS. (*a.*)

Will—Construction—Annuity charged on reversion and directed to be paid half a year after testator's decease.

A testator devised to his son H. certain lands subject to a previous interest, and charged the reversion thus created with the payment in equal half-yearly instalments of an annuity to his daughter S., the first of such payments to become due and be made at the expiration of half a year from the testator's decease.

Held, that the annuity commenced at the testator's decease, but was only charged upon the reversion at the termination of the preceding interest.

Jackson *v.* Hamilton, *Ir.* 9 *Eq. Rep.* 430, 3 *Jo. & Lat.* 702, *discussed and followed.*

In re Bywater, Bywater *v.* Clarke, 30 *W. R.* 94, 18 *Ch. D.* 17, *distinguished.*

By his will, dated the 22nd of January, 1887, the above-named testator bequeathed all his property to his wife, as to his personal property absolutely, and as to his real property for her life or during her widowhood, with remainder as to specific parts thereof to his son Harvey, charged with the payment of an annuity of £30 to his daughter Sarah, and as to other specific parts to his son Alfred. The residue of his real estate (if any) he gave to his son Harvey, and he directed that the said annuity to his daughter Sarah should be paid by equal half-yearly payments, "and that the first payment thereof shall become due and be made at the expiration of half a year from my decease."

The testator died in 1887, and the will was proved by his widow, the sole executrix. Nothing was paid to the annuitant on account of her annuity by the executrix, on the ground that it was not payable until after the widow's death or second marriage.

This was an originating summons taken out by the annuitant to have her rights in respect of the annuity determined by the court.

E. B. Cooper, for the summons.—This annuity is payable out of the income during the lifetime of the tenant for life: *Jackson* v. *Hamilton*, Ir. 9 Eq. Rep. 430, 3 Jo. & Lat. 702. [STIRLING, J.—I should have thought it was only charged on property specifically given to Harvey.] It is payable out of the rents and profits of the estate as from the death of the testator. *In re Bywater, Bywater* v. *Clarke* 30 W. R. 94, 18 Ch. D. 17, is distinguishable. The gift in that case was a future gift. The will in the present case directs payments to be made from the first half-year after testator's decease.

Macnaghten, for Harvey Williams.—The general intention of this will is that none of the testator's children is to take anything until after the decease or second marriage of the widow. This gift to Sarah is not an annuity, but is a legal rent-charge charged on the property. *Jackson* v. *Hamilton* does not affect my contention. The court there held that the rent-charge commenced at once, and was payable by the tenant for life. Here the annuitant contends that the rent-charge is to begin before the estate on which it is charged. The reversioner is not in possession of the land. The annuitant cannot levy a distress, sell, or get a receiver appointed. Hence the rent-charge would be without any of the elements of a rent-charge: *Thomas* v. *Sylvester*, 21 W. R. 912, L. R. 8 Q. B. 368. Hence this is a rent-charge charged up on the reversion. If it be an annuity, then it is payable primarily out of the personal estate. It is reasonably clear that it does not begin until after the widow's decease, and the direction at the end of the will as to immediate payment must be disregarded: *In re Bywater, Bywater* v. *Clarke*. That case, if taken in its entirety, is in my favour.

Kenyon Parker, for the widow.—There is clearly no charge on the life interest. The gift to the widow is of the whole, and the annuity does not arise until after the widow's death or remarriage. The decision in *Jackson* v. *Hamilton* turned on the construction of the will. This is a gift which, in its essence, cannot arise until a future time. The direction as to immediate payment is inconsistent with the rest of the terms of the will, and must be disregarded.

Cooper, in reply.—*Thomas* v. *Sylvester* and cases of that class deal with rent-charges created by deed, and do not affect the present case. *Jackson* v. *Hamilton* is entirely in point in the present case. [STIRLING, J.—I do not understand how the Lord Chancellor in that case could hold the annuity a charge on the reversion and also hold the tenant for life liable to pay it.]

Cur. adv. vult.

Feb. 20.—STIRLING, J.—[After stating the facts and reading the will, continued:—] The question is whether the annuity runs from the death of the testator and is payable according to the directions in the will at the end of the first half year from that date; and, if so, whether it is payable out of the funds specifically devised to Harvey Williams during the life of the testator's widow. Construing the will according to the natural meaning of the language, it seems to me that the charge of the annuity that is created by the will operates only on the reversionary interest devised to Harvey. That seems to me the natural meaning of the gift of the lands to the wife for life or during widowhood, and after her decease of specific portions thereof to the elder son Harvey in fee subject to the annuity. The direction at the end of the will that the annuity shall become due at the expiration of six months from his decease doubtless makes the annuity run from the testator's death, but it does not affect the charge created by the previous devise. There is nothing inconsistent in this. The meaning of the testator is that the reversion is charged with the annuity from the testator's decease—*i.e.*, Harvey takes the property on the widow's death or

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

remarriage subject to the charge of the annuity as from the death of the testator. There is nothing which creates the charge during the widow's lifetime. That is my conclusion on construing the will according to the ordinary meaning of the language of the will. But it is said that there are two cases which bind me to come to a different conclusion. The first of these cases is *Jackson* v. *Hamilton*, 3 Jo. & Lat. 702, an Irish decision of Lord St. Leonards, which was apparently approved by his successor, Brady, L.C. (9 Ir. Eq. Rep. 436). I will refer to the report in Jones & La Touche as being somewhat fuller than the one in the Equity Reports. In that case the testator devised lands to trustees in trust to convey the same to A. to hold for the life of his widow, and after the death of his widow to convey the same to B. and his heirs, subject, however, to the payment of two annuities to C. and D., the first payments thereof to be made on the 1st of May or the 1st of November, which should first happen after his death, and it was held that the annuity was payable *in præsenti* though his widow was living. The suit was instituted in Ireland under circumstances that I will state presently. In its course the master found that the two annuities of £100 and £20 ran during the lifetime of Anne Hamilton, the widow. That was excepted to. The case came before Lord St. Leonards on that exception. He thus deals with it in his judgment: [His lordship here read from the judgment, beginning on p. 715 at the words "The other question which I reserved was whether," down to the end of the report on the next page.] With every word of that judgment I concur, and I would adopt it *verbatim* if it could be made applicable to the present case. It will be observed that the Lord Chancellor treats the annuities as charged on the reversion. Nevertheless he holds that they commenced on the death of the testator, and were payable during the lifetime of the tenant for life. It is contended that what he decided was that these annuities, which he speaks of as charged on the reversion, were in point of fact charged on the antecedent life interest. He does not say so. The ground on which the case is said to have been decided on that point is that the question was raised by Thomas Hamilton, the younger, who, it will be observed, was one of the tenants in common during the life of the widow of the land, subject to the payment of the annuity of £500 (in case the estate already charged therewith should not be sufficient to pay the same), and which said land after the death of the widow was devised to B. and his heirs, subject to the said annuities of £100 and £20 as above mentioned. If that had been the only interest of Thomas Hamilton, the younger, in the property of the testator, it is difficult to see any answer to that observation. But when the case is carefully looked at it is seen that Thomas Hamilton had another and very different interest. The testator on his marriage had entered into articles and covenants, that if he died in the lifetime of his wife Anne, which event happened, she should be entitled to half the real and personal property of which he died seised or possessed. Therefore, having made this disposition by will not in accordance with the marriage settlement, his widow claimed her rights under the articles, and in fact elected to take against the will. Thereupon, at the hearing of the action, a declaration was made that Anne Hamilton was entitled to specific execution of the trusts in the marriage articles, and that she was not entitled to dower, &c. It was declared that the will was well proved, and that the trusts thereof were to be carried into effect, save so far as the provisions of the will conflicted with those of the articles. Then it was referred to the master to take accounts and to inquire whether the devisees, annuitants, and legatees had sustained, or would sustain, any loss in consequence of the widow having elected to take against the will, and whether they were entitled to receive any, and what, compensation for such loss, and out of what fund. Now, it is obvious from that that Thos. Hamilton, the younger, was a disappointed devisee, because by reason of the election of the widow he lost half during her life. The annuitants also were disappointed devisees, because the annuities were charged on the whole estate in reversion, and half was taken from them. There were also other interests of which Thos. Hamilton, the younger, was deprived. The master had reported that the legacies and annuities which were charged exclusively upon the real estates of the testator ought to abate by one equal moiety respectively, seeing that the devisees of the said lands chargeable therewith, by reason of the widow's election to take against the will, had been severally deprived of one equal moiety of the same. The master had then found the value in money of the loss which each of the disappointed legatees, devisees, and annuitants would sustain by reason of the widow's election, and he also found that the fund for compensating them consisted of the arrears and future gales of an abated annuity of £250 during the life of the widow, chargeable on a moiety of the lands devised to the sons of Thos. Hamilton, and of a moiety of the other benefits given to the widow by the will. Upon that it was to the interest of Thos. Hamilton, the younger, as a disappointed devisee, to say that the abated annuities of £100 and £20 respectively did not commence, as the testator had directed, at his (the testator's) death because the fund which would have been applicable, if that view prevailed, for compensating the disappointed annuitants would to that extent be available for him as a disappointed legatee. It seems to me that that was the point of view from which T. Hamilton was arguing, because he also excepted to the finding of the master on various other grounds—for instance, that the trustees were entitled to compensation. That shows, I think, that his object was to reduce the fund available for compensating disappointed persons other than himself. I think, therefore, that that case is no authority for holding that an annuity charged on a reversion is chargeable also on the preceding life interest, though it is made to commence from the death of the testator.

The second case is one before the Court of Appeal in this country—*In re Bywater*. In that case a testator gave to his wife during widowhood, and until all his four daughters by his former wife should attain twenty-one or die under that age, an annuity of £800, and a further annuity of £100 in respect of each such daughters, while under twenty-one, for maintenance and education. After all his four daughters had attained twenty-one or died he bequeathed to his wife during widowhood £600 a year, to be reduced to £200 in the event of her remarriage; and if he should have any children by his then wife he bequeathed to his wife in respect of each such child while under twenty-one a further annuity of £150, to commence after all his four said daughters had attained twenty-one or died, to be applied by his wife in maintaining and educating such children, and to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months from his decease. There was something on the face of the will which created an apparent inconsistency, for there was a direction that the annuity should commence during the particular period—*i.e.*, when all the four daughters attained twenty-one or died—and later on another direction that the first payment should commence six months after his decease. The Court of Appeal held that the testator first created

the annuity and directed it to commence at a future time, and had then given a direction as to the time of payment which was inconsistent with the previous one, and that such direction was not meant to enlarge the gift, and must therefore be rejected.

In the present case there is no inconsistency at all. There is a simple charge on the reversion, and then the testator directs the first payment to be made at a particular time. If I am bound to follow either of these cases I think I ought to follow *Jackson* v. *Hamilton*, which closely resembles the present case, and which, as I understand it, supports the view I take. *In re Bywater* is a question of construction on a will whose language differs materially from the present will.

I hold, therefore, that the annuity commences at the death of the testator, and the first payment is to be made six months from that time, but is chargeable only on the reversionary interest devised to Harvey Williams after the death or second marriage of the testator's widow.

Solicitors, *Collyer & Davis*, for *Benjamin Smith*, Birmingham; *Thomas White & Sons*.

Chan. Div. Romer, J. } June 14; July 16, 1894.

NOYES v. PATERSON. (a.)

*Vendor and purchaser—Specific performance—Voluntary conveyance a link in title—Rescission—*13 *Eliz. c.* 5, *s.* 5; 27 *Eliz. c.* 4, *s.* 3.

The mere fact that a voluntary conveyance, prior to the conveyance to the vendor, is a link in the title to land contracted to be purchased, does not entitle the purchaser to repudiate his contract.

Trial of action.

By a contract in writing, dated the 29th of September, 1893, the plaintiff Noyes agreed to sell, and the defendant Paterson agreed to purchase, a freehold house, called Layston Cottage, Buntingford, in the county of Herts, with the land adjoining thereto, amounting to two and a half acres, for £610. It was provided by the contract that a deposit of £61 should be paid immediately after the signing thereof, and the residue of the purchase-money on completion, and that the purchase should be completed on the 16th of October, 1893, but no time was fixed for delivery of the abstract.

The deposit of £61 was paid in accordance with the contract, but the abstract was not delivered till the 23rd of October, 1893.

The abstract contained a reference to a voluntary conveyance in 1884 from one William John Clark to his wife Rebecca, which conveyance was not abstracted, but was mentioned in one of the abstracted deeds, which contained a covenant for production of it.

The purchaser made a requisition that an abstract of this conveyance should be furnished, and this was done on the 1st of November, 1893.

The conveyance was dated the 22nd of August, 1884, and expressed to be made between William John Clark, hereinafter called the donor, of the one part, and Rebecca Clark, his wife, thereinafter called the donee, of the other part. After reciting that, in consideration of the natural love and affection of the donor to the donee, he had agreed to convey and assign to her the freehold, leasehold, and personal property thereinafter mentioned, and that the debts then due from him to unsecured creditors (particulars of which were set out in a schedule) did not exceed £100, it was witnessed that, in consideration of the natural love and affection of the donor for the donee, and of the sum of 5s., the donor granted to the donee, *inter alia*, the hereditaments the subject of the present sale, to hold the same unto and to the use of the donee and her heirs. The conveyance contained also an assignment by the donor to the donee of certain leasehold property and furniture, and a covenant by the donor that in the above-mentioned schedule the whole of his debts were stated except a mortgage debt charged on the leaseholds, and that, apart from the premises comprised in the conveyance, the donor had at the date thereof sufficient assets to pay such debts.

William John Clark died on the 25th of December, 1886, from which date Rebecca Clark held all the title deeds.

On the 13th of July, 1888, Rebecca Clark sold the premises the subject of the present sale to one Martin, and the conveyance of that date contained a covenant for production of the voluntary conveyance, which was retained by her, all the other title deeds of the premises the subject of the present sale being handed over to Martin.

On the 17th of January, 1889, the premises the subject of the present sale were conveyed by Martin to the plaintiff Noyes, and the title deeds, other than the voluntary conveyance, handed over to Noyes.

On the 8th of November, 1893, Paterson's solicitor wrote to Noyes' solicitor repudiating the contract and demanding a return of the deposit money, stating, as the ground for such repudiation, that the vendor could not make a good title by reason of the voluntary conveyance.

The vendor then commenced this action, claiming specific performance of the contract to purchase, and the purchaser, by way of counter-claim, claimed rescission of the contract and a return of the deposit.

Oswald, Q.C., and *Boome*, for the plaintiff.—The mere existence of a voluntary conveyance does not release the purchaser from his contract, Clark's creditors not setting up any claim. The purchaser did not make any requisitions on the subject, though he might have done so. Clark could, of course, while he lived, have defeated his wife's title by a conveyance for value; but as the title deeds followed the title, and as only a short time elapsed between the date of the voluntary conveyance and the donor's death, and this took place many years ago, the probability of any litigation against the purchaser is very slight. Under these circumstances the title is not too doubtful to force on a purchaser: Fry on Specific Performance, 3rd ed., p. 410; *Spencer* v. *Topham*, 22 Beav. 573, 5 W. R. Ch. Dig. 93; Dart on Vendors and Purchasers, 5th ed., vol. 2, p. 1101. The present purchase is not from the voluntary donee, but from a purchaser for value from her grantee.

They referred to 13 Eliz. c. 5, s. 5; 27 Eliz. c. 4, s. 3; *Halifax Joint-Stock Banking Co.* v. *Gledhill*, 39 W. R. 104, [1891] 1 Ch. 31; *Smith* v. *Garland*, 2 Mer. 123; *In re Briggs and Spicer*, 39 W. R. 377, [1891] 2 Ch. 127; *In re Brall*, [1893] 2 Q. B. 381.

Neville, Q.C., and *Eve*, for the defendant.—The title is too doubtful to be forced upon a purchaser. Clark's voluntary conveyance may have been defeated by him by a conveyance for value under 27 Eliz. c. 4. In *In re Briggs and Spicer* it was held by Stirling, J., that the trustees of a voluntary settlement of freeholds cannot force the title upon a purchaser. [ROMER, J.—It cannot be supposed that a purchaser from Clark would have lain by since December, 1886. Practically, therefore, the defendant gets a good

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

title.] It should have been stated earlier that the deed of 1884 was a voluntary conveyance: *In re Marsh and Earl Granville*, 31 W. R. 845, 24 Ch. D. 11. The plaintiff did not deliver a perfect abstract till after the time fixed for completion. In any case, the defendant is entitled to make requisitions with reference to the voluntary conveyance.

ROMER, J.—I will not preclude the defendant from making any requisition as to any sale of this property during Mr. Clark's lifetime. I cannot help seeing that there was a repudiation of the contract by the purchaser as soon as the circumstances as to the voluntary conveyance became known. The defendant clearly thought, though, in my judgment, erroneously, that the mere fact of there having been a voluntary conveyance justified him in repudiating the contract. His proper course would have been to investigate the title and to make such requisitions as arose out of the investigation. It is very difficult in a case like this to ascertain how much of the litigation has been due to the defendant's having acted on such a view; but, looking at the matter broadly, I think that the costs should be paid by the defendant up to and including judgment.

There will be judgment for specific performance, with a reference as to title in the usual way; but if it is proved to the defendant's satisfaction that Mr. Clark died on the 25th of December, 1886, and did not after the date of the voluntary conveyance deal with the property, the reference as to title need not be prosecuted. The counter-claim will be dismissed, with costs.

Solicitors, *Barfield & Barfield; John Evans.*

Q. B. Div.
(Lawrance and Kennedy, JJ.) } Jan. 23.

REG. *v.* JUSTICES OF ESSEX. (*a.*)

Justices—Practice—Appeal to quarter sessions—Statutory notice setting out the general grounds of appeal sent, but returned through the Dead Letter Office—Service bad—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-sections* 2, 7—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 6.

An appeal to quarter sessions against an order made at petty sessions can only be brought by the person seeking to appeal, after a proper notice setting out the general grounds of the appeal has been duly served by him on the other party, as required by section 31, *sub-section* 2, *of the Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49).

In this case a servant obtained a bastardy order at petty sessions against one Holmes. The prosecutrix, before leaving the court, was told by the defendant that he intended to appeal against the order to the next quarter sessions at Chelmsford. By some mistake the clerk to the justices had entered the woman's address on the summons as 2, West Ham-terrace, Barking, her correct address being 2, West Bank-terrace. This wrong address the appellant's solicitor copied upon the registered letter in which he sent the woman a proper notice of his client's intention to appeal. There is no such place as West Ham-terrace in Barking, and the notice was returned through the Dead Letter Office to the solicitor, who received it before the date for the hearing of the appeal, but after the statutory period for giving such notice had expired. At quarter sessions a preliminary objection to the appeal being heard—on the ground that the statutory notice had not been given—was successfully taken by the woman's counsel. Holmes then applied for a *mandamus* to the justices at sessions to hear the appeal, and a rule *nisi* was granted. To this the woman made an affidavit to the effect that Holmes knew her true address. The appellant did not file an affidavit in reply, but his solicitor did, in which he stated that he copied the address from the summons, and that he did not know, nor did he believe his client knew, the woman's true address. The woman then filed another affidavit stating that she had written a letter to Holmes only a short time previously to the posting of the notice, on which her correct address was written, and that his solicitor had replied to it for him, and had addressed the answer to 2, West Bank-terrace. Evidence was also given that all the depositions bore the woman's correct address.

W. J. Grubbe, for the respondent, showed cause against the rule.—Holmes and his solicitor had ample opportunity of knowing the woman's correct address. In wrongly addressing the notice of appeal the solicitor had been guilty of negligence, because, some weeks having elapsed since the granting of the order, it became his duty to satisfy himself that the address to which he was sending the notice was the true address of the woman. After the notice was returned he should have let the other side know what had occurred. [KENNEDY, J.—Is there power under any Act to remedy such a mistake or to extend the time for giving notice?] I believe not; the verbal notice was no notice at all, and, the proper notice having miscarried, Holmes had failed to comply with the condition precedent, and never, in fact, acquired the right to be heard. [KENNEDY, J.—As a matter of fact you treated the verbal notice as a good notice and attended.] The justices had no other course open to them but to refuse to hear the appeal.

He cited *Reg.* v. *Shingler*, 34 W. R. 490, 17 Q. B. D. 49.

C. E. Jones, for the appellant.—The mistake in wrongly addressing the letter was purely accidental. Holmes, therefore, was placed in the same position as if the solicitor's clerk had correctly addressed the letter containing the statutory notice, but the woman had thought it wise to change her place of abode and leave no address to which letters could be forwarded. The solicitor treated the address on the summons as "the last known address," and, therefore, the only address that had to be considered. Technically the woman was not made acquainted with the grounds of the appeal, but it could not be denied that she was cognizant of them. Not only the woman, but also her counsel, were in court when the case was called. For these reasons Holmes should not be debarred the right to be heard.

LAWRANCE, J.—The rule must be discharged. I have no doubt whatever—indeed it is admitted—that the verbal notice given to the woman by Holmes of his intention to appeal was a bad notice, although it is true it was treated by her as a good notice. The facts, in spite of the conflicting statements in the affidavits of the two parties, make it absolutely impossible for me to believe that the correct address of the woman was unknown either to the appellant or his solicitor at the time that the latter sent the statutory notice by post to her. Assume, however, that the notice of appeal was wrongly addressed by some excusable mistake. When it was returned by the Post Office, it then became the bounden duty of the solicitor, as a man of honour, to do all in his power to rectify his mistake, and, even if too late, send the notice within the statutory time allowed

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

doing so, to acquaint the other side of the fact. I base my decision, however, on those facts which are not disputed, and on these I must decide that the proper course for us is, to hold that the rule must be discharged.

KENNEDY, J.—I am of the same opinion. The notice of appeal was sent, in fact, to a non-existent address. It was contended, nevertheless, that this ought to be treated as good service, because it was sent by the appellant's solicitor to the address on the summons, which he might reasonably have supposed to have been, and did suppose to be, the true address of the woman. I question whether, in all cases where the giving of a notice is a statutory condition of the right to appeal, it does not become the imperative duty of the person seeking to appeal to see that the notice of appeal is really received by the person to whom it is addressed. In the present case, if the solicitor or his client had acted with reasonable care the mistake could not have occurred. I am of opinion, therefore, that the justices were right in holding that the service was bad.

Rule discharged, with costs.

Solicitor for the appellant, *G. A. Stewart.*

Solicitor for the respondent, *F. George.*

Q. B. Div.
(Wills and Wright, JJ.) Dec. 18.

SMART & SONS *v.* WATTS. (*a.*)

Adulteration—Margarine—Sale without proper label or wrapper—Prosecution—Analysis of the substance sold—Condition precedent—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *ss.* 12-28—*Margarine Act,* 1887 (50 *&* 51 *Vict. c.* 29), *ss.* 6, 12.

It is a condition precedent to a prosecution under section 6 *of the Margarine Act,* 1887, *for selling margarine without a sufficient label or wrapper that the procedure under the Sale of Food and Drugs Act,* 1875, *should be followed. Therefore, where an inspector purchased a sample of a substance which the shop assistant who sold it to him admitted to be margarine, and, relying on that admission, did not divide the article into three parts or submit any part of it for analysis, according to the provisions of the Sale of Food and Drugs Act,* 1875,

Held, that the vendor of the article could not be convicted.

Case stated by justices of the County of Middlesex.

At a petty sessions holden at Edgware on the 4th of July, 1894, the respondent (an inspector under the Food and Drugs Act, 1875, to the Middlesex County Council) preferred two complaints against the appellants under section 6 of the Margarine Act, 1887, as follows:—

First, that on the 18th of June, 1894, the appellants exposed for sale by retail margarine, without having attached to each parcel thereof so exposed in such a manner as to be clearly visible to the purchaser a label marked or printed in capital letters not less that one and a half inch square "Margarine"; and, secondly, that at the same time and place the appellant sold margarine by retail without delivering the same to the purchaser in or with a paper wrapper on which was printed in capital letters not less than a quarter of an inch square "Margarine."

The respondent gave evidence to the effect that on the day mentioned he called at the defendant's shop and asked for a quarter of a pound of certain butter which was exposed for sale on the counter. An assistant served him with the amount asked for, and he paid for it. The paper wrapper was plain paper, with no designation of what the article was on the paper or on the article. The respondent then told the assistant that he was the inspector under the Food and Drugs Act, and called her attention to the label, and to the fact that the article was wrapped in plain paper. She said: "This is not butter, it is margarine," and stated that she was serving temporarily, as the manager was out. She sent for the appellants' manager, who stated that the article was margarine. The respondent did not give notice to the assistant or to the manager that the article was purchased for analysis, nor did he submit it for analysis. The tub from which the article was served had the word "margarine" on it, but it was upside down, and not readable.

No evidence was offered by the appellants, but it was contended on their behalf that the statements of the assistant and the manager that the article sold was margarine were not made in the presence or hearing of the appellants, and, consequently, were not admissible as evidence, and, therefore, that there was no evidence that the article sold was margarine; and, further, that the proceedings under the Margarine Act, 1887, s. 12, should be the same as those prescribed by the Sale of Food and Drugs Act, 1875; that under section 14 of that Act the purchaser should have notified his intention to have the article analyzed, and should have divided it into three parts, leaving one such part with the seller or his agent; that under sections 20 and 21 of the Sale of Food and Drugs Act the complainant should have one portion of the article analyzed, and should have produced the certificate of the analyst as to the result of such analysis; that such notification, division, and analysis were conditions precedent to a prosecution, and that, the same not having been made, the prosecution must fail.

The justices convicted the appellants for the offence, and imposed a fine, being of opinion that there was evidence, and finding as a fact, that the substance sold to the respondent was margarine, and that no label was attached to it when exposed for sale on the counter, and that no paper wrapper on which was printed margarine, containing or with it, was delivered to the respondent. They also found as a fact that, although the respondent, when he asked for the article, did so with the intention of having it analyzed, so as to ascertain whether it was in fact butter or margarine, he, nevertheless, abandoned that intention as soon as he was informed by the assistant who was in charge of the shop that the article was margarine, thinking that no useful purpose would be served by analysis.

The question for the court was whether the justices were justified in point of law, under the circumstances, in convicting the appellants.

Bonsey, for the appellants.—These convictions were bad. Section 12 of the Margarine Act, 1887, requires that all proceedings under that Act "shall, save as expressly varied by this Act, be the same as prescribed by sections 12 to 28 inclusive of the Sale of Food and Drugs Act, 1875." Section 14 of the latter Act requires that the person purchasing an article with the intention of submitting it for analysis shall notify his intention to the seller and shall offer to divide the article into three parts, and otherwise proceed in the manner directed by that section. Compliance with the provisions of section 14 is a condition precedent to a prosecution under that Act:

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

see section 20; *Barnes* v. *Chipp*, 26 W. R. 635; 3 Ex. D. 176; *Parsons* v. *Birmingham Dairy Co.*, 9 30 W. R. 748, Q. B. D. 172. The Act of 1887 contains no variation of the proceedings under section 14 of the Act of 1875, and the effect of neglecting to follow these proceedings is equally fatal to a prosecution under the Act of 1887. Moreover, the admissions of the assistant and the manager are not evidence against the appellants: *Brown* v. *Foot*, 66 L. T. 649, 40 W. R. Dig. 6.

Erle, for the respondent.—The convictions were good. There was evidence that the substance was margarine, and it was clearly sold in contravention of the provisions of sections 6 and 7 of the Margarine Act, 1887. It was not necessary to submit the article for analysis; the offence is selling margarine without a proper wrapper or label stating what the substance is. The Act assumes that the article may or may not be analyzed: section 8. Moreover, in the present case, the sample was not bought for analysis, and therefore section 14 of the Act of 1875 did not apply.

WILLS, J.—These convictions must be quashed. The language of the Acts is sufficient, apart from the authorities which have been referred to. The Act of 1887 does not vary the provisions of the Act of 1875 as to the necessity for analysis; section 8 of the Act of 1887 has no application to proceedings such as the present. It only relates to the importation of margarine and its carriage by public conveyance. Section 12 incorporates the procedure under the Act of 1875, and it is clear that in the present case that procedure has not been followed. It is a matter of regret that it should be necessary to incur the needless expense of analysis in a case in which the party accused admits that the substance is what the complainant alleges it to be, but the language of the statutes is imperative.

WRIGHT, J.—I agree.

Convictions quashed.

Solicitors for the appellants, *Neve & Beck.*

Solicitor for the respondent, *Nicholson.*

Prob. Div. & Adm. Div. Divorce. } Nov. 8, 9, 21.

CHURCHWARD *v.* CHURCHWARD AND HOLLIDAY (QUEEN'S PROCTOR INTERVENING). (*a.*)

Divorce—Collusion—Agreement to initiate and conduct suit—Abstention from defence—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 30—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict. c.* 144), *s.* 7.

If the initiation of a suit for dissolution of marriage be procured and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with or withheld.

Trial of the issue of collusion between the petitioner and respondent alleged by the Queen's Proctor.

The husband petitioned for a divorce on the ground of his wife's adultery with the co-respondent. There was no defence, either by the respondent or the co-respondent, and at the hearing the adultery was proved, and the court granted a decree *nisi*; but as the counsel for the petitioner gave the President information of an agreement between the petitioner and respondent and of correspondence between their solicitors, the President thought it right to direct that the papers should be laid before the Queen's Proctor, in order that he might intervene if he should be so advised. He intervened, alleging collusion between the petitioner and respondent.

With the exception of some slight oral evidence the whole of the evidence consisted of the agreement, of certain correspondence, and of the diary, or notes, of the petitioner's solicitor. The facts were shortly as follows:—On the 4th of June, 1893, the respondent left her home, no doubt accompanied, or soon after joined, by the co-respondent. On the 5th she telegraphed to her husband's sister that she had left home for good. On the 6th of June she wrote a letter to her husband containing the following passages:—"You are not surprised, I presume, at my leaving you. It had preyed on my mind for some time past, the fact that you did not want me, and that your opinion was that Poppie would be better looked after without me, and that everything I did was wrong. You have so often, over a mere trifle, told me 'to go,' and I have now done so, and I need not remind you of all the cruel things you have said to me since Poppie's birth." On the 10th of June she wrote:—"From your telegram received yesterday" (this telegram was not produced) "you do not seem to realize the position. I would willingly spare your feelings, but it is far better frankly to tell the truth that I have not left home alone. It is a source of trouble to me to think that poor little Poppie is worrying for me, but you should have thought of this before you so many, many times have told me to go. After all that has occurred it is impossible for me ever to return or matters to be mended. You had far better proceed with a divorce against me. . . . Had you only been different these last three and a half years (which you admit in your telegram) things would not be as they are." At that time, or at latest by the 14th of June, the petitioner was aware that the respondent and co-respondent were living together. It was stated by the petitioner's solicitor, Mr. King, that the petitioner before the 19th of June informed him, as a friend, what had happened, and expressed a wish to sue for a divorce. There was no entry of this in Mr. King's notes for his bill of costs.

The evidence as set out in the judgment in detail showed an attempt on the part of the petitioner's solicitor to obtain a settlement of Mrs. Churchward's property amounting to £2,600 and a reversionary interest in £1,000, the effect of which is dealt with in the judgment *infra*. In the result, on the 11th of July the respondent's solicitor sent to the petitioner's solicitor draft terms of agreement. The terms of this agreement as to the divorce proceedings appear from a letter composed by the petitioner's and respondent's solicitors jointly, and sent to counsel in consequence of the strong objection of the petitioner's solicitor to any reference to the divorce proceedings. That letter, dated the 17th of July, contained this passage:—"We are instructed in matter between husband and wife, where the latter is now living in adultery, and terms are being arranged as to the wife's property, which at present remains in the physical custody of the husband. These terms we, acting for the wife, have suggested that, in consideration of certain things to be done by the wife, the husband shall covenant at once to sue for a divorce, and prosecute his suit to completion, claiming no damages against the co-respondent, the wife and co-respondent agreeing not to defend, and the husband agreeing to these terms on condition that the sum of £100 is secured in joint names of the solicitors in the case to cover his costs." Counsel thereupon, advised:—"I am of opinion that the proposed arrangement is, if not actually collusive

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

liable to the suspicion of collusion, and would, therefore, endanger the husband's decree, and I think his solicitor is very wise in refusing to enter into it. I do not think the terms as to costs so objectionable as the agreement not to defend. The wife and co-respondent may or may not have a good defence; if they have, such an agreement is, of course, *ipso facto*, collusion, and, if they have not, I do not see the necessity for any such agreement, and if the Queen's Proctor intervened, the husband would have considerable difficulty in inducing the court to believe that he did not enter into the agreement for the purpose of suppressing facts which he would prefer were not brought to the knowledge of the court." It was admitted by the petitioner's solicitor in evidence that the terms of agreement stated in the letter to counsel represented the agreement then and now existing between the parties. An endeavour was made by the petitioner's solicitor in a letter, dated the 20th of July, to leave the agreement as to divorce on an understanding, but eventually two agreements were settled and signed by the husband and wife on the 25th of August, one settling the wife's property to some extent for the benefit of the child, and the other in terms which did not specifically provide for no defence being made to the suit.

Nov. 8 and 9.—*Inderwick, Q.C.*, and *Guy Stephenson*, for the Queen's Proctor.

Lawson Walton, Q.C., and *Pritchard*, for the petitioner.

Cur. adv. vult.

Nov. 21.—JEUNE, P., after an exhaustive examination of the evidence, said:—From the evidence before me I draw the following conclusions:—1. That the respondent and co-respondent are guilty of adultery. 2. That the petitioner did not connive at such adultery. 3. That there was no collusion to present to the court false facts in proof of adultery. 4. That the petition was presented in accordance with, and in consequence of, the agreement come to between the parties. By this I mean that the petitioner would have been content with a separation could he so have obtained the pecuniary settlement he sought; and he would not have presented the petition if he could not have secured himself against the risk of diverting his wife's property from his child. It was strongly urged on me that the petitioner would in any case have presented a petition for a divorce, and that the unwillingness exhibited to the respondent's solicitor was a justifiable stratagem to secure a favourable settlement, and a letter of the 7th of August was relied on in support of the contention. I cannot accept this view. 5. That it was in fact part of the agreement that the wife and co-respondent should not defend the suit. 6. That it was not shown that there were any specific facts material to defence or recrimination which might have been brought forward by the wife. But it appears to me impossible to say, especially having regard to the wife's letters of the 6th and 10th of June, that it was proved that there were no material facts which she could have brought forward by way of defence or of recrimination. The petitioner, the petitioner's solicitor, and the respondent's solicitors denied that they knew of any such facts, but such statements did not appear to be conclusive on the point. The question is whether, under these circumstances, the petitioner should be held disentitled to a divorce by reason of collusion with the respondent.

It was contended by Mr. Lawson Walton in his very able argument for the petitioner that the collusion necessary to be shown was that described in the latter part of section 7 of the Act of 1860, as "collusion for the purpose of obtaining a divorce contrary to the justice of the case," and he drew a distinction between such collusion and that referred to in section 30 of the Act of 1857. It is, however, to be observed that the intervention of the Queen's Proctor is not under the latter, but under the earlier part of section 7, where the phrase is simply collusion. But the point is not very material, because, as an alternative, Mr. Walton urged—and this was indeed the real gist of his argument—that in both sections collusion meant collusion for the purpose of obtaining a divorce contrary to the justice of the case in a sense presently to be mentioned which he ascribed to the words. Whatever the meaning of collusion, I cannot doubt that it bears the same meaning in section 30 of the Act of 1857 and in both parts of section 7 of the Act of 1860. It seems to be impossible to suppose that a totally different sense is to be assigned to the collusion which vitiates a claim for divorce if discovered by the judge at the trial, before a decree *nisi* is pronounced, and that brought to his knowledge by the Queen's Proctor before or after such decree. The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it is urged that collusion is agreement either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the court granting a divorce. It was insisted that, in a suit against a wife, unless it be shown that the petitioner's charge of adultery was in fact unfounded, or was supported by false evidence, or that material facts in support of defence or recrimination were concealed, there was no collusion. On the other hand, it was maintained that collusion has a wider scope; and that if there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and *à fortiori* if such agreement contains terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shown that adultery was not in fact committed, or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shown to have been concealed.

There would seem, therefore, to be four questions that may be asked. First, Is it collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms of its conduct, by agreement, though there be no express stipulation that there shall be no defence, and no specific ground for suspicion that a false case is put forward or material facts concealed? Secondly, Does the addition of a term that there shall be no defence render the agreement collusion? Thirdly, Is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed? Or, fourthly, is there collusion only when it is shown that, in consequence of such agreement, false matter has been introduced into the case or material facts suppressed? In support of the more limited view of the nature of collusion reliance is placed on definitions which at various times, and with more or less authority, have been given of collusion.

Mr. Macqueen, in his book on Divorce, 2nd ed., p. 67, summarizes the matter thus: "According to the authorities, there appear to be two kinds of collusion—first, when the parties put forward false facts to form the basis of the judgment; secondly, when the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted to form the basis of the judgment." This definition is, however, obviously incomplete in omitting the suppression of material facts of defence or recrimination as one kind of collusion, and it therefore shuts out

the further consideration which arises, if it be admitted that such suppression does constitute collusion—namely, the consideration whether it must be shown that material facts were in fact concealed. It is remarkable that the learned author goes on to mention *Chisim's case* in the House of Lords (Macqueen's House of Lords Practice 583), without apparently noticing, as I shall presently remark, what an extension to collusion this case appears to afford. In *Crewe* v. *Crewe*, 3 Hagg. 123, at p. 129, Lord Stowell said: "Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion as applied to this subject is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law, therefore, requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult to prove, since the agreement may be known to no one but the two parties in the cause, who alone may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that after the adultery has been committed both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it. She may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncontrolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it. It has been often said, and with peculiar injustice, that, although the original adultery was not collusive, yet the proceedings in these courts lead ultimately to collusion in the conduct of the cause, because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law. The canon directs that a divorce shall not go upon the mere confession of the party; the wife, therefore, must give a negative issue (indeed, the court is almost bound to reject an affirmative issue, since it is necessary, by the canon, that evidence should be produced); she must deny her guilt, and her prayer must be according to her denial. But this is mere style and form. If the court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is whether the husband has received a real injury, and *bonâ fide* seeks relief." I think that in this passage Lord Stowell was considering as, indeed, he says, only the view of the matter applicable to the case before him. It is, no doubt, collusion where there is an agreement between the parties for one to commit, or appear to commit, a fact of adultery in order that the other may obtain a remedy at law as for a real injury. But here again there is omitted, because in this case not relevant, the kind of collusion which results from suppression. It is to be observed, however, how carefully Lord Stowell limits the case in which he excludes collusion to that of a mere desire of both parties to obtain a separation, and does not deal with the results of such a common desire leading to an agreement relative to the suit, still less those of the desire on the part of the husband being induced by extraneous considerations offered by the wife; and it is to be observed, further, that Lord Stowell insists that the husband must have received a real injury and *bonâ fide*. This leaves open the question in what cases is relief sought *bonâ fide*.

Great reliance was placed by Mr. Walton on the definitions of collusion given by Dr. Lushington and the Lord Advocate of Scotland before the Select Committee of the House of Lords in 1844, appended to the report of the Royal Commission appointed in 1850. I therefore refer to them, though they are extra-judicial opinions. Dr. Lushington said (Report, p. 47):—"190.—A question was put to me as to collusion. Now I beg leave to observe that in the sense in which it is used in Doctors' Commons it does not mean even consent or facility where there is just cause for the husband prosecuting the suit, or *vice versa*, but it is permitting a false case to be substantiated or keeping back a just defence. It may be a question whether this rule of collusion extends to cases where recrimination, though practicable, is not resorted to. 191.—Do you mean by saying where recrimination is practicable and is not resorted to, that the collusion consists in the abstaining from recrimination? Yes; but I do not say that so doing has been deemed to be collusion in the legal sense of the term. . . . 194.—Then do you understand that wherever there is a case where the fact of adultery, cruelty, and so forth exists, provided that the fact is not got up for the purpose of the proceeding, it would not be a case of collusion, though the parties were in collusion as to the proceeding in court? Certainly, we should not call it collusion; on the contrary, the expressions which have fallen from the learned judges have been these, and I think they are founded in truth: 'Why, if the wife has already committed the greatest possible offence against the husband by violating his bed, why should she add to it by increasing the expense of the remedy?' 195.—Are you not aware that, to a certain degree, the same principle holds with divorce Bills, for that, if the wife does not make any defence, which is the case with a great majority of those Bills, it is reckoned no proof of collusion? Certainly. 196.—And so if the paramour makes no defence to the action and lets judgment go by default, it is no proof of collusion? Certainly." It is, I think, obvious that Dr. Lushington chiefly desired to insist that the mere abstention from defence did not constitute collusion, and that the case was not presented to his mind of an agreement between the parties providing for the bringing of a suit and for the terms on which it was to be conducted, including a stipulation that there should be no defence, and of the inference to be drawn from such an agreement. The following questions were put to the Lord Advocate of Scotland and answers given by him (p. 63):—"93.—Would it be collusion if the party had actually committed adultery without any collusion, and if then the other party and the adulterous party were colluding together to get a divorce?—That is, I believe, the interpretation pretty generally put upon it. My own impression is that such is not the true meaning of collusion. I mean that if a just cause for a divorce exists without collusion, and that the party wronged seeks to have the remedy of divorce, and is entitled to it, I doubt if the circumstance that the other party has no objection, or is well pleased, would be such collusion as to preclude the remedy. 94.—So that if adultery had really been committed, not for the purpose of getting a divorce, but independently of that, it would be collusion such as to bar the remedy if the parties entered into a sort of plan for getting a divorce grounded upon that adultery?—I think that, accor

ing to the original meaning of collusion, it would not be so; but that if you were to examine them very strictly as to whether they had any collusion in bringing the suit, what would be the effect of the parties admitting that they knew of the suit being intended to be brought, and that they had no objection to it, but that, on the contrary, they had allowed the writ to be served, and dispensed with the time and afforded other facilities, I cannot say." It is clear that the Lord Advocate expressly abstained from pronouncing an opinion on circumstances in some respects similar to those in the present case. It should, however, be added that a little later he expressed the view that the mere circumstance of people going to Scotland to be divorced, as they might go to be married, would not constitute collusion. It is not necessary to say more on that point than that the mere agreement to do what is necessary to give jurisdiction falls far short of the agreement in this case.

Mr. Walton further relied on the expressions used by Lord Chelmsford in the case of *Shaw v. Gould*, L. R. 3 H. L. 55, at p. 77, which are, no doubt, of great weight, though they were not necessary for the decision of the case. The facts, as well as his lordship's view, can be gathered from his words. They were as follows:—"But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch courts to dissolve English marriages, the validity of the divorce of the appellant's mother from Buxton cannot be admitted if it was obtained by concert or collusion. It was argued for the appellants that the only collusion which can affect the validity of a divorce is where there are concert and connivance in the acts upon which the decree proceeds, and that, if a just cause of divorce exists without collusion, any arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable. I quite agree that if the agreement in this case had been that Buxton should bring himself within reach of the Scotch court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon attaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should 'by himself, or by any one through him, give information which should be prejudicial to the divorce.' Such an agreement as this appears to me to come within the very words of the oath *de calumnia*, which was required to be taken by Mrs. Buxton, by which she swore 'that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him; nor did she know, believe, or suspect that there had been any concert or agreement between any other person on her behalf and the said defender or any other person on his behalf with the view or for the purpose of obtaining such divorce.' It is impossible to doubt that the disclosure to the court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to receive if he had given information about it." It would appear, therefore, to have been Lord Chelmsford's opinion—first, that the agreement by a respondent to come within Scotch jurisdiction for the purpose of a divorce being obtained against him, although accompanied by a stipulation that he should receive a certain sum when the divorce was obtained, did not constitute collusion; and, secondly, that the addition of a term that he should forfeit the money if he gave information prejudicial to the divorce did amount to collusion, because the disclosure to the court of the agreement might have been prejudicial to the divorce. Lord Westbury also (p. 87) was of opinion that the decree was collusively obtained, but did not state on what grounds that opinion was based. An agreement to come within the jurisdiction in order that the suit might be brought would, no doubt, not constitute collusion. I venture, with all respect, to think that an agreement that the respondent should be paid if the suit succeeded was at least open to considerable doubt, and this must, it appears to me, have, in truth, been Lord Chelmsford's view, because he thought it collusion to agree, in effect, to conceal those stipulations, as their disclosure might be prejudicial to the divorce. But is not the agreement in this case substantially of the same character as that which Lords Chelmsford and Westbury condemned? Is not an agreement not to defend tantamount in effect to an agreement not to disclose anything prejudicial to the divorce? Although the present petitioner prudently and properly revealed his agreement with the respondent, it is clear that the respondent placed it, by agreement, out of her power to make such a disclosure, and, if so, that agreement, became, like the agreement in *Shaw v. Gould*, collusion. It was pressed strongly on me that in the case of *Hunt v. Hunt*, 47 L. J. P. M. & A. 22, 26 W. R. Dig. 79, Lord Hannen lent the weight of his authority to the narrower view of collusion. In that case it was alleged that the petitioner had been guilty of conduct conducing to his wife's adultery, and that he induced her to refrain from defending the suit by promising not to press for costs against the co-respondent. It would appear that the jury thought that these allegations were well founded. If so, there was, beyond question, a collusive agreement to conceal facts not only material but conclusive. No doubt, however, the President is reported to have said, in summing up to the jury:—"Now, collusion is this, if a party to a suit of this kind, by agreement with the others, procures the withdrawal from the notice of the court of facts which are relevant to the charge which is imputed to him or her, that is collusion." And he later asked the jury:—"Were there facts that were pertinent and material, and such as ought properly to have been submitted to the court or a jury to enable them to determine one or other of the charges against the petitioner? Of course that will depend on the answer you give to the first two questions I here put to you—namely, was his conduct such as conduced to his wife's adultery? Did he habitually use foul and indecent language to her?" It should, I think, be added that, in suggesting the cases in which there would or would not be collusion, the President appears to have put as the test whether the husband did or did not feel that the matters for the concealment of which he stipulated were relevant to the charge made against him. It would, no doubt, appear from portions of his summing up that Lord Hannen regarded proof that material, nay even decisive, facts were concealed by agreement as necessary to make out collusion. But it must be remembered it was a summing up, in which it was not necessary, or indeed desirable, to do more than state as much law as covered the case in hand; and I think that the view of Lord Hannen, expressed in his

summing up, ought not to be put higher than this that, where the main evidence of collusion is an agreement not to defend, in order to find collusion you must see that it was intended to conceal material facts. It would appear, from the case of *Bacon* v. *Bacon*, 25 W. R. 560, decided shortly before *Hunt* v. *Hunt*, that Lord Hannen considered that agreement between the parties to withhold relevant evidence was one form only of collusion; and also that the evidence need be relevant only and not decisive. The latter point is now established by the decision of the Court of Appeal in *Butler* v. *Butler*, 38 W. R. 390, 15 P. D. 66, which I recently followed in *Rogers* v. *Rogers*, [1894] P. 161. Giving, therefore, its full weight to the case of *Hunt* v. *Hunt*, it does not appear to me to conclude a case such as the present, where, though there is an agreement not to defend, there is so much more.

It is now necessary to consider the authorities relied on by the Queen's Proctor. They begin with decisions of the House of Lords before the Act of 1857. It was contended before me that these decisions were not binding in this court. I am clear, however, that they are authorities of the greatest weight. In *Shaw* v. *Gould* Lord Westbury said: "In England, since the Reformation, marriage, being no longer a sacrament, has always in theory of law been dissoluble for adultery in the wife and for incestuous adultery and other crimes by the husband; but until the recent Divorce Act this law was administered by Parliament alone, and though the decision of Parliament was in the form of an Act, as *privilegium*, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative Act. The justice of divorce was recognized, but no forensic tribunal was entrusted with the power of applying this remedy. But the law and practice of Parliament were well known, and, in fact, this House acted as a court of justice." It may be added that those decisions of the House of Lords have been repeatedly recognized as authorities, and notably so, in a case I shall presently mention, by this court. By its Standing Order of the 28th of March, 1798, No. 142 (Macqueen on the Appellate Jurisdiction of the House of Lords, 528, 791) the House of Lords imposed on itself the duty of inquiring "whether there has or has not been any collusion, directly or indirectly, on the part of the petitioner relative to any act of adultery that may have been committed by his wife; or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce or touching any proceedings or sentence of divorce had in the Ecclesiastical Court at his suit; or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife." There can, I think, be no doubt that the provisions as to collusion in the Act of 1857 were intended to continue the practice of the House of Lords in divorce cases. It is, therefore, all important to see what the House of Lords considered collusion to be. In *Chisim's case* it appeared that the costs of the plaintiff in the action of *crim. con.* were paid by the respondent's father, and also that in the Ecclesiastial Court no witnesses were called for the wife. The report states, "The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained." Now, it cannot possibly be said that in this case it was shown that any specific material facts were concealed; and it is expressly stated that the adultery was proved. It seems to me, therefore, that no conclusion is possible, except that the House of Lords considered collusion to be made out from the fact that the parties in the conduct of the proceedings were acting in concert. No doubt the inference was that where such concert existed it was impossible to be sure that all the truth was presented; but the point is that proof of concert in the conduct of the proceedings was held sufficient to engender such a doubt. In *Edwards's case*, Macqueen, p. 583, the report states—"The evidence of adultery in this case was clear; but a bond signed by Captain Edwards was produced, dated the 10th of December, 1778, securing payment of £45 a year to his wife; who, on the other hand, conditioned, on her part, that she and all those who were or might become concerned for her in her defence to the said Thomas Edwards obtaining a divorce would not give any unnecessary delay in the proceeding thereof, but in all things conform herself and themselves so as to bring the suit and proceedings to as speedy an issue as possible; yet, nevertheless, not so as to weaken any real defence that the said Judith might be able to make to the said proceedings or the said Thomas Edwards obtaining his said divorce." The bill, after counsel had been heard as to the effect of this document, was rejected, and it was so treated, therefore, merely on proof that the parties had agreed there should be no defence, and this single fact was considered to establish collusion. In *George's case*, Macqueen, p. 661, there were circumstances connected with a prior separation between the parties as to which the House was clearly not satisfied; but, besides this, great stress was laid on the fact that there had been a contract between the parties with respect to the verdict in the common law court. Beyond doubt this fact was considered of great weight, but it would have been of no weight had it not, in the judgment of the House, by itself gone far, if not the whole way, to establish collusion. I now turn to the decisions of this court. In the case of *Midgely* v. *Wood*, 30 L. J. P. M. & A. 57, 9 W. R. Div. Dig. 15, which was a case of nullity, Sir Cresswell Cresswell expressed his opinion that, in a suit for dissolution by reason of adultery, it would be collusion if the parties were to concur in getting up evidence of the case, though the case were a true one. The learned Judge Ordinary suggested that there might be a distinction in this respect in the case of a suit for nullity, where both parties might institute the suit, on the same grounds, and this appears to me to show that the view of Sir Cresswell Cresswell was that collusion existed where one party, contrary to his or her apparent interest, was found acting in concert with the other in matters material to the suit. The case of *Lloyd* v. *Lloyd and Chichester*, 3[illegible] L. J. P. M. & A. 97, 9 W. R. Div. Dig. [illegible], decided by the full court, consisting of the Judge Ordinary, Wightman, J., and Byles, J., presented facts bearing very close resemblance to those in the present case. The adultery of the respondent, who had left her husband and was living with the co-respondent, was unquestionable. The court stated that it did not find that the husband connived at or was accessory to the adultery; nor was any matrimonial misconduct imputed to him. But it was discovered by the court that the petitioner had received money from the wife's father to induce him to proceed with the suit, there being ground to think that he fancied that a dissolution of the marriage would cause him to lose a reversionary interest under a settlement, that his costs in the suit were provided by the wife's father, that neither costs nor damages were to be demanded against the co-respondent, and that the wife's father and the co-respondent assisted in getting up the evidence, the former giving facilities for obtaining evidence by allowing [illegible]

servants to say what they knew, and the latter giving money for this purpose to an agent sent by the husband to Paris, where the respondent and co-respondent were residing. The court, referring to *Chisim's case*, held that the appearance of collusion in the case was too gross and palpable for any court to overlook it. The material elements in that case of the petitioner receiving consideration to prosecute the case, and having his costs secured, are present in this. It is true that in that case the parties acted together to get up the evidence, whereas in this case that was not done, because it was unnecessary. But what is material is that no more in that case than in this was it suggested that there were any false facts put forward, or any material facts concealed. The utmost that can be said is that the court had before it parties not independent, but acting throughout in concert; and the principle to be gathered from that case appears to be that, under such circumstances, the court is forced to believe that it is being misled, or, at any rate, that it can feel no assurance that it is not. In the face of these two cases I think it impossible to say that in *Jessop* v. *Jessop*, 9 W. R. 640, 2 Swa. & Tr. 301, decided shortly after them, in 1861, Sir Cresswell Cresswell intended to limit collusion to cases in which the agreement was to keep back evidence of a good answer, or to set up a false case, nor do I think his words as to the particulars required, in his summing up to the jury, bear such a meaning. In *Gethin* v. *Gethin*, 10 W. R. 266, 31 L. J. P. M. & A. 43, decided later in 1861, I am inclined to think that Sir Cresswell Cresswell intended to express an opinion that if it were shown that a husband who was respondent withdrew charges against his wife and made no defence, not acting independently, but in pursuance of an agreement, that would constitute collusion. It is true, however, that in that case there was ground for suggesting that the wife had been guilty of adultery, though the jury found she had not; but it cannot be said that there was any concealment of the case of adultery, because in fact the husband had previously filed and abandoned a petition. But I am not sure that this case leads to any clear conclusion. Nor do I attach much importance to the case of *Harris* v. *Harris and Lambert*, 31 L. J. P. M. & A. 160, in which it appeared that the respondent had assisted the petitioner's case by facilitating proof of identification, and Sir Cresswell Cresswell said:—"Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion." I will only say that I do not think that this case in any way militates against the view more fully expressed by that learned judge in other cases I have mentioned. Probably the learned judge thought that the concert between the parties was not in a matter sufficiently material to the suit to amount to collusion. The case of *Barnes* v. *Barnes and Grimwade*, 1 R. 1 P. & D. 505, 16 W. R. Div. Dig. 6, decided in 1867 by Lord Penzance, is not so strong an authority as *Lloyd* v. *Lloyd and Chichester*, because in *Barnes* v. *Barnes and Grimwade* the husband induced the wife, for a consideration, not to oppose, but there were, no doubt, some facts brought to light which, if disclosed to the court, might have induced it to refuse the decree. Still, the words of Lord Penzance appear to me to indicate that the view of collusion did not differ from that of Sir Cresswell Cresswell. His lordship said:—"I am of opinion that although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation, to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery. With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance while a suit is pending, in order to save the expense of an application to the court for alimony. If that evidence stood alone I should hold that it is not sufficient to prove the charge of collusion; but the evidence goes much further. It amounted in substance to this—that the petitioner said to the respondent, 'If you do not oppose I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.' If that is not collusion I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not as far as her own adultery is concerned. But if she had brought to the knowledge of the court the facts which have now been proved as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the court would have granted a decree. For these reasons I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established." I have quoted the whole of the learned judge's judgment, because, taken as a whole, it seems to me to show that from the agreement not to defend alone he would have inferred collusion. On the whole, it appears to me that the authority of the House of Lords, as shown by its practice, and of Sir Cresswell Cresswell, is decidedly in favour of the position that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his fingers on any fact falsely dealt with or withheld; and I do not think that the authority of Lord Stowell, Dr. Lushington, Lord Penzance, or Sir James Hannen can be invoked in favour of a contrary opinion. It must always be remembered that, in matrimonial proceedings, this court has imposed on it, by its previous practice, and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the petitioner's claim. I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decision of the House of Lords and of the Acts of 1857 and 1860 may not be that, when the parties to a suit are acting in complete concert, the court is deprived of the security for eliciting the whole truth afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in section 7 of the Act of 1860, "collusion for obtaining a divorce contrary to the justice of the case," may be understood to indicate that, by such an agreement, justice is imperilled, but not to require that it must be affirmatively shown that, having regard only to the matrimonial conduct of the parties, justice will not be or has not been done. No doubt the protection to the court afforded by the mutual watchfulness of hostile parties often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on

both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the court declines to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem duello miscuit.* He appears before the court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stowell, he has received a real injury and *bonâ fide* seeks relief.

In the present case, being of opinion, as I have said, that the initiation of the suit was procured and its results as to costs and damages settled by agreement, I think it must be held that there was collusion. If it be necessary to constitute collusion that there should be a compact not to defend, that also was present in this instance. Further, if it be needful that suspicion of the concealment of some facts be entertained, I entertain suspicion (I do not wish to say more) as to the facts of the husband's conduct from the expressions used by the wife in her letters. But I do not think it has been shown, nor in my opinion need it, that any specific facts of a material character exist which might have been brought before the court. I was much pressed by counsel with the hardship on the petitioner of dismissing his petition and of rendering the agreement of no effect, But I cannot assent to this view. As regards freedom from an adulterous wife, if the petitioner desires that, for his own sake, I see nothing to prevent his filing a petition without agreement with her. As regards the obtaining pecuniary advantage, for himself or his child, I must say that a divorce suit ought not, in my judgment, to be made the stipulated price of any pecuniary consideration. The intervention of the Queen's Proctor must, therefore, succeed, but there will be no order as to costs. I was pressed to say that the disclosure of the agreement at the trial negatived collusion. I cannot follow that suggestion, because confession is not a defence. But I think that the conduct of the petitioner, in making this disclosure, entitles him to favourable consideration as to costs.

Decree nisi rescinded; no order as to costs.

Solicitor, *The Queen's Proctor.*

Solicitors for the petitioner, *King, Wigg, & Co.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 25.

REG. (ON THE PROSECUTION OF THE MAYOR, &C., OF ROTHERHAM) v. COUNTY COUNCIL OF THE WEST RIDING OF YORKSHIRE. (a.)

Local government — Police—County council — Borough police—Liability of county council to contribute—Additional constables introduced into a borough for an emergency—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-section* 2 (j)—*Police Act,* 1890 (53 & 54 *Vict. c.* 45), *s.* 25.

The liability of a county council to pay one-half of the costs of the pay and clothing of the police of each borough, under section 24, *sub-section* 2 (j), *of the Local Government Act,* 1888, *extends to the costs of the pay of additional constables introduced into a borough for a special emergency under section* 25 *of the Police Act,* 1890.

Appeal from an order of a divisional court (Wills and Wright, JJ.) directing a writ of *mandamus* to issue commanding the county council of the West Riding of Yorkshire to pay to the mayor, aldermen, and burgesses of the borough of Rotherham the balance claimed to be due to them in respect of one-half of the costs of the pay and clothing of the police of the said borough during the year ending the 29th of September, 1893.

At the beginning of September, 1893, disturbances were anticipated in parts of the West Riding of Yorkshire in consequence of a coal strike which was then proceeding, and it was deemed expedient to take steps for the purpose of strengthening the police force of the borough of Rotherham.

Accordingly an agreement in writing was made on the 8th of September, in pursuance of section 25 of the Police Act, 1890, between the Acting Commissioner of Police of the Metropolis and the Watch Committee of the borough of Rotherham, whereby it was agreed that fifty Metropolitan police constables should be temporarily added to the Rotherham police force, and that the Watch Committee should, when required to do so by the Receiver for the Metropolitan Police District, pay to the account of the said Receiver at the Bank of England the pay and allowances of the constables thus added, and such further sums as the Acting Commissioner should certify to have been expended for certain specified purposes.

The question intended to be determined in these *mandamus* proceedings, which were instituted by the Corporation of Rotherham, was whether the county council were liable under section 24, sub-section 2, of the Local Government Act, 1888, to pay one-half of the cost of the pay of the additional constables introduced into the borough under the above agreement.

Section 24, sub-section 2, of the Local Government Act, 1888, enacts as follows:—"In substitution for local grants the council of each county shall from time to time as from the said day pay out of the county fund and charge to the Exchequer Contribution Account the following sums, that is to say (j) they shall, subject to the provisions of this Act, pay to the council of each borough maintaining a separate police force under the County and Borough Police Acts one-half of the costs of the pay and clothing of the police of that borough during the preceding year."

Section 25 of the Police Act, 1890, provides as follows:—"(1) Where a police authority deem it expedient for any special emergency or under any exceptional circumstances to strengthen their police force (in this section referred to as the aided police force) by constables belonging to another police force such number of constables belonging to the last force may be added to the aided force, and for such period, as may be agreed on between the police authorities of the forces; and the constables so added, notwithstanding that they have not been sworn or taken any declaration as constables of the aided force, shall, during that period, be deemed, save otherwise provided by the agreement, to be for all purposes constables of the aided force, and shall have the like powers, duties, and privileges."

The Divisional Court held that, under the above sections, the county council were bound to pay to the Corporation of Rotherham one-half of the costs of the pay of the additional constables.

The county council appealed.

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

Lawson Walton, Q.C., and *Roskill*, for the appellants.—Before the passing of the Local Government Act, 1888, the liability of the Treasury to contribute to the cost of the maintenance of county and borough police forces was governed by section 16 of the Police Act, 1856, and section 2 of the Police (Expenses) Act, 1875. The practice was that the permanent police force of each county and borough was inspected annually, and, on a certificate being given by the Home Secretary that any such police force was efficient in point of numbers and discipline, the Treasury paid one-half of the cost of their pay and clothing. Section 16 of the Act of 1856 expressly provided that such payment should not extend to any additional constables appointed under section 19 of the County Police Act, 1840. The Treasury payment was made with strict regard to the number of men inspected, and was limited to the permanent police force. The Local Government Act, 1888, by section 24, sub-section 2 (*j*), merely transferred the liability to make such payment from the Treasury to the county council; it did not in any way enlarge the liability. The words "the police of that borough" in that sub-section ought to be construed as meaning the permanent police force of that borough. Additional constables introduced into a borough for a short time under an agreement made in pursuance of section 25 of the Police Act, 1890, are not part of the permanent police force of that borough. They have never been sworn in as constables of that borough, and they must be taken to have been inspected in their own district, and in that case they will have been paid for by their own county council. The words "for all purposes" in section 25 of the Police Act, 1890, are relied on by the other side, but they merely mean for all purposes of duty and discipline. The additional constables, though imported for emergency work, are liable to perform all duties as if they were members of the aided force. It cannot have been intended that an agreement made under this section could have the effect of throwing an obligation on a local authority which was not consulted when the agreement was made.

Crump, Q.C., and *A. Macmorran*, for the respondents, were not called upon to argue.

Lord ESHER, M.R.—In my opinion the question which we have to determine is governed entirely by section 24, sub-section 2, of the Local Government Act, 1888, and section 25 of the Police Act, 1890, and is not touched by any other statutes. Section 24, sub-section 2, of the Act of 1888 enacts that the council of each county shall make a number of payments which before were made out of the Exchequer, and, among other things, it says: "(*j*) They shall, subject to the provisions of this Act, pay to the council of each borough maintaining a separate police force under the County and Borough Police Acts one-half of the costs of the pay and clothing of the police of that borough during the preceding year." That, of course, at the time when the Act was passed, meant the permanent police force of the borough. At that time the power of borrowing additional constables from another police authority did not exist; and, therefore, such additional constables were not then within the meaning of the section. It is to be noticed that what the county council have to pay is one-half of the costs of the pay and clothing of the police, which means one-half of what the pay and clothing of the police has cost the borough. Therefore, if in any case the borough did not supply the men with clothing, the section would then only be applicable to the pay. Then comes section 25 of the Police Act, 1890, and that shows who "the police of the borough during the preceding year" are to be. It provides that, where a police authority deem it expedient for any special emergency to strengthen their police force by constables belonging to another police force, "such number of constables belonging to the latter force may be added to the aided force, and for such period, as may be agreed on between the police authorities of the forces." The borrowed constables are said to be "added" to the force; it is clear, therefore, that the force itself is increased in numbers by the addition. The section then continues:—"And the constables so added, notwithstanding that they have not been sworn in or taken any declaration as constables of the aided force, shall during that period be deemed, save as otherwise provided by the agreement, to be for all purposes constables of the aided force, and shall have the like powers, duties, and privileges." The borrowed police are to be deemed for all purposes to be part of the police of the borough to which they are lent. We must now, then, go back to section 24 of the Local Government Act, 1888, and construe it in the light of the later enactment. The liability of the county council is now seen to be to pay one-half of the costs of the pay and clothing of the permanent police force of the borough as added to by the borrowed police. In the present case no question arises as to any costs with regard to the clothing of the borrowed police, for no such costs have been incurred by the Corporation of Rotherham; but the corporation having expended on the pay and clothing of their regular police a certain sum, and having also paid to the Receiver of the Metropolitan Police District another sum for the pay of the additional constables, these two sums together make up the costs to which the sub-section refers, and therefore the corporation are entitled to receive one-half of that amount from the county council. I am of opinion that the judgment of the Divisional Court is right, and that the appeal must be dismissed.

LOPES and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellants, *Badham & Williams*, for *Trevor Edwards*, Wakefield.

Solicitors for the respondents, *Stevens, Bawtree, & Stevens*, for *H. H. Hickmott*, Rotherham.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — Jan. 11, 12, 16, 26.

REG. v. JUSTICES OF LONDON. (*a*.)

Justices—Licensing law—Appeal—Costs—"Party" to appeal—Discretion of justices at quarter sessions— Mandamus—9 *Geo.* 4, *c.* 61, *s.* 29—*Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 31, 32—*Summary Jurisdiction Act*, 1884 (47 *&* 48 *Vict. c.* 43), *s.* 6.

Licensing justices who, being served with a notice of appeal, appear at the hearing of the appeal and actively oppose it are "a party" within clause 5 of section 31 *of the Summary Jurisdiction Act*, 1879.

Section 29 *of* 9 *Geo.* 4, *c.* 61, *so far as it applies to such licensing justices, is inconsistent with section* 31 *of the Summary Jurisdiction Act*, 1879, *as altered by the Summary Jurisdiction Act*, 1884, *and, by virtue of section* 55 *of the Act of* 1879, *must be taken to have been repealed.*

In such cases the justices at quarter sessions have a discretion as to costs, and the court will not grant a

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

mandamus *to compel them to order costs to be paid to licensing justices.*

Semble, *as to licensing justices who do not make themselves parties to the appeal, section* 29 *of* 9 *Geo.* 4, c. 61 *is still applicable, and the court of quarter sessions has no jurisdiction to deprive them of their costs.*

The Summary Jurisdiction Act, 1884, *which repeals section* 32 *of the Summary Jurisdiction Act,* 1879, *down to the words "in accordance with the conditions and regulations contained in this Act," repeals that section down to where those words occur for the second time.*

Appeal from the decision of the Divisional Court (Pollock, B., and Grantham, J.).

At the general annual licensing meeting for the Tower Division of the County of London held on the 30th of March, 1894, one Tant applied for the renewal of a licence to sell liquors to be consumed on premises known as the Cannon Stores public-house, and such renewal was refused.

On the 3rd of April, 1894, the freeholder of the premises, F. J. Magerkorth, appealed to the quarter sessions, and notice of appeal was given to the licensing justices. They appeared by counsel and opposed the appeal, which was heard and dismissed on the 21st of July, 1894.

Application was made to the court by the licensing justices that the appellant should pay to them, by way of costs, such sum as should indemnify them for their expenses under 9 Geo. 4, c. 61. s. 29.

The quarter sessions were of opinion that they had a discretion in the matter, and refused to give costs to the licensing justices.

The licensing justices then applied for a *mandamus* to the justices of the County of London in quarter sessions commanding them to hear and determine, according to law, the application by the licensing justices for an order adjudging that Magerkorth should pay the costs of the respondents in the appeal.

The Divisional Court held that a *mandamus* ought not to be granted.

The licensing justices appealed.

By section 29 of 9 Geo. 4, c. 61 it is enacted that "in every case where notice of appeal against the judgment of any justice in or concerning the execution of this Act shall have been given, and such appeal shall have been dismissed, or the judgment so appealed against shall have been affirmed, or such appeal shall have been abandoned, it shall be lawful for the court to whom such appeal shall have been made or intended to be made, and such court is hereby required, to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given, or to whomsoever he shall appoint, such sum by way of costs as shall, in the opinion of such court, be sufficient to indemnify such justice from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal."

Section 31 of the Summary Jurisdiction Act, 1879, provides that "where any person is authorized by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court subject to the conditions and regulations following." Clause (5) provides that "the court of appeal may also make such order as to costs to be paid by either party as the court may think just."

The Summary Jurisdiction Act, 1884, after a preamble in the following terms:—"Whereas the Summary Jurisdiction Acts regulate the procedure before courts of summary jurisdiction, and on appeal from those courts to courts of quarter sessions, and it is expedient to provide for uniformity of procedure in all such cases," by section 4 and the schedule repeals in section 31 of the Summary Jurisdiction Act, 1879, the words, "by this Act or any future Act." Section 6 is as follows:—"Where a person is authorized by any Act passed before the commencement of the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, or from the refusal to make any conviction or order in pursuance of those Acts, to a court of general or quarter sessions, he shall, after the passing of this Act, appeal to such court subject to the conditions contained in the Summary Jurisdiction Act, 1879, with respect to an appeal to a court of general or quarter sessions."

Jelf, Q.C., Horace Avory, and *D'Eyncourt,* for the appellants.—The justices at quarter sessions have no jurisdiction to refuse licensing justices their costs. By virtue of section 29 of the Act 9 Geo. 4, c. 61 licensing justices are entitled to indemnity costs as a matter of right, and the justices at quarter sessions have refused to perform a merely ministerial duty imposed upon them by Act of Parliament.

Poland, Q.C., and *Danckwerts,* for the justices of London.—The licensing justices were parties to the appeal, and section 31 of the Summary Jurisdiction Act, 1879, as amended by the Summary Jurisdiction Act, 1884, has the effect of giving the justices at quarter sessions a discretion as to costs. That discretion they have exercised, and a *mandamus* will not go.

Marshall Hall, for Magerkorth.

Jelf, Q.C., replied.

The following statutes and cases were referred to:—9 Geo. 4, c. 61, s. 29; Sir John Jervis' Act (11 & 12 Vict. c. 43); 12 & 13 Vict. c. 45, s. 5; The Summary Jurisdiction Act, 1879, s. 31; the Summary Jurisdiction Act, 1884, preamble, ss. 6, 7; the (Interpretation) Act, 1889, s. 13 (11); *Reg.* v. *Justices of Monmouthshire,* 1 Dow. & L. 145; *Reg.* v. *Justices of Glamorganshire,* 40 W. R. 436, [1892] 1 Q. B. 621; *Reg.* v. *Huntley,* 23 L. J. M. C. 106, 2 W. R. Dig. 128; *Garnett* v. *Bradley,* 26 W. R. 698, 3 App. Cas. 944; *Reg.* v. *Justices of Middlesex,* 2 Dowl. N. S. 719; *Reg.* v. *Newton,* 40 W. R. 688, [1892] 1 Q. B. 648; *Reg.* v. *King,* 36 W. R. 600, 20 Q. B. D. 430; *R.* v. *Justices of North Riding,* 2 B. & C. 286; *Reg.* v. *Justices of the West Riding of Yorkshire,* 10 W. R. 757, 2 B. & S. 811; *Reg.* v. *Mainwaring,* 6 W. R. 594, Ell. B. & Ell. 474; *R.* v. *Justices of the West Riding of Yorkshire,* 1 A. & E. 563; *Reg.* v. *Richards,* 20 L. J. Q. B. 351; *Reg.* v. *Edlin,* 65 L. T. N. S. 83, 40 W. R. Dig. 174; *Reg.* v. *Adamson,* 24 W. R. 250; *Reg.* v. *Hellier,* 17 Q. B. 229; *Reg.* v. *Justices of Montgomeryshire,* 14 L. J. M. C. 142; *Reg.* v. *Shingler,* 34 W. R. 490, 17 Q. B. D. 49; *London County Council and the Churchwardens and Overseers of West Ham,* 40 W. R. 663, [1892] 2 Q. B. 173; *Reg.* v. *Justices of Glamorganshire,* 37 W. R. 493, 22 Q. B. D. 628; *Reg.* v. *Lord Mayor of London,* 57 L. T. N. S. 491; *Fourth City Mutual Building Society and the Churchwardens and Overseers of East Ham,* [1892] 1 Q. B. 651; *Deputies, &c., of Borough of Leicester* v. *Hewitt,* 62 L. J. M. C. 51, 41 W. R. Dig. 97; *Reg.* v. *Justices of Hants,* 1 B. & Ad. 654; *Reg.* v. *Davidson,* 24 L. T. N. S. 22, 19 W. R. C. L. Dig. 21; *Reg.* v. *Goodall,* L. R. 9 Q. B. 557, 22 W. R. Dig. 13; *Reg.* v. *Blanshard,* 13 Q. B. 318; *Reg.* v. *Justices of Cumberland,* 4 Ad. & Ell. 695; *Ex parte Overseers*

&c., of Ackworth, 13 L. J. M. C. 38; *Reg.* v. *Goodrich*, 19 L. J. M. C. 240; *Reg.* v. *London County Council*, 40 W. R. 285, [1892] 1 Q. B. 190; *Price* v. *James*, 41 W. R. 57, [1892] 2 Q. B. 428; *Reg.* v. *Deputies, &c., of Leicester*, 15 Q. B. 671; *Reg.* v. *Purdey*, 13 W. R. 75, 5 B. & S. 909; *Reg.* v. *Justices of Gloucestershire*, 41 W. R. 379; and to Tapping on Mandamus, p. 305. [LINDLEY, L.J., referred to *Brooke* v. *Ewers*, Str. 113.]

Cur. adv. vult.

January 26.—LINDLEY, L.J.—This is an appeal by the justices of the peace for the Tower Division of London against an order of a divisional court discharging, with costs, a rule for a *mandamus* to the London Quarter Sessions. In substance, although not in form, the *mandamus* was to compel the London Quarter Sessions to order a person named Magerkorth to pay the appellants certain costs incurred by them upon an appeal from a refusal to renew his licence. The appellant justices contend that under the Licensing Act of 9 Geo. 4, c. 61, s. 29, they are entitled, as a matter of right, to an order indemnifying them against the costs in question. The court of quarter sessions, while affirming the order of the licensing justices, refused to give them any costs of the appeal against their order. They did so, as we were informed, on the ground that they had a discretion in the matter of costs under section 31 of the Summary Jurisdiction Act, 1879. The Divisional Court refused a *mandamus* upon the ground that the question was one for the quarter sessions to decide, and that, even if the court of quarter sessions were wrong in the view they took of the Act of 1879, no *mandamus* ought to go.

It was strongly contended before us that the court of quarter sessions had no jurisdiction to refuse the licensing justices their costs, and that a *mandamus* ought to go to compel the court of quarter sessions to order such costs to be paid. The extent of the jurisdiction of an inferior court must necessarily be ascertained before the question whether they have exceeded it or have refused to exercise, it can be determined; and a mistake made by an inferior court upon the extent of its own jurisdiction can be corrected by *mandamus*, prohibition, or *certiorari*, according to the circumstances of the case: see as to *mandamus*, *Brooks* v. *Ewers*, *Reg.* v. *The Justices of Monmouth*, and *Reg.* v. *King*. Unless this were so there would be no method of controlling inferior courts. But from time immemorial the Court of Queen's Bench has had the power of compelling them to exercise their jurisdiction and of preventing them from exceeding it. On the other hand, it is equally clear that there is no appeal from the decision of an inferior court upon any matter which that court is competent to decide unless a right of appeal is conferred by statute. Before therefore determining whether a *mandamus* ought to go or be refused it is necessary to ascertain what jurisdiction the court of quarter sessions has over costs in cases like the present.

This inquiry involves the necessity of examining several Acts of Parliament in order to determine whether section 29 of 9 Geo. 4, c. 61 is still in force, and, if it is, whether it is applicable to this particular case. Sections 27, 28, and 29 of 9 Geo. 4, c. 61 relate to appeals from orders made by justices of the peace. A right of appeal to quarter sessions is given by section 27. Section 28 authorizes justices to bind persons to appear and give evidence on the appeal. Section 29 provides, *inter alia*, for the payment by an unsuccessful appellant of the costs and charges of the justices whose order is appealed against, and who have to be served under section 27 with notice of the appeal. The costs and charges to which justices are entitled under this section are strictly limited to those which they have incurred by reason of having been served with notice of the appeal. In 1872 these sections were expressly repealed except so far as they relate to renewals of licences and transfers of licences under sections 4 and 14 of 9 Geo. 4, c. 61: see 35 & 36 Vict. c. 94, s. 75, and schedule 2. The language of this repealing Act would lead anyone to suppose that sections 27, 28, and 29 of 9 Geo. 4, c. 61 were wholly unrepealed in 1872. But this appears not to be the case, for it was decided in 1851 by *Reg.* v. *Hellier* that part of section 29 of 9 Geo. 4, c. 61 had been repealed in 1848 by the Summary Jurisdiction Act, 11 & 12 Vict. c. 43, s. 27. *Reg.* v. *Hellier* was an appeal from a conviction and not an appeal from an order relating to a renewal or transfer of a licence. But *Reg.* v. *Hellier* is important as shewing that the provisions of 9 Geo. 4, c. 61 relating to notices to justices and to costs to be paid to them by an applicant were very materially altered, and in some very important respects repealed by the Summary Jurisdiction Act, 1848. It is, however, in my opinion, plain that in 1872 the Legislature intended to preserve and did preserve sections 27, 28, and 29 of 9 Geo. 4, c. 61 so far as they were then in force, and so far as they related to the renewal of licences or the transfer of licences under sections 4 and 14 of the same Act. If this conclusion be correct it follows that, notwithstanding the repeal of sections 27, 28, and 29 of 9 Geo. 4, c. 61 as regards all matters except renewals or transfers of licences, still, upon an appeal to quarter sessions from an order made on an application to renew a licence, a justice served with notice of the appeal continued to be entitled under section 29 of the Act of 9 Geo. 4, c. 61 to an order that the unsuccessful appellant should pay him such sum by way of costs as should, in the opinion of the court of quarter sessions, be sufficient to indemnify him "from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal." Such I take to have been the law as it stood after the passing of the Act of 1872. Since that Act there has been no further express repeal of the sections 27, 28, and 29 of 9 Geo. 4, c. 61. But there have been several Acts consolidating and amending the various statutes relating to proceedings before magistrates, and one question is whether these later statutes are so inconsistent with sections 27, 28, and 29 of 9 Geo. 4, c. 61 as to have impliedly repealed them even in licensing cases. The subsequent statutes to which I refer are the Summary Jurisdiction Acts of 1879 and 1884. These Acts, with the previous Summary Jurisdiction Acts of 1848 and 1849, form a code of procedure which it is necessary to study with care. In interpreting these Acts it must be borne in mind that justices in dealing with licensing matters are a court of summary jurisdiction within the meaning of these Acts. This was decided in *Reg.* v. *Glamorganshire* to be the true construction of the Summary Jurisdiction Act, 1884, and of the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 13, clause 11). But the Act 9 Geo. 4, c. 61 is not one of the "Summary Jurisdiction Acts" (see 42 & 43 Vict. c. 49, s. 50, and 52 & 53 Vict. c. 63, s. 13, clause 7), and this circumstance creates some difficulty in applying those Acts to licensing cases. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), is divided into parts. Part 2 is headed "Amendment of Procedure," and sections 31 and 32 relate to appeals. These sections do not give a right to appeal, but are applicable respectively to cases in which a right to appeal is given either by the Act itself or any future Act (section 31), or by some

prior Act (section 32). This last section, which is the one applicable to appeals under 9 Geo. 4, c. 61, was not obligatory, and there is nothing in the Act of 1879 which repeals sections 27, 28, and 29 of 9 Geo. 4, c. 61 so far as they were then in force. That Act is not referred to in the schedule of statutes repealed by section 55 of the Act of 1879, nor, having regard to section 32, can it, I think, be said that the above sections of 9 Geo. 4, c. 61 are inconsistent with the Act of 1879. The Summary Jurisdiction Act of 1879 was, however, materially amended by the Summary Jurisdiction Act, 1884. The preamble of this Act is important, and runs thus: "Whereas the Summary Jurisdiction Acts regulate the procedure before courts of summary jurisdiction, and on appeals from those courts to courts of quarter sessions, and it is expedient to provide for uniformity of procedure in all such cases." The Act then, by section 4 and the schedule, repeals a great number of enactments, not, however, including 9 Geo. 4, c. 61, ss. 27-29. But sections 31 and 32 of the Summary Jurisdiction Act, 1879, are very materially altered. The first part of section 32 is repealed down to the words "in accordance with the conditions and regulations contained in this Act." These words occur twice in section 32 of the Act of 1879. They occur first in the middle of a sentence, and secondly at the end of the section. Looking at section 32 as it stands in the Act of 1879 and as partially repealed by the Act of 1884, I come to the conclusion that section 32 of the Act of 1879 is repealed down to the words in question where they occur for the second time. Any other construction renders the unrepealed part of the section unintelligible and inconsistent with the repeal of any part of it. Section 31 of the Act of 1879 is expressly amended by striking out the words "By this Act or any future Act." The effect, then, of the Act of 1884 on the Act of 1879 is to make section 31 of that Act apply to all appeals to quarter sessions from courts of summary jurisdiction. But, if so, section 31 is inconsistent with so much of section 29 of 9 Geo. 4, c. 61 as entitles the licensing justices to costs, if they can be regarded as "a party" within clause 5 of section 31. Moreover, if this inconsistency is established, then by section 55 of the Act of 1879 section 29 of 9 Geo. 4, c. 61 is repealed so far as the inconsistency extends. The question for determination thus becomes narrowed down to the question whether the licensing justices can be regarded as a party within clause 5 of section 31 of the Act of 1879 as amended by the Act of 1884. I certainly am not prepared to hold that they cannot be so regarded. Whether they can or cannot seems to me to depend on the circumstances of each case. If there is an objector who is the real party, and the licensing justices, though served with notice of the appeal, either do not appear or, even if they do, yet take no part in the appeal beyond informing the court of appeal of the reasons for which they acted, then, in my opinion, the justices are not parties. This conclusion is warranted by comparing the language of clause 2 of section 31 with clause 5 of the same section, and is in conformity with *R.* v. *Justices of Hants*, *Reg.* v. *Purdey*, and *Reg.* v. *Goodall*. If there is no objector, and the licensing justices take no active part in the appeal, or merely inform the court of the reasons for their own order, then again, in my opinion, they are not parties to the appeal. But, whether there is an objector or not, if the licensing justices not merely inform the court of quarter sessions of the reasons for which they acted, but act as objectors themselves and actively oppose the appeal, then, in my opinion, they make themselves parties, and may even be made to pay costs. In the case supposed it is by no means clear that they could not have been made to pay costs under section 27 of 9 Geo. 4, c. 61 (see *Reg.* v. *Justices of Cheshire*, 11 A. & E. 139). Such costs are not the costs contemplated in the first part of section 29 of that Act, but are costs of an entirely different character.

In this particular case there were no respondents to the appeal to quarter sessions except the licensing justices. The order of quarter sessions describes them as parties; they appeared by counsel to support their own order; and, if I understand rightly, they actively opposed the appellant. In short, they acted as his opponents, and made themselves parties to the appeal. They have not applied, and they could not successfully apply, for a *mandamus* on the ground that the court of quarter sessions took an erroneous view of their conduct. The appellants rest their case on the broad ground that, whatever their conduct was, the court of quarter sessions had no jurisdiction to deprive them of their costs. I cannot adopt this view, and I have come to the conclusion that the decision appealed from was correct. As already observed, the costs to which justices would be entitled under the first part of section 29 of 9 Geo. 4, c. 61 are strictly confined to costs and charges incurred by them by reason of the notice served upon them. Any costs beyond those are not within the section. If, as appears to be the case, there is no statute except 9 Geo. 4, c. 61 which entitles justices (who do not make themselves parties) to be indemnified against such costs and charges as they are entitled to under section 29 of that Act, it will follow that section 29 is still applicable to such a case, and that the court of quarter sessions will have no jurisdiction to deprive them of their costs. Moreover, if in the case supposed the court of quarter sessions were to refuse them their costs, upon the ground that section 29 of 9 Geo. 4 c. 61 was repealed, I should be of opinion that a *mandamus* ought to go to compel the quarter sessions to exercise their jurisdiction in the only way in which they could exercise it—viz., by making an order for the payment by the appellant of such costs. But the present case is not one of that description. *Garnett* v. *Bradley* is, in my judgment, an authority for, and not against, the conclusion at which I have arrived. It leaves justices who do no more than section 29 of 9 Geo. 4, c. 61 contemplated entitled to the indemnity which that section has provided for them, but justices who make themselves parties are not entitled to such indemnity.

A. L. SMITH, L.J.—This is an appeal from a judgment of the Queen's Bench Division, refusing to make absolute a rule *nisi* for a *mandamus* commanding the justices in and for the administrative county of London in quarter sessions assembled to hear and determine according to law an appeal, in which one Magerkorth was appellant and P. M. Martineau and other the licensing justices acting in and for the Tower Division of the said county were respondents; the object sought by the *mandamus* being that the licensing justices, who were respondents to the appeal, might obtain from the justices of the county of London an order for costs under section 29 of the 9 Geo. 4, c. 61, which the justices of London had refused to make. This rule *nisi* was resisted, upon the ground that, as to this matter of costs, they, the justices of London, had heard and correctly determined according to law, and, even if not, it was a matter within their jurisdiction to hear and determine, and upon either ground the rule must be discharged. My brothers Pollock and Grantham were of opinion that this latter ground was sufficient to discharge the rule upon; but, considering the course the forcible and learned arguments have taken in this court, it is necessary to determine the main points

first, in order to ascertain what is the position of licensing justices as to costs in a case like the present. That they were in fact respondents to the appeal in the present case cannot be denied. The order of sessions describes them as parties to the appeal, and, in the affidavit of Mr. Martineau and his solicitor, Beal, they designate themselves as "respondent justices," and it appears that they instructed counsel on their behalf to contest, and he did contest, the appeal with the appellant. The important point upon the merits of the case is whether, when an appeal is brought at quarter sessions under section 27 of the Act 9 Geo. 4, c. 61 against the refusal of justices at the general annual licensing meeting to grant a renewal of a licence, and such appeal is dismissed, the justices in quarter sessions are bound, under section 29 of that Act, to order that the appellants shall pay to justices who appear as litigant parties and contest the appeal their costs, so as to indemnify such justices therefrom.

It is necessary, in the first place, to accurately determine what sections 17 to 29 of the Act of 9 Geo. 4, c. 61 enact, for, until this is done, it is impossible to understand what is the position of licensing justices as to costs, either under that Act or the subsequent Summary Jurisdiction Acts, when their decision is appealed against. By section 27 of 9 Geo. 4, c. 61 an appeal is given to a party aggrieved by any act of any justice done in or concerning the execution of the act, and in the present case Magerkorth, the landlord, being a party aggrieved by reason of his tenant, Tant, having been refused a renewal of his licence by the respondent justices, appealed to quarter sessions. It will be seen that there is no provision in section 29 as to who is to be respondent to such an appeal, and, indeed, in cases in which there is no one appearing before the licensing justices to object to the renewal of a licence, there is no one who can be compelled to be a respondent. If there be an objector, he would ordinarily be the respondent. The licensing justices cannot be made respondents and parties to the appeal against their will. All that the appellant has to do as regards them is to give them notice of his intention to appeal. Upon this notice being given, the licensing justices have three courses open to them. They need not go to quarter sessions at all. They may go there in their character of justices, as distinguished from that of litigant parties to the appeal. They may also go there as respondents—*i.e.*, litigant parties to the appeal—if the appellant treats them as such and they accept that position. Although there is no machinery by which justices can be made respondents against their will, I know of no impediment to their becoming in fact respondents, if the appellants seek to make them parties and they acquiesce in being so treated. If they become parties to the appeal, in my judgment the provision in section 27 as to costs applies to them as to any other respondents, and the court of quarter sessions may determine the appeal "with or without costs, as to the court shall seem meet." By section 29 the licensing justices are dealt with, not as parties to the appeal, but as justices, who, having notice of the appellant's intention to appeal, may, if they think fit, go to quarter sessions, not as litigant parties, but as justices whose decision is appealed against, and inform the court of quarter sessions as to the reasons for their decision. The costs which by this section (29) the court of quarter sessions are required to award to such justices, whether the appeal be dismissed or allowed, are such as shall, in the opinion of the court, be sufficient to indemnify such justices from all cost and charge whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of the appellant to appeal. The costs *inter partes*, as before stated, are dealt with in section 27. These are not the indemnity costs, as Mr. Jelf calls them, which are dealt with in section 29. As to these latter costs section 29 is imperative, that the court of quarter sessions, if the appeal is dismissed, shall make order that they shall be paid by the appellant to the justices upon their appearing as justices, and if default in payment of such costs be made, the appellant may be committed to gaol until he pays them, and if the appeal be allowed, the justices in quarter sessions may make order that the licensing justices are to obtain like costs from the treasurer of the county. That the justices who receive the above-mentioned notice are not thereby rendered parties to the appeal is, upon examining the section, clear. If they were parties there would be presumably some provision by which the appellant could get his costs from the justices, if he succeeded, and yet in section 29 there is none. The authorities also show that justices who merely have notice of the appellant's intention to appeal served upon them are not thereby made parties to the appeal: see *Reg.* v. *Purdey*, *Reg.* v. *Goodall*, and *Price* v. *James* in this court. Unless the licensing justices accept the position of respondents, contesting the appeal with the appellant, they are not parties to the appeal; but if they do, in my judgment they become parties thereto, and accept the responsibilities attaching thereto.

It was argued on behalf of the justices of London that section 29 of the Act of Geo. 4 was repealed by implication, firstly, by section 27 of Sir John Jervis' Act (11 & 12 Vict. c. 43), and, if not by that, then by the subsequent Summary Jurisdiction Acts, by section 31 of the Act of 1879, read in conjunction with the Summary Jurisdiction Act of 1884, ss. 6, 7, and read, if necessary, with the Interpretation Act of 1889 (52 & 53 Vict. c. 63), s. 13, sub-section 11.

That these Summary Jurisdiction Acts form the code by which the procedure of justices in petty sessions and upon appeal to quarter sessions is now regulated I do not doubt, and the preamble to the Act of 1884 shows that this is so, and in the cases of *Reg.* v. *Shingler* and *Reg.* v. *Justices of Glamorganshire* it was so held. That this code also applies to appeals in quarter sessions from decisions of licensing justices was held by this court in the case of *Reg.* v. *Justices of Glamorganshire and Pontypool.* In the case of *Reg.* v. *Hellier*, in 1851, it was held that section 27 of Sir John Jervis' Act was inconsistent with some parts of section 29 of the Act of Geo. 4—viz., the direction as to payment of the costs awarded to the clerk of the peace, instead of to the justice, and as to the provision for imprisoning the appellant until he paid such costs; but the case, although it refused to enforce a *fi. fa.* founded upon an order drawn up in the terms of section 29 of 6 Geo. 4, c. 61 did not repeal the section *in toto*, as at one time suggested by Mr. Poland, and, indeed, this was but faintly insisted upon at the bar. The 2nd schedule to the Licensing Act, 1872, shows that at that date section 29 of 9 Geo. 4, c. 61 was unrepealed, for by that Act certain portions of the section were repealed, leaving it untouched as to other parts which relate to the matters in hand—a clear indication that the Legislature did not then consider the section already repealed. I do not doubt that, since the passing of the Summary Jurisdiction Act of 1884, appeals from licensing justices to quarter sessions, as regards costs *inter partes*, are regulated by section 31 of the Act of 1879, sub-section 5, and consequently an appellant must now appeal subject to the condition that the court of quarter sessions may make such order as to costs to be paid by either party as the court may think just. The word "party" in sub-section 5 of

section 31 means precisely the same as the word "party" in sub-section 3 of that section—*i.e.*, the litigant parties to the appeal—and section 31 does not touch the provisions of section 29 of the Act of Geo. 4, which has solely reference to the peculiar position of justices who appear at quarter sessions, not as litigant parties to the appeal, but as justices who are not parties thereto.

These being the provisions of this code, I have arrived at the conclusion that section 31 of the Act of 1879, read in conjunction with the Act of 1884, does not repeal section 29 of the Act of 9 Geo. 4, c. 61, and, excepting in so far as *Reg.* v. *Hellier* held that section 27 of Jervis' Act is inconsistent with it, that it still stands unrepealed. But, though this is so, what was the jurisdiction to be exercised by the justices of London in the present appeal as to costs? It is true that they decided to dismiss the appeal—they had two litigant parties before them the appellant on the one hand and the respondent justices on the other—then what was to be done? In my judgment, to exercise the discretion vested in them either under section 27 of 9 Geo. 4, c. 61 or section 31 of the Act of 1879, as to whether they would award costs to the parties, who were respondents; and when the justices of London decided that they had such discretion in the present case, in my judgment they decided rightly, and according to law.

A series of cases upon *mandamus* was cited to us upon the one side and the other as to when *mandamus* had been granted and refused. The importance of these cases is to ascertain upon what principle it is that the court has acted. It is of no avail to discuss whether each case, upon the facts of the case, was within or without the rule applicable to the granting or refusing a *mandamus*. The rule is this: when an inferior court hears and determines a matter within its jurisdiction, however erroneously it may decide either the law or facts therein, no *mandamus* will go, the reason being that the Court of Queen's Bench has no prerogative to decide by way of appeal matters decided by an inferior court within its jurisdiction. Where an inferior court declines jurisdiction the Court of Queen's Bench has a prerogative to interfere by way of *mandamus* to command the inferior court to proceed to do its duty according to law. Where an inferior court has usurped—that is, has exceeded its jurisdiction—*certiorari* or prohibition is the appropriate remedy. The judgment of Lord Esher in *Reg.* v. *King* lays down in other words this rule as to *mandamus*. It appears to me that if the sole jurisdiction given to an inferior court by an Act of Parliament be, that, upon the happening of a given event, the inferior court shall award costs to certain designated persons to be paid by another designated person, and the event in fact happens, and there is no dispute as to who the designated persons are, and the inferior court nevertheless refuses to obey the Act and to award costs as enacted, it declines jurisdiction within the meaning of the rule, and then the inferior court, to give itself jurisdiction to do so, can no more decide that the Act has been repealed than it can decide any other fact to exist which does not exist so as to give itself jurisdiction. But that case is not the present case when rightly understood. Upon the assumption that the justices of London were in error in the conclusion they arrived at (though I think they were not, whatever their reasons may have been), when the respondent justices were applying for costs under section 29 of 9 Geo. 4, c. 61 it was for the justices of London to determine whether, under the circumstances which then existed, the respondent justices were persons entitled to costs under section 29, or were persons entitled to costs as being litigant parties to the appeal and to whom section 29 did not apply, and I think that this was a matter clearly within their jurisdiction to decide. Consequently, whichever ground be taken, each is fatal to the rule *nisi*. For these reasons, in my judgment, the appeal of the respondent licensing justices fails, and must be dismissed, with costs. As to whether the respondent justices can obtain the costs they have been put to under section 66 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), I express no opinion, for the section does not, in my judgment, affect the present case.

Appeal dismissed.

Solicitor for the licensing justices, *E. W. Beal.*

Solicitors for Magerkorth, *King & Burrell.*

Solicitors for the justices of London, *Nicholson & Patterson.*

High Court of Justice.

Chan. Div. Stirling, J. } Jan. 30; Feb. 19.

In re TOWNSEND'S CONTRACT. (*a.*)

Vendor and purchaser—Title—Legal estate in copyholds devised to trustees—Limitation of estate—Executory devise—Vendor and Purchaser Act, 1874.

A. by his will devised all his freehold and copyhold estates at H. to trustees, their heirs and assigns, upon trust to pay the rents and profits thereof to T. for her life, and after her death to stand possessed of the same upon trust for such person or persons as T. should by her will appoint, and in default of appointment to T. absolutely. The trustees of A.'s will were duly admitted tenants to the testator's copyhold property. T. died in 1893, *having by her will directed the trustees thereof to sell the said copyhold estates at H. and assure them to the purchaser thereof. The trustees sold them by auction to B., who objected to the title on the ground that the trustees of A.'s will were dead, that their successors in title had never been admitted tenants on the roll in respect of the said copyholds, and that until the persons entitled were thus admitted there was no one who could make a proper surrender to B. On a summons by the vendors for a declaration that they had shown a good title,*

Held, that the direction in T.'s will to sell and assure to a purchaser operated as an exercise of the power of appointment conferred upon T. by the will of A.; that such direction must not be read as taking effect with reference to the legal estate in the copyholds devised to T. in default of appointment; and that the legal estate remained vested in the trustees of A.'s will. Consequently the purchaser's objection was well founded.

Doe *v.* Barthrop, 5 *Taunt.* 382, *distinguished.*

John Ward by his will devised to the trustees therein named, their heirs and assigns, all his freehold and copyhold estates at H., to hold to them, their heirs and assigns, for ever upon trust to pay the rents and profits thereof to Mrs. Townsend during life for her separate use and without power of anticipation, and after her death to stand seised or possessed of the said estates in trust for such person or persons as she should by her will appoint, and in default of and subject to any such appointment the testator gave the said estates to the said Mrs. Townsend, her heirs and assigns, for ever.

The said John Ward died in 1861, and after his

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

decease the trustees of his will were duly admitted tenants to the copyhold property devised by the testator.

Mrs. Townsend died in 1893, having by her will exercised the power of appointment given to her by the will of John Ward as aforesaid, directing her trustees to sell all the said copyhold estates at H., and to assure the same to the purchaser or purchasers thereof, his or their heirs and assigns respectively.

In compliance with this direction the trustees put up the said copyhold estates to auction and sold them, tracing their title from the will of John Ward aforesaid, and stating in the conditions of sale that all the trustees of that will were dead.

The purchaser objected to this title, on the ground that the trustees of John Ward's will had been admitted tenants on the roll, but no devolution of the legal estate had been shown. He contended that the person entitled must be admitted as tenant on the roll at the expense of the vendors, so that a proper surrender could be made to the purchaser.

The vendors replied that this was unnecessary, as the legal estate was, in effect, only vested in the trustees of John Ward's will for the life of the tenant for life, and after the death of the latter it vested in the purchaser as appointee under her will, whereby she exercised the power of appointment given to her by the said will of John Ward.

This was a summons taken out by the vendors for a declaration that they had sufficiently complied with the purchaser's requisition, and that they had shown a good title.

Methold, for the summons.

A. Beddall, for the purchaser.

Feb. 19.—STIRLING, J.—I am of opinion that the requisition has not been sufficiently complied with. The question I have to decide is whether the trustees of the will of John Ward took the legal estate in these copyholds. It is to be observed that the devise includes both freehold and copyhold estates, but it has been decided by the late Master of the Rolls in *Baker* v. *White*, 23 W. R. 670, L. R. 20 Eq. 166, that, although the same general rules govern the determination of the question of what estate trustees of a will can take in the case of both classes of property, yet, in applying those rules, the question as to the freeholds and copyholds must be decided irrespectively of the circumstance that both are comprised in the same devise. [His lordship here read from the Master of the Rolls' judgment at p. 175: "Now I come to treat . . . reference to the Statute of Uses."] In the present case freeholds and copyholds were given to the trustees, their heirs and assigns, upon trust to pay the rents and profits, reading it shortly, to Mrs. Townsend, during her life for her separate use. There is no question that they took the legal estate during her life.

Among the rules which are to be applied to gifts both of freehold and copyhold property to trustees is this, that where you find words of devise to trustees and their heirs, then those words are to have their full natural effect as giving an estate of inheritance to the trustees, unless something is found on the face of the will which cuts that estate down in some determinate event: *Doe* v. *Davies*, 1 Q. B. 430; *Poad* v. *Watson*, 3 W. R. 488, 6 E. & B. 606; and *Collier* v. *Walters*, 22 W. R. 209, L. R. 17 Eq. 252. I need not go through all these three cases, as the two former are sufficiently dealt with for my purpose by Jessel, M.R., in the last one. [His lordship here read from the Master of the Rolls' judgment at p. 261 L. R. 17 Eq.: "Now the first observation . . . less than a fee simple will do" on p. 263.] Applying that rule to the present case, I ask what less estate than an estate of inheritance can satisfy the words of this will? The testator directs that from and after the decease of Mrs. Townsend the trustees are to stand seised or possessed of the said estates in trust (in effect) for such persons and purposes as she shall by will appoint. Now those words imply, to my mind, that they were to take an estate lasting beyond the life of Mrs. Townsend.

At what definite point, then, can the estate be cut down? The only suggestion is, that it is to be found in the words of the gift to Mrs. Townsend, her heirs and assigns, in default of appointment. It is said that there is to be found there something in the nature of an executory devise of the copyholds in default of appointment. Assuming that to be so, then, as it seems to me, Mrs. Townsend has, by her will, made a direction, limitation, or appointment of this property, for she had directed her executors to sell all her copyhold estates and to assure them to the purchaser thereof. That seems to me, having regard to the decisions in *Holder* v. *Preston*, 2 Wils. 400, and *Glass* v. *Richardson*, 2 De G. M. & G. 658, to operate as a direction to appoint to the purchaser. It is said that that direction ought to be read as taking effect with reference to the legal estate devised to Mrs. Townsend. But it seems to me that if I were to read the will of John Ward as giving her such an estate, I should be departing from the rule, as there would be no definite or ascertainable period at which the estate of the trustees would be determined, and, looking at the will as a whole, I should, if it were necessary to decide it, be inclined to hold that the estate devised to Mrs. Townsend, her heirs and assigns, was equitable, and not legal. But assuming that the contention of the vendors is correct, I think that Mrs. Townsend has really given a direction or made an appointment by her will within the meaning of the will of John Ward, and consequently, in the events which have happened, the legal estate remains vested in the trustees of his will. I have only to decide that, and I may add that, in so deciding, I am not in any way departing from the decision of *Doe* v. *Barthrop*, 5 Taunt. 382. The words of the will in that case were different. There was a devise of copyholds to trustees and their heirs in trust to permit A. to receive the rents or to pay the same to A. during her life for her separate use, and, subject to such estate and interest, the testatrix devised the property to such persons as A. should by will appoint, and in default of appointment to the right heirs of A. It is to be observed that there nothing was said as to the trustees standing possessed of any estate after the death of A., but the will starts afresh after the gift of the life interest, and makes a new devise to such persons as she, A., should appoint, and in default, to her right heirs. That is in a different form from the devise in the will in the present case. I hold that in this respect the vendors have not sufficiently complied with the requisitions.

Summons dismissed.

Solicitors, *Gepp & Sons; W. Rogers.*

Chan. Div. } Feb. 22.
Kekewich, J. }

"MOROCCO BOUND" SYNDICATE v. HARRIS. (*a.*)

Copyright—International copyright—Breach out of the jurisdiction of copyright in a foreign country—

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Jurisdiction — Dramatico-musical work — Copyright Act, 1833 (3 & 4 *Will.* 4, *c.* 15)—*Berne Convention, articles* 2, 9—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33).

The English courts have no jurisdiction to restrain a British subject, resident in England, by injunction from infringing the international copyright granted by the Berne Convention in one of the other countries of the Copyright Union.

The plaintiffs were assignees of the copyright in a dramatic work called "Morocco Bound," consisting of music and libretto. The defendants had made arrangements for a Continental tour, during which it was proposed to produce "Morocco Bound" in various towns in Europe, beginning with Hamburg, where it was proposed to open on the 25th of February. The first named defendant was within the jurisdiction.

Article 2 of the Berne Convention provides:—"Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives."

Article 9 provides:—"The stipulations of article 2 apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not."

An *ex parte* injunction had been granted to restrain the production over the 22nd of February. This was an application to restrain the defendants and each of them, their and his servants and agents, until judgment or further order from representing or performing, or causing to be represented or performed, in certain places named, "or in any foreign country which has become a party to the Berne Convention," the piece called "Morocco Bound." In support of the application the affidavit of a German lawyer was read, and it stated that according to German law the authors or their assignees of the piece would enjoy copyright in Germany, and that the German court would enforce that right.

H. T. Eve, for the motion.

T. E. Scrutton, for the defendant Harris, and *E. Cannot*, for the defendant Chamberlain.—The plaintiff company should enforce its rights in Germany. The application is without precedent.

Eve, in reply.—Harris submits to the jurisdiction.

KEKEWICH, J. [after disposing of questions not calling for a report, continued:].—A more serious point has been argued, and, shortly stated, it is that I have no jurisdiction to grant the order asked as regards Germany. The order asked goes beyond that, but if I had jurisdiction to grant it as regards Germany, I ought to make an order extending to any other country within the Copyright Union. By the Act of 1833 the plaintiffs have "the sole liberty of representing or performing, or causing to be represented or performed," this piece, "Morocco Bound," "at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions." That is strictly limited, according to the universal rule, which is expressed in the old maxim, *Extra jurisdictionem impune non prohibetur*. So far as that is concerned, the plaintiff company has no right in Germany. Reliance is then placed on the joint effect of the Berne Convention, the Order in Council, and the Act of 1886. [His lordship read article 2, and continued:—] Paraphrasing that, and applying it to this case, it comes to this, "The plaintiffs, being the representatives of the authors in England, shall enjoy in Germany for their work, 'Morocco Bound,' the rights which the respective laws do now, or may hereafter, grant to natives of Germany." When one reads it in that way, which I inadvertently omitted to do on the *ex parte* application, it is obvious that a question of German law arises. I assume, there being no contradiction, that the affidavit before me correctly states the German law, and that this work will have protection in Germany. The plaintiffs have, therefore, so far established their case. The only reason why I can be called upon to enforce the plaintiffs' right in this action is because the defendant Harris is a British subject resident in England. But he is infringing the plaintiffs' right in Germany, and I am, in fact, asked to enforce German law in Germany. That seems an exceedingly strong thing to do. No authority has been cited for it, and Mr. Eve has been in vain asked to produce such an authority. To enforce German law in Germany cannot be more the duty of an English judge than it would be the duty of a German judge to enforce English law in England. I refuse the motion.

Solicitors, *Stanley, Woodhouse, & Hedderwick; Steadman, Van Praagh, Sims, & Co.*

Chan. Div. }
Kekewich, J. } Jan. 11.

SHACKELL & CO. v. CHORLTON & SONS. (a.)

Company—Voluntary winding up—Distress for rent—Rent payable in advance—Proof—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 138, 163.

A company, formed under the Companies Acts, was tenant under an agreement which provided that, on payment being required, two quarters' rent should become payable in advance, the rent being payable on the usual quarter days. The company went into voluntary liquidation on the 20th of December, 1894, and a liquidator was appointed. On the 27th of December a demand was made for the rent due for the December quarter, and payment was required of two quarters in advance. This demand not being satisfied, the defendants levied a distress for the whole amount.

Held, that the liquidator was only liable for an apportioned part of the rent.

In re Lancashire Cotton Spinning Co., Ex parte Carnelley, 36 *W. R.* 305, 35 *Ch. D.* 656, *followed and applied.*

By an agreement dated the 3rd of May, 1892, certain hereditaments were demised to the plaintiffs from the following 24th of June, at the yearly rent of £250, payable quarterly on the usual quarter days. The agreement provided that two quarters' rent were to be due and payable in advance if required. The rent was duly paid down to the 29th of September, 1894. On the 20th of December, 1894, the company was wound up voluntarily, and a liquidator appointed. On the 21st of December, 1894, a formal notice of the resolution, and of the appointment of the liquidator, was given to the defendants. On the 25th of December £64 10s. became due, but was not paid. On the 27th of December a demand was made for the whole of the rent, and for the two quarters due in advance on the 24th of June, 1895, under the agreement. The plaintiffs did not satisfy this demand, and on the 28th of December the defendants levied a distress for £187 10s.

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

On the 29th of December the liquidator gave the defendants notice requiring them to withdraw, and also wrote asking them to withdraw, but the defendants sent no reply. An application was then made to Romer, J., sitting as vacation judge, who granted an injunction restraining the proceedings under the distress.

This was a motion to continue the *interim* order, and was treated as the trial of the action.

Warmington, Q.C., and *Waggett*, for the plaintiffs.—The defendants are only entitled to an apportioned part of the rent: *In re South Kensington Stores, Ex parte Seymour*, 29 W. R. 662, 17 Ch. D. 161; *In re Lancashire Cotton Spinning Co., Ex parte Carnelley*, 36 W. R. 305, 35 Ch. D. 656.

Marten, Q.C., and *O. Leigh Clare*, for the defendants, cited *London and Westminster Loan and Discount Co.* v. *London and North-Western Railway*, 41 W. R. 670, [1893] 2 Q. B. 49.

Warmington, Q.C., was not heard in reply.

KEKEWICH, J.—I think I must apportion this rent. There is no difficulty in the construction of the agreement. On payment being required, two quarters' rent became immediately due and payable in advance on the 27th of December, 1894. For the whole of that demand the landlord is entitled to prove as a debt due to him now. But he says he can distrain for it, and so he could as against an ordinary tenant or as against a company not in liquidation. But liquidation having ensued, the provisions of the Companies Act, 1862, have to be applied, and it makes no difference that this is a voluntary liquidation. The landlord says he is entitled to distrain on the intelligible principle that the liquidator is bound by the agreement. Unfortunately for him that is not the principle upon which the court has proceeded in these cases. The principle is thus enunciated by Cotton, L.J., in *In re Lancashire Cotton Spinning Co.*: "In my opinion the landlord coming to ask the court to exercise the power which, according to the decisions, has been given by section 87, must show one of two things—either that it is inequitable for the company or its liquidator to insist on section 163: that there is some special equity which entitles the landlord to relieve him from the burden of section 163; or that it is a case in which the court will allow a distress to be put in so as to recover the rent which ought to be paid as one of the expenses of the winding up." That is perfectly simple, and runs through many cases. That notion is, that if the liquidator uses the property for the purposes of the winding up, it stands on a similar footing to costs incurred in advertising the property for sale. What expenses has the liquidator incurred? He has only incurred up to this time whatever is due in respect of his continuance in possession. How can I now, on the 11th of January, say that he has incurred this expense on the 24th of June, 1895. I do not know what may happen between this and then. I cannot see how I can bring this within either alternative; and, having the principle, I must follow it under somewhat peculiar circumstances. The liquidator must have a reasonable time to consider when he is prepared to go out of possession, and, of course, giving up possession and taking away his chattels, he must pay an apportioned part of the rent from the 20th of December to that date. The rest of the rent is a debt for which the landlord will have a right to prove. I do not think I ought to make the landlord pay costs, but, as I decide against him, I do not give him any costs.

Solicitors, *Carthew & Wheeler*, for *James Morgan*, Cardiff; *Chester & Co.*, for *Lawson, Coppock, & Hart*, Manchester.

Chan. Div. } Romer, J. } Feb. 11.

ECCLESIASTICAL COMMISSIONERS v. WODEHOUSE. (*a.*)

Ecclesiastical Commissioners—Glebe—Opening mine on glebe—Right to work mine on glebe—Waste—Right to sue in respect to waste on glebe—Land—Consent necessary to working mine—5 & 6 Vict. c. 108, s. 20; 21 & 22 Vict. c. 57, ss. 1, 2, 10; 13 Eliz. c. 10; 13 Eliz. c. 20; 14 Eliz. c. 11; 14 Eliz. c. 20.

No mine can be opened on glebe land without the consent of the Ecclesiastical Commissioners, under 5 & 6 Vict. c. 108, s. 20, and the working of any mine on glebe land that must not be presumed to have been open before the passing of the statutes 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, and 14 Eliz. c. 20 is waste, in respect of which the Ecclesiastical Commissioners can maintain an action.

Trial of action.

This was an action on the part of the Ecclesiastical Commissioners to restrain the working of a gypsum mine on the glebe of the Rev. F. A. Wodehouse, rector of Gotham, Nottinghamshire, on the ground that their concurrence, as required by statutes 5 & 6 Vict. c. 108 and 21 & 22 Vict. c. 57, had not been obtained.

The defendants to the action were Mr. Wodehouse and Mr. John Salkeld, to whom Mr. Wodehouse had, by an agreement for a lease dated the 20th of May, 1885, given the right to take the gypsum, with the clay and marl, upon "certain part of the glebe lands belonging to the rectory of Gotham."

The plaintiffs claimed a declaration that the said agreement was void, damages or an account against the defendant Salkeld, and an account of the moneys received by the defendant Wodehouse from Salkeld in respect of the mine.

The defendant Salkeld put in a defence to the effect that the plaintiffs had led the defendant to believe that they would consent to the lease being granted upon application being made to them by the defendant Wodehouse. He further contended that if the mines comprised in the agreement were open at the time of the passing of the Act 5 & 6 Vict. c. 108, and that the Act in no way curtailed the rights of the rectors of Gotham to demise the same; that when the defendant Wodehouse became rector of Gotham the mines had been open from time immemorial, and that from 1865 Wodehouse had worked the mines with the consent, knowledge, or acquiescence of the patron or ordinary of Gotham for the time being and of the plaintiffs. He further contended that, if the plaintiffs' consent to such working was necessary, such consent must now be presumed. He also contended that the statement of claim disclosed no ground of action, as the plaintiffs did not allege that they were patrons of Gotham or otherwise interested in the matter in question. He counter-claimed specific performance, and, in the alternative, damages against Wodehouse for breach of contract.

Wodehouse put in a defence to the effect that he had never undertaken to grant the lease except with the consent of the plaintiffs.

On the 2nd of March, 1894, on an interlocutory application, Kekewich, J., made an order restraining Salkeld from working the mine. The action was subsequently transferred to Romer, J.

The plaintiffs now only asked that the injunction granted by Kekewich, J., might be made perpetual.

Neville, Q.C., and *O. Leigh Clare*, for the plaintiffs.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

—The facts do not show that the plaintiffs acquiesced in the opening of the mines. Whether they acquiesced, however, is a question of fact. Between the statutes of Elizabeth, 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, 14 Eliz. c. 14, and the statute 5 & 6 Vict. no mines could be open under glebe land: *Dean of Worcester's case*, 6 Co. Rep., pt. vi., 37*a*. Certainly the incumbent had no right to open such mines, and if he did open them he committed waste. In regard to committing waste an incumbent stands in the same position as a tenant for life: *Bartlett* v. *Phillips*, 4 De G. & J., at p. 420. No dealing with property can be valid which authorizes waste: *Holden* v. *Weekes*, 9 W. R. 94, 1 J. & H. 278. It therefore follows that to open a mine under glebe land without the plaintiffs' consent must be irregular and invalid. To justify the defendants it would be necessary to show that the mines had been open before the statutes of Elizabeth were passed. As a matter of fact we submit that the evidence has shown that the mines were only opened recently by a former rector. As a matter of fact the plaintiffs never gave their consent to such an opening, and if they had done so a deed would have been necessary.

Oswald, Q.C., and *E. A. Speed*, for the defendant Salkeld.—The Ecclesiastical Commissioners have no right to intervene in this case or to apply for an injunction, as they have no estate in the glebe. The powers of the ordinary and patron are not vested in them: *Holden* v. *Weekes*. But even if they had originally the power, they no longer possess it. They have stood by and allowed these mines to be open, and are now bound by their acquiescence. [They referred to Burn's Ecclesiastical Law, vol. 4, heading Glebe (302).] The meaning of the Acts of Elizabeth has been misstated. The Act was only aimed at checking leases. After the Act the parson, with the consent of the patron and ordinary, had a right to open mines: *Huntley* v. *Russell*, 13 Q. B. 572; *Doe d. Brammall* v. *Collinge*, 7 C. B. 939, 954.

Birrell, Q.C., and *P. Barlow*, for the defendant Wodehouse.

Neville, Q.C., replied.

ROMER, J.—The first contention of the defendant Salkeld is that the plaintiffs must be taken to have consented or be held to be in the same position as if they had consented to the leasing of the gypsum mine by the defendant Wodehouse. [His lordship held on the evidence that when the agreement was entered into between the defendants they were both aware that the consent of the plaintiffs was necessary for its validity, and that Salkeld had for his own private reasons desisted for some years from asking Wodehouse to obtain such consent, and that if the plaintiffs had remained quiescent he had in no way been misled by such quiescence.] His lordship continued:—Under these circumstances it appears to me that the plaintiffs cannot be held to have consented to the agreement between Salkeld and Wodehouse, and that Salkeld had no equity of any kind against the plaintiffs which would prevent them insisting upon the injunction. The next point raised by the defendant Salkeld is this. He contends that the defendant Wodehouse had the right to work the gypsum even without the consent of the plaintiffs, and could, therefore, lease that right, at any rate during his life, and that he, Salkeld, through this right of Wodehouse, and as against both Wodehouse and the plaintiffs, is entitled to continue working the gypsum for the term fixed by the agreement of the 20th of May, 1885, if Wodehouse so long lives, or, failing that, as a yearly tenant of Wodehouse so long as his yearly tenanacy is not properly determined by Wodehouse. There is obviously a difficulty in the way of this contention, seeing that Wodehouse never agreed to let to Salkeld except subject to the plaintiffs' consent being obtained, but I pass this over, as I intend to decide the main question raised, whether Wodehouse had, in fact, a right to work the mine without the plaintiffs' consent.

Now, it is clear by the statutes 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, and 14 Eliz. c. 14 all alienations of the glebe by a rector beyond those expressly authorized are prohibited. And waste is an alienation, and therefore prohibited. This was pointed out at an early date in the *Dean of Worcester's case*, and since the statutes in question it has been repeatedly held that as an incumbent has only the powers of a tenant for life the opening of new mines on a glebe by him, at any rate, without the consent of both patron and ordinary, is waste and illegal. [His lordship referred to *Knight* v. *Moseley*, Amb. 176, and *Huntley* v. *Russell*, and continued:—] It would thus seem that even with the consent of the patron and ordinary the parson cannot open new mines. Certainly *Holden* v. *Weekes* does not go to that. As for the *Duke of Marlborough* v. *St. John*, 5 De G. & Sm. 174, the headnote in that case, stating that the parson can with the consent of the patron and ordinary open mines, is not justified by the judgment of Parker, V.C., as the passage relied upon in support of the headnote at p. 179 dealt with the parson's right at common law as it existed prior to the statutes of Elizabeth. This was pointed out by Wood, V.C., in *Holden* v. *Weekes*, at p. 284, where he also points out that the *Earl of Rutland's case*, reported in Leving & Siderfin, is no authority for the proposition that since the statute a parson might open a new mine, and, moreover, there appears considerable force in the argument of the plaintiff's counsel in *Holden* v. *Weekes*, at p. 281, that even in the cases of the leases authorized by the restraining statutes the leases must be by deed at the ordinary rents, and that there could be no ordinary rents of mines which had never before been opened. No doubt it was an inconvenience, but owing to the statutes new mines could not be open at all, and probably it was for this reason that the Legislature, by the statutes 5 & 6 Vict. c. 108 and 21 & 22 Vict. c. 57, gave power to open mines under the sanction of the Ecclesiastical Commissioners. For these reasons it appears to me that, even with the consent of the patron and ordinary, the defendant Wodehouse had no right to open a new mine, and could therefore confer no right whatever on the defendant Salkeld to work such mine. But in this present case, not only has no consent of the ordinary been given, but on the evidence before me I am not satisfied that even the consent of the patron has been given. The next point raised by the defendant Salkeld is that the mine of gypsum worked by him is to be treated, not as a new mine, but as one already opened. On the facts before me it is established that the mine had never been opened or worked at all before it was opened about the year 1850 by the late rector. That opening and the subsequent working by the late rector were done without the consent of the plaintiffs, and were therefore illegal. That being so, that illegal working could not give the present rector a right to continue it, or to treat the mine when he was appointed as an open one that he had the right to work. Of course, a mine might have been worked for so long a time and under such circumstances as to justify the court in holding that it was an open mine when the statutes of Elizabeth were passed, or, at any rate, that that continued working must be presumed to be lawful. But that is not the case here, and in justice to the present rector it must be

pointed out that he did not pretend to have any rights to work this mine, except with the consent of the plaintiffs, to be given in accordance with the provisions of the above-mentioned statutes of the present reign. With reference to the point that the working of the past rector would not in itself entitle the present rector to contend that the mine is an open one so far as he is concerned see the observations in the judgment of the court in *Huntley* v. *Russell*, at p. 591, and the judgment of Turner, L.J., in *Bartlett* v. *Phillips*, 4 De G. & J., at p. 421, where he observes with regard to the defendant, the vicar, in that case, "If a wrong act were done by a preceding vicar, I do not see how the defendant could be justified in continuing the wrong." This point of the defendant Salkeld also fails. The working of the defendant Salkeld being illegal, the only remaining question, so far as the plaintiffs' action is concerned, is whether the plaintiffs are entitled to sue to restrain the further illegal working. In my opinion they are, as under the statutes 5 & 6 Vict. c. 108 and 27 & 28 Vict. c. 57 no lease of this mine can be made without their consent be given, and all the rent under the lease must be paid to them. They have, therefore, a clear interest in the mine, and in seeing that the rent payable to them under any future lease sanctioned by them is not diminished or prejudiced by previous illegal workings. And indeed in the present case the necessity of their being able to sue is approved from the fact that the defendant Salkeld is contending that they must be held to have given their consent to his working. It is said that the plaintiffs cannot sue because they have no estate in the glebe. But the courts have never held that an estate in the glebe is necessary to enable a person interested from suing to restrain waste of the glebe. The patron has no estate in the glebe: see Coke on Littléton, 341*a*, and yet he can certainly sue. So in proper cases can the ordinary, though he has no estate, and apparently even the metropolitan and the Crown: see the judgment in *Ross* v. *Adcock*, 16 W. R. 1193, L. R. 3 C. P., at p. 667, and the cases there referred to. In fact, owing to the nature of ecclesiastical estates and the difficulty of preventing waste, and of finding persons sufficiently interested to intervene, the courts have been (and I think quite rightly) anxious to allow any person who has an interest (even though small) to come forward and move the court for the purpose of preventing waste. The plaintiffs under their statutes have conferred upon them important rights and duties with regard to the leases of mines on parsons' estates, and have such an interest in those mines as entitles them, in my opinion, to apply to the court for an injunction in any case where those mines are being illegally worked. And still more have they a right to come in in a case like the present, where, if they did not intervene, the illegal working would practically go on unchecked. No one but the plaintiffs has offered to intervene in the present case, and probably under the circumstances no one but the plaintiffs had sufficient grounds for intervention, especially as the defendant contended that he was in the position of a man working with the consent of the plaintiffs.

Before quitting this part of the case I ought to say that a statement is attributed to Wood, V.C., in the report of *Holden* v. *Weekes*, at p. 285, that the patron is the only person who can properly intervene with reference to the opening of mines by an incumbent. I think the learned judge could not have meant literally what he is there reported to have said. He was dealing with a lease where the patron was suing, and I thing he only desired to point out that there was really no question as to the patron's right to sue.

In fact he refers immediately afterwards to the ordinary's right to intervene. I therefore hold that the plaintiffs are entitled to succeed, and I make perpetual the injunction restraining the defendant Salkeld from continuing to work the mine, and I order him to pay the plaintiffs' costs of their action. I make no order as to the costs of the defendant Wodehouse in the plaintiffs' action.

Then as to the counter-claim of Salkeld, it must be dismissed with costs both as against the plaintiffs and as against the defendant Wodehouse. The claim by Salkeld that he has a right to continue his working clearly fails. He has not been deceived or misled in any way, and his claim for damages for deceit is unfounded, while his claim against Wodehouse for damages for breach of contract wholly fails.

The only breach of contract he could allege was that Wodehouse had not forwarded to the plaintiffs with sufficient speed the application for a lease after he had in writing requested Wodehouse to do so, but even if Wodehouse was not justified, under the circumstances, in making the delay he did in forwarding the application, and I do not say he was not justified, clearly no damage accrued to the defendant by the delay. I gather the delay benefited him, as thereby he was enabled to work the mines longer than he otherwise could, and so probably made a profit. At any rate, no damage caused by the delay was proved before me.

Solicitors, *Jennings, White, Miles, & Co.*; *Harvey & Capron*, for *W. H. Speed*, Nottingham; *Fox & Joy*.

Q. B. Div.
Commercial Causes.
Mathew, J.

March 11, 12.

CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA v. MACFADYEN & CO. (*a*.)

Banker—Letter of credit—Bill of exchange—Negotiation of bills with bank—Knowledge of terms of letter of credit.

A letter of credit was addressed by the defendants to K. & Co., merchants in Batavia, in which the defendants undertook to open in favour of K. & Co. a credit for £5,000, "to be availed of by drafts on us . . . against produce bought and paid for by you, but not immediately ready for shipment." Acting under the letter of credit, K. & Co. drew bills on the defendants, without having bought and paid for produce, and negotiated them with the plaintiffs, a firm of bankers. The plaintiffs were aware of the terms of the letter of credit. The defendants declined to accept the bills. In an action against the defendants for the amount of the bills,

Held, that the letter of credit must be construed according to its ordinary meaning, and that, no goods having been "bought and paid for" by K. & Co., the defendants were not liable.

Union Bank of Canada *v.* Cole, 47 *L. J. C. P.* 100, 26 *W. R. Dig.* 31, *followed.*

In this case certain points of law raised in the pleadings were set down for decision before the trial of the issues of fact, the parties having made certain admissions for the purposes of such preliminary hearing.

The following facts appeared from the statement of claim.

The plaintiffs carried on the business of bankers at Batavia, in Java, amongst other places, and had their head office in London.

(*a*.) Reported by T. MATHEW, Esq., Barrister-at-Law.

The defendants were merchants carrying on business at Winchester House, Old Broad-street, E.C.

Messrs. Knowles & Co. were merchants carrying on business at Batavia.

On the 4th of August, 1893, the defendants issued to Messrs. Knowles & Co. a letter of credit as follows:—"We hereby cancel our revolving credit opened in your favour on the 8th of July, 1892, and open in its stead the following extended credit for £5,000 to be availed of by drafts on us at 3, 4, or 6 months' sight against produce bought and paid for by you but not immediately ready for shipment, but to be shipped within two months of the passing of the drafts, and documents in full cover of same to be sent into the bank through whom you negotiate for despatch to us by first mail after receipt. On the shipping documents being handed to the bank the amount so covered shall again be available, provided that in no case shall the amount uncovered current at any one time exceed the sum of £5,000 sterling. The produce bought under this credit you must hold under lien to us until the documents have been handed to the bank for transmission to us. Marine insurance will frequently be held covered on this side under our open cover, and in that case the documents to be given in will only be a complete set of the bills of lading, with the usual letter advising us that the insurance is to be covered on this side. When the letter is not given, then policies of insurance effected by you must be sent in with the bills of lading. This credit to continue in force for one year from this date. These are the terms on which we grant this credit, and we hereby undertake to accept on presentation and pay at maturity or take up under discount all drafts drawn by you in conformity with the said terms and conditions."

Messrs. Knowles & Co., acting or purporting to act under this letter of credit, drew six bills of exchange upon the defendants, amounting altogether to £2,350, and negotiated them with the plaintiffs at Batavia in the usual way, the plaintiffs becoming holders in due course. The bills were sent forward by the plaintiffs to the head office in London, and were duly presented to the defendants for acceptance. The defendants refused to accept, and they were protested and noted by the plaintiffs.

The plaintiffs claimed £2,352 16s. 6d. and interest at five per cent. on the amount of the bills as damages for breach of the contract contained in the letter of credit, and, alternatively, that the defendants should be compelled to make good the representation contained in the letter of credit, on the faith of which the plaintiffs took and paid for the bills.

By their defence the defendants denied that Knowles & Co. acted or purported to act under the abovementioned letter of credit, and pleaded that the bills were not drawn by Knowles & Co. against produce bought by them for shipment to the defendants. Alternatively, it was pleaded that if the bills were drawn against produce bought by Knowles & Co. for shipment to the defendants, the produce was not paid for when the bills were negotiated with the plaintiffs, or at any subsequent time, and, further, it was alleged that no produce was shipped by Knowles & Co. within two months of the passing of the bills, or at any other time; that no documents in cover of the same were despatched by the plaintiffs to the defendants; that the plaintiffs knew, when Knowles & Co. negotiated the bills with them, that no produce had been bought or paid for by Knowles & Co. for shipment to the defendants, and, alternatively, that the plaintiffs had taken no steps to ascertain whether Knowles & Co. had bought or paid for produce in accordance with the terms of the letter of credit. The defendants counter-claimed for £1,488 0s. 9d. and interest at five per cent. in respect of four bills of exchange, amounting altogether to £2,250, drawn by Knowles & Co. upon the defendants and negotiated with the plaintiffs, in respect of which produce of the value only of £761 19s. 3d. had been bought and shipped by Knowles & Co. These bills were accepted by the defendants, and negotiated by the plaintiffs with parties who became holders for value, to whom the defendants paid the amount of the bills. The defendants (it was said in the counter-claim), accepted the bills in the belief that Knowles & Co. had bought and paid for produce to be shipped to the defendants, and the plaintiffs (it was further said), by presenting the bills for acceptance, warranted or represented to the defendants that Knowles & Co. had bought and paid for produce.

Issue was joined, the plaintiffs refusing to admit or denying the allegations in the counter-claim.

The parties made certain admissions of fact, as follows:—

The defendants admitted for the purpose of the decision of the question of law that the bills of exchange mentioned in the statement of claim purported to be drawn under the letter of credit and the other facts as set forth in the statement of claim.

The questions of law raised by the plaintiffs on these admissions were:

(1) Whether it was a condition precedent to the plaintiffs recovering in this action that produce should have been brought against which the bills of exchange could be drawn; and

(2) Whether it was a condition precedent to the plaintiffs recovering in this action that such produce should have been both bought and paid for.

The plaintiffs admitted for the purpose of the decision of the question of law that the terms of the letter of credit were known to them when they gave value for the bills mentioned in the counter-claim, and, in effect, admitted the other facts alleged in the counter-claim; and the questions of law raised by the defendants upon the plaintiffs' admissions were:—

(1) Whether by presenting the bills of exchange for acceptance the plaintiffs impliedly warranted and represented to the defendants that produce had been bought and paid for against which the bills could be drawn; and

(2) Whether, without the implication of such warranty or representation, the defendants were entitled to recover on their counter-claim.

Joseph Walton, Q.C. (*Reginald Brown* with him) for the plaintiffs.—The letter of credit does not make it a condition precedent that the goods should have been "bought," or "bought and paid for." It must be read, "to be bought and paid for." [MATHEW J.—What was the object of the credit if the goods had to be paid for already?] That is my argument. The letter of credit does not provide for any security being taken by the bank before the bills come forward to the defendants for acceptance. The letter is not addressed to the bank at all, but contains only the terms of the arrangement as between the defendants and Knowles & Co., and the bank is not bound by it. It would be no protection for the bank to trust Knowles & Co. for the invoice of the goods ordered for Knowles & Co. might mislead them; and the bank could not be expected to enter upon an inquiry as to whether goods had actually been bought.

Bigham, Q.C., and *H. F. Boyd*, for the defendants.—The letter of credit is not an open one, and the bank had notice of its terms. The defendants, under the letter of credit, are only bound to accept or take up drafts in conformity with its conditions. It is the duty of the bank to make inquiries of Knowles & Co., and see that goods had been bought. The

no contract between the bank and the defendants, and, if there is one, it is subject to the terms of the letter. Further, if the bank claims as the assignee of Knowles & Co., it is subject to the conditions as between Knowles & Co. and the defendants. The bank trusted to Knowles & Co. drawing bills in accordance with the letter of credit; and it has clear notice that the goods must be "bought and paid for" before the defendants can be made liable. If they trusted Knowles & Co. they did it at their own risk. The case of *Union Bank of Canada* v. *Cole*, 47 L. J. C. P. 100, 26 W. R. Dig. 31, is in point.

They also relied on *Brazilian and Portuguese Bank* v. *British and American Exchange Banking Corporation*, 18 L. T. 823, 16 W. R. C. L. Dig. 67; *Maitland* v. *Chartered Mercantile Bank*, 38 L. J. Ch. 363, 17 W. R. Ch. Dig. 26; *In re London and Mediterranean Bank, Ex parte Agra and Masterman's Bank*, 19 W. R. 486, L. R. 6 Ch. App. 206.

Walton, Q.C., replied.

Bigham, Q.C., in support of the counter-claim, cited *Leather* v. *Simpson*, 19 W. R. 431, L. R. 11 Eq. 398.

March 12.—MATHEW, J.—In this case the plaintiffs are a banking company in London, with a branch business at Batavia. The defendants are merchants in London. The bills in question were drawn upon the defendants by Knowles & Co., commission merchants in Batavia. Certain admissions have been made by the parties, in order that the real question, the construction to be put upon the letter dated the 4th of August, 1893, set out in the statement of claim, may be raised. The letter is written by the defendants to Knowles & Co., and the material portions are these:—"We hereby cancel our revolving credit opened in your favour on the 8th of July, 1892, and open in its stead the following extended credit for £5,000 (five thousand pounds), to be availed of by drafts on us at three, four, or six months' sight against produce bought and paid for by you, but not immediately ready for shipment, but to be shipped within two months of the passing of the drafts, and documents in full cover of same to be sent into the bank through whom you negotiate for despatch to us by first mail after receipt." Later on it runs: "The produce bought under this credit you must hold under lien to us until the documents have been handed to the bank for transmission to us." And the letter ends: "This credit to continue in force for one year from this date. These are the terms on which we grant this credit, and we hereby undertake to accept on presentation and pay at maturity or take up under discount all drafts drawn by you in conformity with the said terms and conditions."

It was argued for the plaintiffs that this document represented an ordinary mercantile transaction, the object being to enable the Batavian firm to raise money for the purpose of buying produce. It was said that the letter would not be a letter of credit unless it had that operation; and that the words "bought and paid for" meant "to be bought and paid for," as the expression "produce bought under this credit" showed. The argument for the plaintiffs therefore involved a contention that the phraseology of the letter should be treated as altered. But an objection to that arugment is this. It entails the construing of this letter as an open credit; and, if the plaintiffs are right, there would be nothing to prevent Knowles & Co. from going to the bank, presenting a bill, and obtaining the whole amount of the credit without giving any security whatever. The reply to that objection, again, is that entire trust was placed in Knowles & Co., and nobody thought that the letter would be abused.

For the defendants it was argued that the document must be construed strictly according to its terms, and that there is no reason for interpolating the important words "to be" before the words "bought and paid for." If the document is strictly construed there is no such inconsistency or absurdity (it is said) as counsel for the plaintiffs suggested. It appears from the letter itself, and the statements of counsel, that the course of business in Batavia was this. Small parcels of produce were purchased from time to time, which it was not always convenient to ship. There was, therefore, an interval of time for obtaining money in respect of shipments; and what was contemplated by Knowles & Co. and the defendants would seem to be that Knowles & Co. should buy and pay for the goods, and give a lien upon those goods in favour of the defendants; and that this lien should be consummated and completed by forwarding the shipping documents.

In the ordinary course there is no difficulty about obtaining money in such circumstances, because the foreign correspondent has only to obtain the bill of lading, annex it to the draft, and thus give security to the bank. But here an interval was contemplated during which there would be no shipping document, and, therefore, no money could be raised. It was said that the meaning of the agreement was that Knowles & Co. should give the defendants a lien on the goods when bought and paid for, and that Knowles & Co. were subsequently to draw upon them and forward the goods; that Knowles & Co. and the defendants were the only parties to the agreement; and that as between them if the defendants became aware that no purchase of goods had been made by Knowles & Co., and that there was, consequently, no lien, they would be entitled to refuse to accept the bills.

It seems to me that this argument is well founded, and that there is no good reason for rejecting any part of the document or giving it any other than the ordinary meaning, which is that Knowles & Co. should be entitled to draw on the defendants, but not unless they had bought and paid for, and thus been enabled to give a lien on the goods purchased. What is the position of the bank? I was invited to consider what the ordinary course would be where a letter of this sort was shown to a bank and the bank was asked to act upon it. The pertinent question was put by the plaintiffs' counsel, Was the bank expected to enter upon an inquiry as to whether goods had actually been bought? Perhaps not; but it would not be unreasonable to suppose that the bank manager, on seeing a letter of this kind, would ask Knowles & Co. whether they had bought and paid for the goods upon which their correspondents and the bank would have a lien. It must be assumed that Knowles & Co. would say that they had. If the answer was untrue the bank, having relied on their good faith, must take the consequences of any breach of good faith on their part.

The bank having been misled in discounting these bills, I proceed on the lines of the case of the *Union Bank of Canada* v. *Cole*, and give judgment for the defendants. The counter-claim was hardly discussed, and I think there is nothing in it. To my mind, there was no false representation and no warranty or guarantee by the bank that the goods had been bought and paid for, and the defendants have no right to recover. There will, therefore, be judgment for the defendants on the claim, and for the plaintiffs on the counter-claim.

Judgment for the defendants on the claim, and for the plaintiffs on the counter-claim.

Solicitors for the plaintiffs, *Linklater, Hackwood, Addison, & Brown.*

Solicitors for the defendants, *Stibbard, Gibson, & Co.*

Q. B. Div.
(Lawrance and Wright, JJ.) Jan. 30, 31.

GWILLIAM (*Respondent*) *v.* TWIST & YOUNG (*Appellants*). (*a.*)

Master and servant—Cases of sudden emergency—Liability for acts or defaults of volunteer—Agent of necessity — Where driver of hackney carriage must be licensed—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 60-62.

The driver in charge of a public stage carriage was stopped by the police and told that he was not to drive the omnibus farther. V., a man formerly in the service of the owners of the vehicle, thereupon volunteered to drive the omnibus back to the yard, and the driver and conductor acquiesced in his doing so. On the way G. was knocked down and injured.

Held, that the owners of the omnibus were liable to pay for the injuries caused to the plaintiff through V.'s negligent driving.

Appeal from the judgment of his Honour Judge Chalmers sitting at the county court, Birmingham, whereby he adjudged that the plaintiff Gwilliam should recover from the defendants £30 and costs for personal injuries.

The material facts of the case are as follows:—The defendants in the action were owners of a public carriage—a three-horsed omnibus—which about 10 o'clock on the evening in question was in charge of two of their servants. A police inspector on duty, noticing that Harrison, the driver, was drunk, stopped the omnibus and told him that he had better not drive any more that night. A man who had formerly been in the service of the defendants as a conductor, named Vears, came forward and offered to drive the omnibus back to the yard, some quarter of a mile distant, and the conductor and Harrison agreed to his doing so, and both got inside the omnibus. On the way to the stables the plaintiff was knocked down by the omnibus as it was being driven rapidly round a sharp corner.

At the trial the learned judge found (1) that the accident was caused by the negligent or unskilful driving of Vears; (2) that the police inspector did not order Vears to drive the omnibus back to the yard, but that Vears had volunteered, and that Harrison and the conductor had acquiesced in his doing so; (3) that, whether or not the driver was drunk, the inspector considered that he was not in a fit state to drive, and in stopping him doing so had acted properly.

Ernest Pollock (with whom was *T. Willes Chitty*), for the appellants, the omnibus proprietors, contended that Vears was not their servant at the time of the accident; that neither Harrison nor the conductor had power to authorize him to drive on behalf of their employers; that Vears was not in the position of an agent of necessity, for there was no need to get a stranger to drive the omnibus back to the yard at all, for alternative and more reasonable courses could have been adopted. Any claim Gwilliam had to damages should have been brought against Vears personally.

Houghton, for the respondent, submitted that Harrison and the conductor had an implied authority to get assistance, when necessary, to take the omnibus back to the yard. Vears, therefore, was not, at the time of the accident, a mere volunteer. To drive the omnibus back to the yard at once was the only reasonable course that could have been taken. The appellants were, therefore, liable for the acts or defaults of Vears. The facts were not disputed, nor was the charge of negligence against Vears denied.

Ernest Pollock, in reply.—The cases of *Illidge* v. *Goodwin*, 5 C. & P. 190, and *Booth* v. *Mister*, 7 C. & P. 66, were not authorities that could be relied on by the respondent, because in neither of them was there any such elements present as the interference of the police.

[From the arguments urged in court it appeared that the Birmingham Corporation, under the powers of the Municipal Corporation Acts, had made numerous bye-laws for the regulation of hackney carriages, which were supposed to incorporate some of the provisions of the Town Police Clauses Act, 1847, and it was contended at the trial that clause 60 of that Act affected the present case. There were also bye-laws applying to stage carriages, but these, it appeared, did not purport to include any like provisions. In the appeal Wright, J., pointed out that clause 60 only applied to hackney carriages, the drivers of which must be licensed, and therefore the arguments that the defendants, nor their servants on their behalf, could not authorize an unlicensed man to drive failed, because an omnibus plying for hire out of the metropolitan area was not such a hackney carriage.]

LAWRANCE, J.—I have come to the conclusion, although not without considerable hesitation and doubt, that there is no evidence before the court upon which we can hold that the judgment of the county court judge should be disturbed. The facts in this case are simple enough, but the evidence on the main question, which we have to decide, is far from satisfactory. The real point we have to consider is whether the acquiescence of Harrison and the conductor in allowing Vears to drive renders, under the particular circumstances, the owners of the omnibus liable for any accident which might arise from his negligence or want of skill. As a matter of fact, the county court judge did not decide that point, but he found that the men did acquiesce in Vears driving the omnibus back, and therefore in his judgment it ought to be assumed that they had authorized him to do so. Upon that finding the court is now asked to decide whether that authority was such as to make the owners liable for what subsequently occurred. There was no finding in fact as to that question beyond what I have already stated, and although, had the case come before me in the first instance, I might have come to a contrary conclusion, yet, upon the finding that Vears was authorized by Harrison and the conductor to drive, I have come to the conclusion that the owners ought to be held liable, and therefore the appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. The question we have to consider is really this: Was there any evidence upon which the county court judge could, consistently with the law, have come to the conclusion which he has arrived at? His decision certainly raises an important question of law on which there is singularly little, if any, direct authority. It seems to me that the law is this: that in cases of sudden emergency the servant may have authority within the scope of his employment to act in good faith, and according to the best of his judgment, for his employer's interest, so long as he violates no express limitation of his authority and no order of his master applicable to the case, and provided that the act was not one clearly unreasonable. In cases where this doctrine, if correct, can be applied, it makes no difference that the servant's judgment was, in fact, mistaken, or even wrong, and

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

masters would not be liable for the result any more than a railway company is liable for any error of judgment on the part of their engine driver in running his train too fast, if he acted according to the best of his judgment, and they were not guilty of any negligence in appointing him. Of course, the servant cannot have an implied authority to do for his master anything which it would be illegal for the master to do for himself; as, for example, to violate a bye-law or statute providing that it shall be illegal to employ an unlicensed person as a driver. In that case the servant could not bind his employers by authorizing such a person to drive. But no such illegality is shown in the present case. And if it is possible in law for a servant in cases of sudden emergency to have such authority, we cannot say here that there is not sufficient evidence upon which the judge could not have found that there was such emergency, and that the servant had acted within the limits of his authority. It is not necessary for me to say—in fact, I prefer not to say—what conclusion I think I myself should have drawn from the evidence given at the trial. There can be no doubt, however, that there might be great difference of opinion as to the various parts or steps in the proceedings—for instance, there might have been an implied authority to authorize a man to take the omnibus back to the yard, yet not sufficient authority to send him to drive the omnibus along a narrow and crowded street, or even, perhaps, to turn a sharp and difficult corner leading into the yard, especially as a whistle or shout would have at once brought out men who would have known what to do. On the whole, however, I think the evidence was sufficient for the county court judge to hold that there was an implied authority for Vears to act as their servant or agent, and I cannot see that his judgment is wrong in law.

Appeal dismissed, with costs; but execution stayed to allow of an appeal on terms.

Solicitors, *T. A. Dennison & Co.*, for *H. G. Tanner; W. F. Aldis*, for *H. E. Parry.*

Privy Council.

March 6.

(*On appeal from the Supreme Court, New South Wales.*)

NEWTON AND OTHERS *v.* DEBENTURE-HOLDERS, &c., OF THE ANGLO-AUSTRALIAN INVESTMENT, &c., CO. (LIMITED). (*a.*)

Company — Mortgage of uncalled capital — Power to mortgage—Winding up—Priority—Companies Act, 1862.

A company limited by shares was authorized by its memorandum of association "to receive money on loan or deposit or otherwise, and upon any security of the company, or upon the security of any property of the company, or without giving security."

Held, that these words authorized a charge upon uncalled capital.

The articles of association of the company, as altered by special resolution, contemplated and provided for the issue of debentures, which were to be a charge upon uncalled capital. Debentures were accordingly issued and expressly charged all uncalled capital.

In the winding up the debenture-holders claimed to have a first charge on the capital of the company which remained uncalled at the commencement of the liquidation.

Held, that they were entitled to be paid out of such calls in priority to the unsecured creditors of the company.

In re Pyle Works (Limited), 38 *W. R.* 674, 44 *Ch. D.* 534, *approved.*

This was an appeal from an order of the Supreme Court of New South Wales.

The facts are set out in their lordships' judgment, and raised the question (*inter alia*) as to whether the mortgagees of the uncalled capital of a limited company were entitled to priority over unsecured creditors of the company upon calls made by the liquidator in the subsequent winding up.

Lyttelton Chubb and *E. E. Fletcher*, for the appellants.

Sir R. Webster, Q.C., and *G. Henderson*, for the respondents.

The judgment of their lordships (Lord HERSCHELL, L.C., Lords WATSON, HOBHOUSE, MACNAGHTEN, SHAND, and DAVEY, and Sir RICHARD COUCH) was delivered by

Lord MACNAGHTEN.—The Anglo-Australian Investment Finance and Land Co. (Limited) was incorporated in 1880 as a company limited by shares under the colonial statute 37 Vict. No. 19, known as the Companies Act, 1874. The company is now in course of voluntary liquidation.

A question has arisen in the winding up between holders of debentures claiming to have a first charge on the capital of the company which remained uncalled at the commencement of the liquidation and a large body of persons who had money on deposit with the company, and who are creditors without security. In the Supreme Court of New South Wales this question has been decided in favour of the debenture-holders by the Chief Judge in Equity. The appeal is brought on behalf of the depositors from his decision.

For the purposes of this appeal it may be taken that the provisions of the colonial statute are identical with those of the Companies Act, 1862.

In the argument before their lordships the appellants disputed the priority claimed by the debenture-holders on three grounds. (1) They maintained that it is not competent for any company limited by shares to create a charge upon its uncalled capital, so as to confer priority in the winding up. (2) They contended that in the present case a charge on uncalled capital was impliedly prohibited by the terms of the memorandum of association; and (3) they argued that if the charge was valid to any extent it did not apply to so much of the uncalled capital as was reserved by the articles of association to be dealt with only in a particular event and under a special resolution.

The power of a company limited by shares to charge uncalled capital has been the subject of several reported cases in this country. The court seems almost always to have regarded such a charge with disfavour. Whenever the question has arisen borrowing powers have been construed strictly, and sometimes, perhaps, rather narrowly. But no case was cited to their lordships in which any judge has ever held it to be beyond the powers of a limited company to create a charge upon its uncalled capital.

Stanley's case, 12 W. R. 894, 4 De G. J. & S. 407, in 1864 goes further in that direction than any other. There Knight Bruce and Turner, L.JJ., laid great stress on the difficulty of enforcing a charge on uncalled capital owing to the discretionary power of making calls which the company's deed of settle-

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

ment entrusted to the directors, and they seem to intimate that, assuming the borrowing powers of the company to have extended to future calls, it would have been a breach of trust on the part of the directors to give effect to the charge, though created by their own act under the authority of the company—a proposition which it is somewhat difficult to follow. The decision, however, turned entirely upon the construction of the deed of settlement. There was power to charge "the property or funds" of the company. It was held that that expression did not include future calls. "They are property," said Turner, L.J., "not of the society immediately, but which may be called up by the directors of the society at their discretion." The context, too, was relied on as showing that the property intended to be charged was property capable of being "assigned, transferred, conveyed, or surrendered." *Stanley's case* was approved and followed by this board in the *Bank of South Australia* v. *Abrahams*, 23 W. R. 668, L. R. 6 P. C. 265, where the judgment was delivered by James, L.J. But there the difficulty in connection with the discretionary power of the directors in regard to calls was treated merely as an argument against implying a power to charge future calls, where the language of the instrument was doubtful. And it certainly seems to be assumed in the judgment that, by "apt and proper words or a sufficient context," a power to charge uncalled capital may be conferred. In *In re Phœnix Bessemer Steel Co.*, 44 L. J. N. S. Ch. 683, 23 W. R. Dig. 45, Jessel, M.R., said, "There can be no doubt that the power can be given to a company by the articles of association." He brushed aside the difficulty which weighed so much with the Lords Justices, observing that to his mind it was no difficulty at all, and referring to the case of companies governed by the Companies Clauses Consolidation Act, 1845. Where such companies have power to create mortgages, the statute itself confers upon them as incidental to that power a power to charge future calls. The decision in *In re Phœnix Bessemer Steel Co.* was in 1875. During the last twenty years Sir G. Jessel's opinion has been followed in many cases, and many securities have been given and taken on the faith of it. Kay, J., adopted the same view in the case of *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156, which was decided in 1888. More recently still, in 1890, the question came before the Court of Appeal in *In re Pyle Works*, 38 W. R. 674, 44 Ch. D. 534. After examining all the previous authorities and discussing the matter very fully, Cotton and Lindley, L.JJ., upheld a charge on uncalled capital. They found nothing in the Act expressed or implied to prevent or avoid such a security. Lopes, L.J., with some hesitation, concurred in the judgment. The main argument against the validity of the charge was that it seemed to contravene the directions of the Act in regard to the application of moneys recovered from contributories in the winding up. But the answer was obvious. The liability of a contributory, as a present member, to pay calls in the winding up is not a liability springing into existence for the first time on the company going into liquidation. It is merely the ripening of that liability which the contributory undertook when he became a member. The liquidator, no doubt, is bound to distribute what belongs to the company in the manner prescribed by the Act. But after all the question is:—What does belong to the company? What are its assets or its property? That must depend on what dispositions have been made, and what charges have been validly created, while the company, acting within its powers, was free to deal as it pleased with its own.

Their lordships see no reason to differ from the conclusion at which the Court of Appeal arrived in the case of *In re Pyle Works*. But they desire to add that if they had felt any doubt about the matter they would have been most reluctant to introduce into the administration of company law in a colony which has adopted the Act of 1862 a rule different to that established by judicial decisions in this country. There is no case in which uniformity of practice is more important or more desirable.

The second point may be dealt with shortly. The debentures expressly charge all uncalled capital. The articles of association as altered by special resolution contemplate and provide for such a charge. A regulation made by special resolution is of the same validity as if it had been originally contained in the articles of association. The special resolution does not, indeed, purport in terms to authorize a charge upon uncalled capital, because no doubt it was assumed that that power had already been conferred by the memorandum of association. If the power is to be found there, nothing is wanting to make the case complete. On the other hand, if the memorandum when authorizing certain charges has omitted to authorize a charge upon uncalled capital, the omission may imply a prohibition.

Now among the objects for which the company was established is this, "to receive money on loan or deposit or otherwise, and upon any security of the company, or upon the security of any property of the company, or without giving security." Their lordships have no hesitation in coming to the conclusion that those words authorize a charge on uncalled capital. There would be some difficulty, and perhaps not much advantage, in attempting to define precisely the meaning of each of the two expressions "any security of the company" and "the security of any property of the company" in the order and position in which they occur. If they are taken separately there is room for criticism and possibly for argument. But their combined effect is hardly open to question. Evidently the intention was that all the resources of the company, from whatever quarter they might be derived, and in whatever state they might happen to be, should be available for the development of the company's business. The power given by this clause of the memorandum is referred to in a subsequent passage in the memorandum itself as "the general power of the company to give any security of any description for money." That is really what it comes to, and in their lordships' opinion that is the substance and meaning of the clause.

The only other point to be mentioned is an ingenious argument which was founded upon article 6 of the articles of association. That article is in the following terms:—

"The total amount to be called up in respect of shares shall not exceed £5 per share unless and until the company shall by special resolution . . . determine that the paid-up capital of the company has become insufficient to meet its liabilities, and that it is therefore necessary to call up the whole or portion of the balance of £5 per share, but in the event of the company so determining the company may by special resolution also determine what amount of such unpaid capital is required to be called up, and within what time or times, and may prescribe or authorize the directors to prescribe in what sums per share, and at what intervals, the amount so required is to be called up or paid, and what notices (if any) are to be given of calls having been made, and on what days or within what periods calls or instalments are to be payable."

It appears that at the time when the debentures

were issued the prescribed limit of £5 per share had not been reached. There was therefore a portion of the uncalled capital which remained under the directors' control. On behalf of the appellants it was argued that, assuming the charge to be good to any extent, it must be confined to that part of the uncalled capital which was still at the call of the directors. The balance, it was said, was intended to be reserved for the benefit of the general creditors in the event of liquidation. In their lordships' opinion it is impossible so to construe the article in question. If the company had power to charge its uncalled capital there is nothing in this article excluding any part of the uncalled capital from the operation of the charge. Nor is the reservation, such as it is, calculated to give rise to any practical difficulty. Unless and until the company makes default the debenture-holders have no right to intervene. In the meantime the provision is rather a protection to the debenture-holders. It is an additional safeguard for their interest. On default being made the debenture-holders would be in a position to present a petition for the winding up of the company. In the event of winding up the provisions of article 6 would no longer be in force, and there would be nothing to prevent the whole of the uncalled capital being applied in or towards the satisfaction of the claims of the debenture-holders.

Their lordships are therefore of opinion that the appeal wholly fails, and they will humbly advise her Majesty that it ought to be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants, *Barraud, Regge, & Jupp.*

Solicitors for the respondents, *Cheston & Sons.*

Court of Appeal.

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 16.

In re LORD THURLOW.
Ex parte OFFICIAL RECEIVER. (*a.*)

Bankruptcy — Adjudication — Adjournment—Discretion —Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 20, *sub-section* 1; *s.* 105, *sub-section* 2.

On an application under section 20 (1) *of the Bankruptcy Act,* 1883, *to adjudicate a debtor bankrupt, the registrar has a discretion, for sufficient reason, to adjourn the application under section* 105.

Semble, *the fact that an immediate adjudication would result in injustice to the creditors is a "sufficient reason" for adjournment.*

Appeal by the official receiver against an order of a registrar in bankruptcy postponing the consideration of an application to adjudicate the debtor a bankrupt.

A bankruptcy petition was presented against the debtor on the 7th of February, 1894, the act of bankruptcy alleged being the non-compliance by the debtor with a bankruptcy notice.

On the 5th of April a receiving order in bankruptcy was made against the debtor.

On the 20th of June the first meeting of creditors was held, and was adjourned till the 18th of July in order that the debtor might submit a scheme of arrangement.

On the 18th of July an incomplete proposal for an arrangement was submitted, the scheme of which was, the withdrawal of the claims of certain friendly creditors, and the vesting of the debtor's assets in a trustee for the benefit of the remaining creditors. As the debtor had not obtained the withdrawal of the requisite number of claims, the meeting was again adjourned in order that he might amend the scheme and obtain further withdrawals. Further adjournments took place, and eventually the meeting was held on the 2nd of January, 1895. There were present only four out of a large number of creditors. The debtor himself was not present, he being in India, where it was stated that he had gone for the purpose of making the necessary arrangements to perfect the scheme. An application was made on his behalf for a further adjournment, in order to enable him to be present, but the motion to adjourn was not carried. The scheme of arrangement was then withdrawn, and no resolution of creditors was passed.

On the 20th of February, the debtor having returned to this country, his public examination took place, and it was stated that he had been successful in obtaining the withdrawal of a large number of claims.

On the 21st of February the official receiver applied to the registrar for an order adjudicating the debtor bankrupt. The registrar thought that the opinion of the creditors had not as yet been really given on the matter, and that they ought to have a further opportunity of considering it. The registrar was further of opinion that an immediate adjudication would be prejudicial to the interests of the creditors. He therefore did not adjudicate the debtor a bankrupt, but made an order under section 3 of the Bankruptcy Act, 1890, extending the time for fourteen days in order that the debtor might have a further opportunity of lodging a proposal for the arrangement of his affairs.

The Bankruptcy Act, 1883, s. 20, enacts that "where a receiving order is made against a debtor, then, if the creditors at the first or any meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor bankrupt and thereupon the property of the bankrupt, shall become divisible among his creditors and shall vest in a trustee.

Section 105 (2): The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

Sir R. T. Reid, A.G., and *Muir Mackenzie*, for the official receiver.—The registrar had no power to postpone the adjudication of the debtor, there having been no resolution passed at the first meeting of the creditors. Section 20 is imperative, and on the happening of any one of the contingencies mentioned in the section the registrar is bound to forthwith adjudicate the debtor bankrupt: *Ex parte McCulloch, In re McCulloch*, 28 W. R. 935, 14 Ch. D. 716; *Ex parte Pinfold, In re Pinfold*, 40 W. R. 223, [1892] 1 Q. B. 73; *Ex parte Official Receiver, In re Reed & Bowen*, 35 W. R. 660, 19 Q. B. D. 174. Secondly, if the registrar has a discretionary power of postponing the adjudication, he exercised his discretion wrongly in this case. There has been great delay on the part of the debtor in submitting his scheme of arrangement.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Pollard and *Kershaw*, for the debtor.—The word "shall" is not used in section 20 in an obligatory sense. That view is supported by the opinion of Vaughan Williams, J., in *In re Pinfold*, and in *In re Reed & Bowen* both the Master of the Rolls and Lopes, L.J., said that there might be an adjournment for a sufficient reason. Section 3 (15) of the Act of 1890 also shows that the registrar has a discretion in a case such as this, for the word "may," not "shall," is used in that section. The discretion was rightly exercised. There was no refusal by the registrar to adjudicate the debtor bankrupt, but only a postponement.

Muir Mackenzie replied.

Lord ESHER, M.R.—In this case a receiving order was made against the debtor, and the question then arose whether the debtor ought to be adjudicated bankrupt. The registrar did not refuse to adjudicate, but left the question open. Whether or not the registrar will eventually be obliged to adjudicate the debtor a bankrupt is not now the question. The question is whether the registrar had any power to postpone the consideration of the matter as he did. It has been contended that the registrar had no such power. It is said that if any one of the contingencies mentioned in section 20 happens, then not only the registrar, but this court also, is bound to immediately adjudicate the debtor a bankrupt. Pushed to its logical conclusion, that argument comes to this, that, although the circumstances of the case may be such that a postponement, however short, will be of the greatest advantage to the creditors, and that this advantage will be lost if the debtor is immediately made bankrupt; nevertheless the court is bound to do so. The principle to be applied to bankruptcy proceedings is, in my opinion, that the Court of Bankruptcy, more than any other court, ought to brush aside technicalities in order to arrive at a decision which is absolutely fair and just. I do not hesitate to say with regard to the administration of the law of bankruptcy, as Dr. Lushington used to say with regard to admiralty law, that the court has to administer a law which is far wider than either the common law or equity. If the powers of the court are in any way limited by Act of Parliament of course we are bound by the Act, but in construing the Act the court will strive to so construe it as to leave the greatest latitude to the court. In the present case we are asked to tie the hands of the court in such a way as to compel it to do manifest injustice. I know that the word "shall" is used in the section in question, but the word "shall" is not always obligatory in its meaning; it is sometimes directory, and I decline in construing a bankruptcy statute to hold that the word "shall" is used in an obligatory sense unless I am clearly and beyond all doubt bound to do so. I think that the true view of the meaning of the word "shall" in this section is given in the case of *In re Reed & Bowen*. In my opinion the registrar is bound to make the order of adjudication unless he is of opinion that for good reason shown the proceedings ought to be adjourned. [His lordship read section 20.] The power of adjournment is given by section 105 (2), the language of which is as wide as any that could be used: "The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose." In my opinion that section applies to a case the circumstances of which bring it within section 20, just as much as when an application is made to adjourn proceedings under any other section. Section 105 enables the court for good reason to adjourn the application for adjudication under section 20; but if no good reason is shown, then the court must forthwith make the order asked for. Therefore the registrar in this case had jurisdiction to adjourn the proceedings, and the only remaining point is whether under the circumstances of this case there was good reason for him to do so. The registrar states that he was present when the public examination of the debtor took place, and his view is that no reasonable man could doubt that it was for the advantage of the creditors to have an adjournment. In my opinion it is impossible to say in this case that the registrar has exercised his discretion wrongly. This appeal will therefore be dismissed.

LOPES, L.J.—I am of the same opinion. Two questions are raised. First, was the registrar bound to forthwith adjudicate the debtor a bankrupt or had he a discretion to adjourn the proceedings? Secondly, if he had a discretion, did he exercise that discretion judicially and properly? As to the first point, it has been contended that the word "shall" in section 20 of the Bankruptcy Act is used in a mandatory sense, and that the meaning of the section is that the adjudication in bankruptcy is a peremptory act, as to which the court has no discretion. The Attorney-General went the length of saying that even if an immediate adjudication would be manifestly against the interest of the creditors and productive of gross injustice, the word "shall" is so strong that the registrar and the court itself has no discretion in the matter. I must confess to having been a little astonished at the argument that the word "shall" is always used in a mandatory sense. I think section 105 and section 109 also show that that is not always the case in the Bankruptcy Act. Independently of the decided cases I have no doubt that the registrar has power to adjourn the proceedings, but the cases of *Ex parte McCulloch* and *In re Pinfold* are authorities which support my view. In the latter case there are expressions used by Vaughan Williams, J., and Collins, J., which clearly show that in their opinion the word "shall" is not used in the sense contended for by the Attorney-General. Vaughan Williams, J., there says: "It has been contended that the county court judge acted upon the view that the word 'shall' in section 20 was a word which took away from him in all cases all discretion, and left him no choice but to order an adjudication when once it had been proved to him that there had been a failure to accept the composition in pursuance of the Act. If that were the construction which he put upon the section I should certainly hesitate before I adopted it." In the same case Collins, J., uses language to the same effect. Then in *In re Reed & Bowen* the Master of the Rolls says: "If there is no sufficient reason for an adjournment, and if the facts mentioned in section 20 are made out, the registrar would have no discretion, but would act wrongly in his judicial capacity if he did not forthwith adjudge the debtor a bankrupt." The meaning of that sentence is that the registrar may adjourn the adjudication if there is sufficient reason for his doing so. Therefore it is clear to my mind that the word "shall" ought not to be construed in the sense contended for by the Attorney-General, but that the registrar has power to adjourn the proceedings. As to the question whether the registrar exercised his discretion judicially I have no doubt in my mind. He heard the evidence of the debtor at the public examination, and he saw that it was for the benefit of all parties that there should not be an immediate adjudication.

RIGBY, L.J.—If section 20 stood alone I should have great difficulty in arriving at a conclusion as which when read with section 105 I do arrive without any difficulty. The word "shall" is no doubt *prima facie* obligatory, but the language of section 105 is

sufficiently wide to reach this or any other case under section 20. I cannot doubt that an application for adjudication under section 20 is a "proceeding" which may be adjourned under section 105, and that if a good case is made the court has power to adjourn the proceedings. As to the particular facts of the case, I think no sufficient ground has been made out for us to disagree with the registrar's exercise of his discretion.

Appeal dismissed.

Solicitor for the appellant, *Solicitor to the Board of Trade.*

Solicitors for the respondent, *Kine & Hammond.*

App. Bankruptcy.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 15.

In re LOW.
Ex parte GIBSON. (a.)

Bankruptcy — Bankruptcy notice — Irregularity — No substantial injustice—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).

In an action in which the petitioning creditor had been plaintiff and the debtor and five other persons defendants, judgment was recovered against the debtor and three of the five other defendants. In a bankruptcy notice founded upon the judgment, the judgment was stated to have been recovered against all the defendants, their names being given.

Held, that the irregularity caused no substantial injustice to the debtor, and that the bankruptcy notice was not invalidated thereby.

Appeal of the petitioning creditor against an order of a registrar in bankruptcy dismissing the bankruptcy petition.

The petition was presented on the 6th of December, 1894, the act of bankruptcy alleged being the non-compliance by the debtor with a bankruptcy notice founded upon a final judgment.

An action had been brought in the Chancery Division by the petitioning creditor against the debtor and five other defendants. In that action judgment was recovered on the 26th of June, 1894, against the debtor and against three of the other defendants. In the bankruptcy notice founded upon this judgment the judgment was erroneously described as having been recovered on the 26th of June, 1894, against the debtor and the five other defendants (whose names were given in the notice), instead of stating, as the fact was, that the judgment was against the debtor and three out of the five other defendants.

The registrar held that the misdescription of the judgment in the bankruptcy notice rendered the notice invalid, and he dismissed the petition.

Bankruptcy Act, 1883, s. 4 (1): "A debtor commits an act of bankruptcy in each of the following cases:—(*g*) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the court, and he does not, within seven days after service of the notice . . . either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

F. Cooper Willis, for the petitioning creditor.—The decision of the registrar was wrong. The mistake of inserting in the bankruptcy notice the names of the two defendants against whom there was no judgment could not possibly deceive or mislead the debtor. The date of the judgment was given, and the debtor knew that by that judgment he was required to pay the petitioning creditor a certain sum. The bankruptcy notice therefore complied with the provisions of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883. The irregularity, if any, was purely formal, and, no substantial injustice having been caused by it, the bankruptcy notice is not invalidated: see section 143. *In re Howes, Ex parte Hughes*, 40 W. R. 647, [1892] 2 Q. B. 628, is distinguishable, because there the variance between the judgment and the notice was such as to embarrass the debtor.

Muir Mackenzie, for the debtor.—The bankruptcy notice was bad because it does not require the debtor "to pay the judgment debt in accordance with the terms of the judgment." It refers to a judgment against six defendants, which was a non-existing judgment. It has always been the rule that in bankruptcy forms must be strictly followed, because of the penal consequences of bankruptcy (see *per* Bowen, L.J., in *In re Howes, Ex parte Hughes*). There was no power to amend this notice, for amendment is never allowed in order to make that an act of bankruptcy which, in the absence of amendment, would not be so: see *Ex parte Coates, In re Skelton*, 5 Ch. D. 979, 26 W. R. Dig. 13; *In re Miller*, 10 Morr. 183; *In re Bates*, 35 W. R. 668, 4 Morr. 192. Secondly, if execution had issued on this judgment against four joint defendants, there must have been a joint writ of execution: *Ex parte Christie*, 1 Mont. & Bly. 352; *Clarke* v. *Clement*, 6 T. R. 525. The bankruptcy notice must follow the form of the writ of execution, for where it is impossible to issue execution you cannot issue a bankruptcy notice. This notice ought, therefore, to have been issued in the first instance against the four defendants jointly (as they are not partners, and do not come within section 110), but the notice need not have been served upon more than one defendant.

LORD ESHER, M.R.—As to the first point, it is true that there was an irregularity in the bankruptcy notice in the description of the judgment, for in the bankruptcy notice it is stated that the judgment was obtained against six defendants, whereas, as a matter of fact, the judgment was only against four of the defendants. But in the notice the debtor is told the date on which judgment was recovered against him and several other named persons. The debtor knew perfectly well that on the date mentioned an action did come on for trial against himself and all the other persons mentioned in the notice. The debtor further knew that in that action judgment was not recovered against all the defendants, but only against himself and three of the other defendants. Could the debtor, therefore, have any doubt as to what the judgment was in respect of which the bankruptcy notice was served upon him? No, he could have none, unless it were possible that he should have thought that on the same day another action was brought against him and the same three defendants, and that judgment was recovered against them for the same amount. Such a suggestion as that is manifestly absurd. It is obvious to my mind that in

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

this case the point as to the difference between the judgment and the bankruptcy notice is not an objection of any substance, but is purely formal, and the defect could not do any injustice to the debtor. The irregularity is quite unimportant, and does not, in my opinion, invalidate the bankruptcy notice. Then it is said that if a judgment is obtained against several defendants jointly a bankruptcy notice cannot be issued against one of them unless it is drawn up as against all. It is admitted, however, that if the bankruptcy notice is drawn up as against all it need not be served on more than one. But what good does it do to the person who is served with the notice to have the names of the others on the notice if there is no necessity of serving them? It is a point of the most extreme technicality, and one which, in my opinion, cannot succeed.

As to the cases which have been cited, they were all cases in which there was some irregularity in the bankruptcy notice which might cause the debtor substantial injustice. If that is so, then the court always treats the irregularity as fatal to the validity of the notice. In the present case I think that the notice was a good notice, and the appeal must, therefore, be allowed.

LOPES, L.J.—I am of the same opinion. Bankruptcy proceedings involve *quasi*-penal consequences, and, therefore, the principle which has been laid down is that in order to prevent injustice forms must be followed. But there is a great difference between a case of material irregularity and a case in which the irregularity is perfectly immaterial and of such a kind that it cannot possibly perplex the debtor, and, therefore, in the latter case the notice is not rendered bad. In the present case I am of opinion that the defect is immaterial, and the debtor could not have been embarrassed by it or misled as to what judgment was referred to.

As to the second point, I entirely agree with what the Master of the Rolls has said.

RIGBY, L.J.—I am of the same opinion. A slip has been made in the bankruptcy notice. The question is whether this slip can, under any circumstances, be treated as doing substantial injustice to the debtor. I cannot see that he can have suffered any possible injustice.

If we were to hold that any informality whatsoever makes a bankruptcy notice ineffectual we should be deciding in the teeth of section 143, and should also be overruling cases which ought, in my opinion, to be followed.

As to the other point, I cannot understand why it should be obligatory to address the notice to all the debtors unless it was intended to be followed by service on them all. No good would result from upholding such a technicality as that, and in my opinion the argument cannot prevail.

Appeal allowed.

Solicitors for the petitioning creditor, *Faithfull & Owen.*

Solicitors for the debtor, *Drake, Son, & Parton.*

From County Palatine of Durham. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Feb. 8; March 11.

In re LENG.
TARN *v.* EMMERSON. (*a.*)

Administration—Insolvent estate—Married woman—Loan to husband for business purposes—Application of rules in bankruptcy—Costs of administration action—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act,* 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

Section 3 *of the Married Women's Property Act,* 1882, *is a statutory rule postponing a wife's claim against her husband's estate in bankruptcy to the claims of his other creditors, and is therefore one of those rules as to debts provable which, by section* 10 *of the Judicature Act,* 1875, *has to be observed in administering the estates of deceased insolvents.*

Section 10 *of the Judicature Act,* 1875, *applies to the estate of a testator which, though solvent at the time of his death, is insolvent if the costs of an administration action are taken into account.*

Appeal from an order of the Chancellor of the County Palatine of Durham, dated the 28th of December, 1894.

George Leng, the testator in the action, died on the 15th of March, 1893, having by his will appointed his niece, Jane R. Emmerson, the defendant, sole executrix thereof, and having devised and bequeathed to her the whole of his real and personal estate.

The plaintiff in the action claimed to be a creditor of the testator for a sum of £100, and brought the present action, on behalf of herself and all other creditors, for the administration of his estate.

Mrs. Leng, the appellant, was the testator's widow, and claimed against the estate a sum of £181 7s. 6d., which she alleged that she had advanced to the testator for business purposes in connection with a farm which had belonged to him. This claim, being disputed by the defendant, was ultimately fixed by the registrar at £71 3s., a sum which, together with the taxed costs for proving the claim and interest, amounted to £105 16s. 8d.

The testator's estate was solvent at the time of his death, and remained solvent except for the costs of the administration action.

Upon the further consideration of the action the registrar postponed the claim of the widow to the claims of all the other creditors for value, a decision which was affirmed by the Chancellor.

The widow appealed.

Section 3 of the Married Women's Property Act, 1882, is as follows: "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under the reservation of the wife's claim to a dividend as a creditor for the amount of value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

Section 10 of the Judicature Act, 1875, provides that in the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

assets may prove to be insufficient for the payment of its debts and liabilities, and the cost of the winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

J. H. Redman, for the appellant.—The testator's estate is not "insufficient for the payment in full of his debts and liabilities" within the meaning of section 10 of the Judicature Act, 1875. The costs of an administration action are not included in such debts and liabilities. If the Legislature had intended to include them, the section would have mentioned them, as it mentions the cost of winding up a company. But, in any case, the section deals only with the rights of secured, as against unsecured creditors, not to the rights of secured or unsecured creditors *inter se*. There is no case under the Married Women's Property Act which shows that the word "bankruptcy" in section 3 has a more extended meaning than in the Bankruptcy Act. *In re May, Crawford* v. *May*, 38 W. R. 765, 45 Ch. D. 499, is the only case in which the combined effect of the two sections has been considered, and that case is in my favour.

He referred also to *In re West of England Bank, Ex parte Brown*, 27 W. R. 869, 12 Ch. D. 823; *In re Maggi*, 30 W. R. 729, 20 Ch. D. 545; *In re Williams, Jones* v. *Williams*, 36 W. R. 34, 36 Ch. D. 573. [LINDLEY, L.J., referred to *In re Albion Steel, &c., Co.*, 26 W. R. 348, 7 Ch. D. 547.]

Gatey, for the plaintiff.—"Insufficient" in section 10 must mean insufficient after the costs of realizing the estate. As to the other point, *In re Genese*, 34 W. R. 79, 16 Q. B. D. 700, following *Ex parte Taylor*, 12 Ch. D. 366, 27 W. R. Dig. 146, shows that this is not a debt provable at all until after the other creditors have been satisfied. The rules imported into section 10 are the rules for the time being enforceable in bankruptcy, not necessarily under the Bankruptcy Act itself. One of such rules is that contained in section 3 of the Married Women's Property Act, 1882, and the widow's claim must be postponed.

G. W. M. Dale, for the defendant.

Redman replied.

Cur. adv. vult.

March 11.—LINDLEY, L.J., read the following written judgment, in which Lord Halsbury concurred:—This case turns on the combined effect of section 3 of the Married Women's Property Act, 1882, and section 10 of the Judicature Act, 1875. [His lordship read the former section, and continued:—] This section is curiously framed. Money lent always becomes the property of the borrower as soon as he gets it. The money is his, although he owes money to the same amount, with or without interest as the case may be. The section nevertheless first of all makes money lent or intrusted by a wife to her husband for the purposes of his trade his assets in the event of his bankruptcy. This, I suppose, is intended to be a qualification of the previous section (2), which, as regards property, treats a married woman as *feme sole*. The qualification, however, is not general, but is confined to the case of her husband's bankruptcy, by which is meant when he has been adjudicated. If the section had stopped there the wife would have had no claim against the assets of her bankrupt husband even after payment of his other creditors; her assets would have to be treated in bankruptcy as his. To prevent this, words are added to preserve her rights when all his creditors for money or money's worth are paid. Subject to their payment she may claim a dividend as a creditor. But she can claim nothing in the bankruptcy until after payment of all her husband's other creditors. In other words, in bankruptcy she has no provable debt until her husband's other creditors are paid. This is the short effect of the section, although it is most awkwardly expressed. *In re Genese* is quite in accordance with this view. It was there held that a wife could not prove against her husband's estate until his other creditors had been paid 20s. in the pound. I pass now to the Judicature Act, 1875, section 10. [His lordship read it, and continued:—] Few sections in the Judicature Act have created more difficulty than this, but certain points are now settled.

It is settled that the rules in bankruptcy which increase a bankrupt's assets—*e.g.*, the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions—do not apply to the administration in Chancery of the assets of a deceased person. Those assets must be ascertained by applying the general laws of property, and not the special rules applicable only to cases of bankruptcy. The authorities for this proposition are *In re The Withernsea Brickworks*, 29 W. R. 178, 16 Ch. D. 337, which was followed in *In re Maggi* and *Pratt* v. *Inman*, 38 W. R. 200, 43 Ch. D. 175. See also *In re Baker*, 38 W. R. 417, 44 Ch. D. 262. Two further rules have been settled, viz.:—First, that the common law right of an executor or administrator to retain a debt due to himself is not affected by section 10 of the Judicature Act, 1875: *Lee* v. *Nuttall*, 27 W. R. 805, 12 Ch. D. 61; *In re May*; secondly, that this section has not deprived judgment creditors of their right to be paid in priority to other creditors in an administration action, although they have no priority in bankruptcy: see *Smith* v. *Morgan*, 5 C. P. D. 337, 28 W. R. Dig. 4, and *In re Maggi*. In *In re Maggi* Fry, L.J., then Fry, J., came to this conclusion. But in commenting on section 10 of the Judicature Act, 1875, he seems to have overlooked the words "as to debts and liabilities provable," and he considered that section 32 of the Bankruptcy Act, 1869, which enacted that, subject to certain specified exceptions, all debts should in bankruptcy be paid *pari passu*, was not made applicable to administration actions. No doubt if that section were held applicable in all cases it would exclude the right of an executor to retain his own debt, and would deprive judgment creditors of their priority. But these persons are entitled to preference on grounds peculiar to themselves, and the rules which favour them are rather exceptions to ordinary rules as to payment of debts than illustrations of those rules. Whilst I recognize the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy which requires debts (with some exceptions) to be paid *pari passu* is not applicable in administration actions where the estate being administered is insolvent. Whether debts entitled to priority in bankruptcy are to be treated as entitled to similar priority in administering the assets of a deceased insolvent was a question on which decisions were conflicting: compare *In re Albion Steel, &c., Co.*; *In re Association of Land*

Financiers, 29 W. R. 277, 16 Ch. D. 373. All doubt on this point was, however, removed by an Act passed in 1888 (51 & 52 Vict. c. 62, s. 1 (6)), which makes the rules in bankruptcy applicable. Construing section 10 of the Judicature Act, 1875, by the decisions and by the express provision of section 1 (6) of the Act of 1888, the rules in bankruptcy as to debts and liabilities provable must now, I think, include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy. The priority conferred in the case of bankruptcy by the Married Women's Property Act, s. 3, must, therefore, in my opinion, be treated as imported by section 10 of the Judicature Act, 1875, into the administration of the estates of deceased insolvents.

It was urged that the last part of section 3 of the Married Women's Property Act was only a qualification of the first part, and that as the first part of the section does not affect debts provable, but relates only to what are to be treated as assets, that part of the section is not one of the rules in bankruptcy to which section 10 of the Judicature Act, 1875, applies, and that consequently the second part, which is in effect a proviso to the first, cannot be regarded as one of such rules. I confess that I was at first disposed to think this view correct, but on reflection I cannot adopt it. If we were to accede to this argument we should be attaching too much weight to the first part of the section and too little to the second part, and we should miss the true meaning of the section as a whole. I have already stated what I take to be its effect, and although it is badly drawn, the section is really a statutory rule postponing a wife's claim against her husband's estate in bankruptcy to the claims of his other creditors. This is, therefore, one of the rules, as to debts provable, which by section 10 of the Judicature Act, 1875, have to be observed in administering the estates of deceased insolvents. This conclusion is not inconsistent with *In re May*, which was not a case of proof, but of retainer by the wife as her husband's administratrix. The Legislature has not yet thought proper to alter the law of retainer, and section 3 of the Married Women's Property Act is not addressed to that subject.

It only remains to notice the point that the husband's estate is not proved to be insolvent. When he died his assets exceeded his debts, but unfortunately the costs of the administration action have to be provided for, and it is admitted that his estate is insolvent if the costs of the administration action are to be taken into account. But these costs must be paid out of the estate of the deceased before any question can arise which concerns the payment of his creditors. With reference to their payment and to their priorities *inter se* it would be contrary to common sense to call an estate solvent when the amount divisible amongst them is not sufficient to pay them all in full. Then reliance was placed on the phraseology of section 10 when dealing with companies, and on the maxim *expressio unius est exclusio alterius*. This maxim, however, is seldom satisfactory unless some good reason can be given for supposing that the speaker really intended to exclude what he did not expressly mention. In this particular case such an intention would be unreasonable, and cannot be imputed to the Legislature. The express mention of costs in dealing with companies being wound up and the omission of all mention of costs in dealing with the estates of deceased persons are easily accounted for. The section applies to all modes of winding up companies, but only to one mode of administering the estates of deceased persons—viz., administration by the court. It may well have been considered desirable to point out to liquidators winding up insolvent companies, without the assistance of the court, that they must deduct the costs of winding up and then see whether the assets left are sufficient to pay the debts in full or are insufficient for that purpose. It was quite unnecessary to instruct the judges of the High Court on such a subject. For these reasons I am of opinion that the decision of the Chancellor of the Duchy was correct, and that the appeal must be dismissed, with costs.

A. L. SMITH, L.J.—The first and main question is whether, when a deceased husband's estate is being administered in the Court of Chancery, and is unable to pay its creditors in full, the rule which applies in bankruptcy as to the wife's proof against her husband's estate, for money lent by her to him for the purposes of his trade, is to be imported when the widow claims in the administration against the estate of her deceased husband.

The statutes which relate to this point are as follows: [His lordship referred to the Judicature Act, 1873, s. 25, sub-section 1; the Judicature Act, 1875, s. 10; and the Married Women's Property Act, 1882, s. 3, and continued:—]

If the husband becomes bankrupt, it is clear that the rule which is enacted by statute is, that for money lent by the wife to her husband for the purposes of his trade she is not to prove till her husband's other creditors have been satisfied, and this was rightly so held by Cave, J., in *In re Genese*. We have, therefore, one statute (the Married Women's Property Act, 1882) laying down in clear terms what the rule of bankruptcy is to be as regards the proof of a wife in the case of bankruptcy of her husband, and another statute (Judicature Act, 1875) enacting that in administering insolvent estates of deceased persons the same rules shall be observed as may be in force for the time being under the law of bankruptcy. So far matters are apparently clear, but it is said that, although there are these two statutes standing together, cases have decided that the rule laid down in section 3 of the Married Women's Property Act, 1882, is not, by section 10 of the Judicature Act, 1875, imported into administrations of deceased husbands' estates which are insolvent.

In the first place, I should say that I know of no case which deals with the conjoint operation of section 10 of the Act of 1875 and section 3 of the Act of 1882, with the exception of *In re May*, which was not a case, as the learned judge himself pointed out, of the widow seeking to prove, but of the right of retainer by the widow, to which section 3 of the Act of 1882 did not apply.

It is true that it has been held by authority which cannot be controverted that all the rules of bankruptcy are not incorporated into the administration of insolvent estates by section 10 of the Act of 1875; and the question now is whether the rule in section 3 of the Act of 1882 is so or not.

It is difficult to extract from the cases the principle upon which each has been decided, with this exception, that I think it may be stated that the courts have held that section 10 of the Judicature Act, 1875, does not import into administrations those provisions of the bankruptcy law which merely go to swell the assets of the estate which is being administered, such, for instance, as the provisions by which a judgment creditor is not allowed to reap the benefit of his execution, by reason of a bankruptcy intervening before its completion (*Witherness Brickworks case*, followed by Chitty, J., in *Pratt* v. *Inman*), or the provision that money received by way of a fraudulent preference must be returned.

But has any binding authority gone further, and held that the rules as to proof of debts in bankruptcy

are not incorporated? If there be such an authority, what becomes of the express words in section 10 of the Act of 1875, "the same rule shall prevail . . . as to debts and liabilities provable"?

Cotton, L.J., in *In re Withernsea Brickworks*, stated what I take to be the principle, if there be one, to be extracted from the cases when he said, "What is proposed to be done in the present case is, not to apply a particular rule to the administration of the assets of the company, but to bring into the assets something which, apart from this section (section 10), would not be assets, because it has been seized by a creditor under such circumstances that he can hold it as a security for his debt."

As regards swelling the assets to be distributed, it appears to me that the cases have decided that the law of bankruptcy does not apply, but as regards the distributing of the assets, *i.e.*, as regards the proofs to be allowed, I find no case binding me to hold that the rules of bankruptcy do not apply.

It is true that in 1882 Fry, L.J., then Fry, J., in the case of *In re Maggi* held that the bankruptcy rule, that all debts shall be paid *pari passu* (see section 32 of the Bankruptcy Act, 1869) was not imported into the administration of insolvent estates, and that a judgment creditor took priority over other creditors, and he placed what he termed the narrower construction upon section 10 of the Judicature Act, 1875, and held that it was confined to cases in which the rights of a class of secured creditors was conflicting with a class of unsecured creditors and has no application to the rights *inter se* of the members of those classes.

This is not a decision upon the conjoint operation of the two statutes which we have now to consider, and I therefore do not inquire if the learned judge's construction of section 10 is not too narrow, and moreover the case does not bind me. Now what is the true reading of section 3 of the Act of 1882? It is that the first limb of the section goes to swell the assets of the estate that is being administered, and this is true; for without the first limb of the section the wife's money would have been a provable debt, and it not being so until after the other creditors are satisfied, the assets are *pro tanto* enhanced; but this not all the section enacts, for it expressly and in unmistakable terms enacts that her proof shall be postponed till the other creditors of the husband are satisfied.

It appears to me that section 3 of the Married Women's Property Act is explicit as to the proof of the wife. I cannot get over the enactment, and I do not see that the cases cited bind me to hold otherwise.

I therefore am of opinion that the Chancellor arrived at a right conclusion.

As to whether the costs of administration were to be added before ascertaining whether the deceased husband's estate could pay its liabilities in full, I am of opinion that they must be, though in this case they certainly appear to me to be very large.

Appeal dismissed.

Solicitors, *A. S. C. Doyle*, for *J. Ingram Dawson*, Barnard Castle; *Huntington & Leaf*, for *Richardson & Piper*, Barnard Castle; *Belfrage & Co.*, for *J. H. Holmes*, Barnard Castle.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — Feb. 26.

ST. GEORGE'S LOCAL BOARD v. BALLARD. (a.)

Local government—Streets—New streets—Construction of new street—Bye-laws—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 157.

The defendant was the owner of a strip of land on one side of a lane in an urban district. The lane led from a high road, and ended in a cul-de-sac, *and on the other side of it stood a row of houses, which had been built for many years. On part of his strip of land the defendant built three small houses fronting the high road, and having access solely therefrom. The side wall of one of the houses abutted on the lane, and the garden wall extended along the lane for a distance of* 80 *feet.*

Held, that what the defendant had so done did not constitute the lane a new street so as to be subject to bye-laws with respect to new streets made by the urban sanitary authority under section 157 *of the Public Health Act*, 1875.

Appeal from a judgment of Lawrance, J., at the trial of the action without a jury.

The action was brought by the plaintiffs, the urban sanitary authority of the parish of St. George, in the county of Gloucester, for an injunction to restrain the defendant from laying out or constructing a new street within their district otherwise than in accordance with the bye-laws made by them, under section 157 of the Public Health Act, 1875, with respect to new streets and buildings within their district.

The bye-laws in question were as follows:—

"(4) Every person who shall lay out a new street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be 36 feet at the least. (5) Every person who shall construct a new street which shall exceed 100 feet in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every bye-law relating to a new street intended for use as a carriage-road. (6) Every person who shall construct a new street which shall be intended for use otherwise than as a carriage-road, and shall not exceed in length 100 feet, shall so lay out such street that the width thereof shall be 24 feet at the least. (8) Every person who shall construct a new street shall provide at one end at least of such street an entrance of a width equal to the width of such street, and open from the ground upwards."

In the plaintiffs' district there was a lane or roadway about 8 feet in width and about 175 feet in length, commencing at the south side of a road called Church-road and ending in a *cul-de-sac*. The lane or roadway was bounded on the east side by a row of houses called Providence-place, which were erected before the plaintiff board was created, and on the west side by a strip of land which formerly formed the gardens of the said houses, and which had lately been acquired by the defendant.

The plaintiffs alleged that the defendant had submitted to them plans of certain houses which he proposed to erect upon the said strip of land, and that they had disapproved of such plans, on the ground that they did not provide for the laying out of the lane or roadway of the width required by their bye-laws, and had given notice of such disapproval to the defendant; but that, notwithstand-

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

ing such disapproval and notice, the defendant commenced, and, after a further notice threatening an action, proceeded, to erect the said houses and to lay out the said lane or roadway as a new street of the width of 8 feet only, contrary to the said bye-laws.

The plaintiffs claimed an injunction to restrain the defendant from laying out or constructing the alleged new street of a less width than 36 feet throughout its entire length, and from building any house or houses upon the lands fronting, adjoining, or abutting on the said new street or any part thereof, until the same should have been laid out or constructed of the width aforesaid, in accordance with the said bye-laws.

It appeared that the defendant had built upon part of the strip of land in question three houses, being small shops and having a frontage of 51 feet on Church-road. The only access to the houses was from Church-road. The flank wall of one of the houses abutted on the lane, and the garden wall of that house extended along the lane for a distance of 80 feet.

Lawrance, J., gave judgment for the defendant.

The plaintiffs appealed.

Bosanquet, Q.C., Lord Coleridge, Q.C., and *F. R. Y. Radcliffe*, for the plaintiffs.—This is the case of a new street within the meaning of the bye-laws. Before the defendant began to build the lane was a private way, his houses make it for the first time a two-sided street.

They cited *Vestry of St. Giles, Camberwell* v. *Crystal Palace Co.*, 40 W. R. 648, [1892] 2 Q. B. 33; *Roberts* v. *Richards*, 54 J. P. 693; *Robinson* v. *Local Board of Barton-Eccles*, 32 W. R. 249, 8 App. Cas. 798; *Taylor* v. *Corporation of Oldham*, 25 W. R. 178, 4 Ch. D. 395; *London County Council* v. *Lawrance & Sons*, 41 W. R. 688, [1893] 2 Q. B. 228.

E. U. Bullen and *W. Lloyd*, for the defendant, were not called upon to argue.

Lord ESHER, M.R.—The learned judge at the trial found that the building of these houses by the defendant was not the beginning of the building of a new street. That is a question of fact on which I am not disposed to disagree with the learned judge. The defendant has built three small shops facing Church-road, the side of one of them abutting on the lane in question opposite Providence-place. The mere fact of building this corner house does not itself constitute the making of a new street, neither is there any evidence of an intention to begin the building of a new street. I therefore think the appeal must be dismissed.

LOPES and RIGBY, L.JJ., concurred

Appeal dismissed.

Solicitors for the plaintiffs, *Meredith, Roberts, & Mills*, for *Sibly & Dickinson*, Bristol.

Solicitors for the defendant, *Ridsdale & Son*, for *Latchams & Montague*, Bristol.

High Court of Justice.

Chan. Div. Stirling, J. } Jan. 15; Feb. 14.

In re HORLOCK.
CALHAM *v.* SMITH. (*a.*)

Will—Satisfaction—Covenant by testator to pay a certain sum three months after death—Legacy to covenantee of greater amount—No time fixed for payment.

A. covenanted by deed to pay a sum of money to B. within three months from his (A.'s) decease.

Held, that, in the absence of clear proof that the consideration for the promise was immoral, the court would not readily assume it to be so, and that the deed was a good deed.

A legacy given simpliciter *is not a satisfaction of a debt of less amount due to the legatee under a bond and payable within three months from the death of the testator.*

By an indenture or deed of covenant dated the 3rd of July, 1891, and made between the above-named testator, Frederick Geldart Webb Horlock, of the one part, and the plaintiff, Ann Calham, of the other part, after reciting that the testator was indebted to the plaintiff in the sum of £300, the testator covenanted with the plaintiff, her executors and administrators, that the testator's executors and administrators would, within three calendar months next after his decease, pay to the plaintiff, her executors and administrators, the sum of £300, and the plaintiff on her part, for herself, her executors and administrators, covenanted not to demand or sue for payment of the said sum of £300 until after the expiration of three calendar months from the death of the testator.

The testator made his will on the 31st of July, 1891, and by a codicil thereto, dated the 14th of October, 1891, he bequeathed to the plaintiff a legacy of £400. The testator died in 1892, and the executors of the will paid the legacy of £400 to the plaintiff, but refused to pay the £300 alleged by the plaintiff to be due under the deed of covenant aforesaid, on the ground that the consideration therefor was immoral, and that in any event the alleged debt of £300 was satisfied by the legacy of £400 bequeathed to the plaintiff as aforesaid.

This was an originating summons taken out by the plaintiff to have it determined whether or not the said debt of £300 was satisfied by the legacy of £400, and whether or not the said sum of £300, with interest thereon, was due to the plaintiff.

The executors of the will of the testator were abroad, and they had appointed the defendant their attorney, who was now sued as administrator with the will annexed of the testator.

It was admitted by the plaintiff that previous to the date of the execution of the deed of covenant immoral relations had subsisted between the testator and the plaintiff, but the latter in her evidence swore that they had ceased previous to such date and were never resumed. The testator continued to make the plaintiff an allowance of 30s. a week up to the time of his death.

The rest of the facts sufficiently appear from the judgment.

Graham Hastings, Q.C., and *S. Dickinson*, for the summons.—The legacy is not a satisfaction of the debt. The rule that a debt is satisfied by a legacy of equal or greater amount is not a rule that obtains now. The judges always evade it if they can, and

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

they readily seize upon the slightest distinction between the debt and the legacy in order to do so. In this case the time for payment is not the same, as the legacy, being given *simpliciter*, is payable not until twelve months after the death of the testator, whereas the debt due under the bond is due three months after death. The fact that interest would run from these dates respectively is enough to take the case out of the rule.

Mathews v. *Mathews*, 2 Ves. sen. 635; *Nicholls* v. *Judson*, 2 Atk. 300; *Haynes* v. *Mico*, 1 Bro. C. C. 129; *Clark* v. *Sewell*, 3 Atk. 96.

Grosvenor Woods, Q.C., and *Herman Robinson*, for the administrator.—The legacy is of greater value than the debt, and the latter has been satisfied. The difference between the time of payment is not sufficient in the present case to evade the general rule. In all the cases where the rule has been evaded the testator has himself specified the time of payment. Here the legacy is given *simpliciter*, and is payable with the year following the testator's death. Its payment is not accelerated or postponed: White and Tudor's L. C. Eq., 6th ed., pp. 364, 405. The evidence supports the presumption that the testator intended the legacy as a satisfaction of the debt. The rule as to satisfaction is still in existence: *In re Fletcher*, 36 W. R. 841, 38 Ch. D. 373.

Graham Hastings, Q.C., in reply, referred to *Horlock* v. *Wiggins*, 39 Ch. D. 142, 37 W. R. Dig. 203. [STIRLING, J., referred to *Dowse* v. *Glass*, 29 W. R. 563.]

Cur. adv. vult.

Feb. 14.—STIRLING, J.—There are two defences raised against the plaintiff's claim—(1) that the consideration for the deed of covenant is immoral, and (2) that in any case the debt has been satisfied by the legacy of £400 bequeathed by the testator to the plaintiff. Now with respect to the first defence. On the face of it the deed is executed in consideration of a debt due from the testator to the plaintiff, but it is admitted that there never was any such debt, hence it is a voluntary deed, and as the testator's estate is more than sufficient to pay all the creditors, the plaintiff would be entitled to the £300 if the deed is a good one. Now, if the consideration for the deed was immoral, it obviously cannot be a binding instrument, but the burden of proof upon this point lies with the executors, who raise it. They say that the relationship between the testator and the plaintiff continued immoral up to the death of the testator. The plaintiff denies this, and alleges that the testator's health did not permit him to continue the cohabitation which she admits subsisted previous to the execution of the deed. This statement is unsupported, and is therefore unreliable. Consequently I assume that the relationship between them continued to be immoral. The executors also say that the deed was given in exchange for an informal document whereby the testator promised that the plaintiff should receive £300 from his executors if she continued to live with him up to his death, and that the consideration for that promise was clearly immoral. The real question is, however, Was the consideration in the deed itself immoral? It is plain that the testator as an honourable man would feel himself bound to make provision for the plaintiff, and I think it is plain from his letters that he in fact did consider himself so bound. Now I think that the court ought not to hastily assume consideration to be immoral, and consequently I am of opinion that this deed is a voluntary deed and a good deed, and that the plaintiff is entitled to the sum of £300.

Now as to the second defence—*i.e.*, that the debt is satisfied by the legacy of £400 bequeathed by the testator to the plaintiff. The general rule is that where a testator gives to a creditor a legacy equal to or greater than the debt, the legacy is a satisfaction of the debt. This rule was established in the last century, but no sooner was it established than the judges sought to avoid it. Lord Hardwicke especially set himself against the rule, and in *Nicholls* v. *Judson* and *Clark* v. *Sewell* he held that legacies respectively given therein were not satisfactions of debts due from the testators to the legatees, on the ground that the legacies under the terms of the respective wills were not payable immediately on the death of the testator, whereas the debts were. Again, in *Haynes* v. *Mico* Lord Thurlow followed Lord Hardwicke, and held that, where there was a difference in any circumstance between a legacy and the debt, the legacy should not be deemed a satisfaction.

The earlier cases were reviewed by Alexander, L.C.B., in *Adams* v. *Lavender*, M'Cl. & Y. 41, and he came to the conclusion that *Haynes* v. *Mico* was good law. In *Atkinson* v. *Littlewood*, L. R. 18 Eq. 595, Malins, V.C., felt himself compelled to apply the general rule of law, but the case is not in point. Next, in *Dowse* v. *Glass*, where a testator had covenanted to pay an annuity of £10 to H. D. "so long as she should continue the widow of J. D." by equal half-yearly payments, and subsequently, by his will, bequeathed to her "an annuity of £30 if she should so long continue a widow," Hall, V.C., held that the circumstance that the latter annuity would not become payable until a year after the testator's death, whilst the former was payable half-yearly, rebutted the presumption of satisfaction. It will be observed that previous to *Dowse* v. *Glass* in every case a time had been fixed by the testator for the payment of the legacy, but in that case this was not so.

In the present case the debt due under the bond is payable three months and the legacy not until a year after the testator's death. I have to say whether, under these circumstances, the legacy is a satisfaction of the debt. I join many judges in disapproving of the general rule which has been laid down. I equally disapprove of many of the exceptions which have been taken, but both are binding upon me, and I must take the law as I find it, and finding that Hall, V.C., applied the rule of *Haynes* v. *Mico* in a case very similarly circumstanced to the present one, I think I ought to follow him. The parol evidence given in the case is of a doubtful character, but I think, on the whole, it is in the plaintiff's favour, and ought not to affect the decision, and therefore, upon these grounds, I hold that the plaintiff is entitled to the payment of the debt and interest thereon from three months after the testator's death.

Solicitors, *Dobell; Hubert Smith.*

Q. B. Div. (Divisional Court). (Cave and Lawrance, JJ.) April 4.

BERNI *v.* THORNEY. (*a.*)

Licensing—Refreshment houses in Wales—Refreshment house open on Sunday—Refreshment Houses, &c., Act, 1860 (23 *Vict. c.* 27), *s.* 6—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 11—*Sunday Closing* (*Wales*) *Act*, 1881 (44 & 45 *Vict. c.* 61), *s.* 1.

The Licensing Act, 1874, *s.* 11, *regulates the hours at*

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

which refreshment houses in Wales must be closed. Such refreshment houses are not governed by the Sunday Closing (Wales) Act, 1881, *s.* 1.

Case stated by justices of the peace for the county of Glamorgan sitting at Merthyr Tydfil as a court of summary jurisdiction for the purpose of obtaining the opinion of the Queen's Bench Division.

An information was laid under section 1 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), by J. Thorney, the respondent, superintendent of police, against Battista Berni, the appellant, for that Berni on Sunday, the 6th of January, 1895, being a person licensed to sell refreshments in a certain house, did unlawfully sell or expose for sale in such house refreshments between the hours of eleven on the night of the 5th of January and four in the morning of the 7th of January, 1895.

After hearing the parties the justices convicted the appellant, and fined him ten shillings and costs.

The appellant applied to the justices to state a special case, on the ground that their decision was wrong in law; and the justices accordingly stated the present case.

From the special case the following facts appeared:

The appellant was the keeper of a refreshment house, and held a refreshment house licence, granted under the Refreshment House, &c., Act, 1860 (23 Vict. c. 27), and Acts amending that statute, authorizing him to sell any victuals or refreshments to be consumed in such refreshment house (except beer, cider, wine, and spirits). On Sunday, the 6th of January, 1895, a police constable found about thirty men and boys partaking of and paying for ice cream and ice water, which the appellant was selling.

It was contended for the appellant before the justices:

(*a*) That the effect of the Refreshment House Acts as amended by the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 11, was to require that refreshment houses in the district of Merthyr Tydfil should be closed from eleven at night until four on the following morning, and that, the appellant's house not having been kept open between those hours, no offence had been committed.

(*b*) That the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), which was passed for the purpose of prohibiting the sale of intoxicating liquors in Wales on Sundays, and which required that all premises in Wales in which intoxicating liquors were sold should be closed during the whole of Sunday, did not apply to refreshment houses.

The justices were of opinion that the Sunday Closing (Wales) Act, 1881, governed refreshment houses, and that such refreshment houses must be closed from eleven on Saturday night until four on the following Monday morning.

The questions of law for the opinion of the court were: (1) Does the Sunday Closing (Wales) Act, 1881, govern the closing of houses holding refreshment licences? (2) Did the appellant commit any offence in keeping open his refreshment house on Sunday, the 6th of January, 1895, at 8 p.m.?

S. Evans, for the appellant.—The Sunday Closing (Wales) Act, 1881, does not apply to refreshment houses. [He was stopped.]

Horace Avory, for the respondent.—Other statutes besides the Sunday Closing (Wales) Act, 1881, must be considered. By section 6 of the Refreshment Houses, &c., Act, 1860, refreshment houses kept open between 9 p.m. and 5 a.m. must be licensed. Further, by the Public-house Closing Act, 1864 (27 & 28 Vict. c. 64), s. 5, "between the hours of one and four o'clock in the morning, no person . . . shall open, or keep open, any refreshment house." And the Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 11, which refers to the last-mentioned statute, substitutes "for the hour of one o'clock in the morning the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment houses are required to be closed." Here, the "premises licensed for the sale of intoxicant liquors" had to be closed during the whole of Sunday, under the provisions of the Sunday Closing (Wales) Act, 1881, and therefore this refreshment house also should have been closed during the whole of Sunday. If that is not the true reading of the statutes, there is no time at which a refreshment house need close.

CAVE, J.—This is the most hopelessly wrong decision I ever came across in my life. One cannot expect magistrates to know the law, but they ought to have a clerk with some legal knowledge.

Section 1 of the Sunday Closing (Wales) Act, 1881, says, "In the Principality of Wales all premises in which intoxicating liquors are sold or exposed for sale by retail shall be closed during the whole of Sunday." These premises are not "premises in which intoxicating liquors are sold," and the Act does not affect refreshment houses at all. Refreshment houses must be closed when the previous Act, the Licensing Act of 1874, says that they must be closed.

LAWRANCE, J.—I agree. I am all the more glad to be of the same opinion as I am frequently in Wales myself.

Conviction quashed.

Solicitors for the appellant, *Linton & C. & W. Kenshole*, Cardiff and Aberdare.

Solicitors for the respondent, *Wrentmore & Son*, for *Lewis & Jones*, Merthyr Tydfil.

Q. B. Div.
(Cave and Wright, JJ.) March 27.

PHYTHIAN v. BAXENDALE. (*a*.)

Highway — Driver leaving horse unattended while "passing upon" highway—Horse and cart left standing—Penalty—Highway Act, 1835 (5 & 6 *Will.* 4, c. 50), *s.* 78.

Where a person in charge of any carriage passing upon a highway negligently or wilfully leaves such carriage so that he ceases to have the direction or government of the horses or cattle drawing the same, he is liable, under the Highway Act, 1835, *upon conviction, to a fine not exceeding £5; and the fact that the carriage was standing still during the whole time that the driver was absent and had in fact caused no obstruction on the highway, is no defence.*

Special case.

Appeal from the decision of the justices sitting at petty sessions held at Much Woolton in the Chirkwall division of the county of Lancaster in December last, who had convicted Phythian and fined him for having left unattended on the highway a wagon and horses of which he was in charge. The information was preferred by Baxendale, a superintendent of police, under section 78 of the Highway Act of 18[illegible] and the charge was that the appellant, on the 3rd November last, at Allerton, "then being the driver of a certain carriage, to wit, a cart on a certain highway

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

way there situated, was then and there negligently and wilfully at such a distance from such carriage whilst the same was then passing upon the said highway that he could not have had the direction and government of the horses then and there drawing the same."

The justices found as facts that the appellant was, on the day and at the place in question, the driver of a laden lorry or farm wagon drawn by two horses on a journey from Halewood to Liverpool; that he stopped his horses and left them standing on the highway, and went into a public-house, or, at all events, to the door of it (a distance of ten yards or thereabouts from the wagon); that he returned to his horses, started them, and went on his way; that he was away from his horses for ten minutes, and whilst at the house he had not the direction and government of the horses.

It was proved and admitted that the lorry and horses did not obstruct the passage of the highway.

The facts were not disputed by the appellant, but his advocate contended, as a matter of law, that they did not constitute the offence charged, inasmuch as the wagon was standing still during all the time the appellant was away from it, and "passing" meant "moving," and that the horses were not then actually drawing the same. It was further contended that the particular portion of the section under which the information was laid applied to moving vehicles only, and that the words "passing" and "drawing" implied motion, and were not applicable to carriages in a state of rest, with which the Legislature had dealt in other parts of section 78 of the Act (*e.g.*, quitting a cart and going on the other side of a hedge enclosing the highway, and leaving a cart, &c., on the highway, so as to obstruct the passage thereof). It was also pointed out for the appellant that, in the earlier part of the section, the words "passing" and "being upon" the highway were both used, and a distinction drawn between them.

The justices were of opinion that the words "whilst it shall be passing upon such highway" meant whilst it was on its way or journey, and that, whether the driver left his horses whilst they were moving and let them go on or stopped and then left them, they were equally passing from Halewood to Liverpool upon the highway, and liable, owing to the absence of the driver's control, to be the cause of accident, which it was the object of the statute to prevent.

Temple-Franks, for the appellant, submitted that the Highway Act, 1835, being a penal statute, must be construed strictly.—Section 78 was the clause under which the charge was brought, and in that clause a carriage was spoken of as "passing or being upon such highway" immediately before the words "whilst it shall be passing upon such highway" upon which the present charge was founded. A distinction was therefore intended to be drawn by the framers of the statute between "a carriage passing upon" and "a carriage being" on a highway. Quitting a carriage "being" upon a highway was only an offence when there was a "quitting and going on the other side of the hedge or fence enclosing the highway and leaving a cart," &c. The justices had not so found here. No charge of obstruction was made against Phythian, and the justices expressly found, in fact, that there was no obstruction caused by the wagon being left where it was, and therefore the offence could not fall within the words of the section: "Or shall leave any cart or carriage on such highway so as to obstruct the passage thereof." The finding of the justices was contrary to common sense, or if the conviction were upheld in this case a driver would have to face the risk of being summoned and fined each time he left his cart unattended for a minute or two.

Mattinson, for the respondent, was not called upon.

CAVE, J.—I am of opinion that the decision arrived at by the justices in this case was right, and that the appeal must be dismissed. The appellant was in charge of a wagon taking a load from Halewood to Liverpool, and in the course of that journey he left his horses in the way described in the case. It was contended before the magistrates that because the wagon was standing still during the time the driver was away, therefore the wagon was not "passing upon" the road, and the section imposing a penalty for leaving a cart on the highway unattended did not apply. I cannot adopt that view, for in my opinion the cart was clearly passing upon such highway at the time in question. The horses were not taken out, the journey had not been completed, the resting for a while was but an incident in the journey. It was urged that the justices had expressly found that no obstruction to the traffic had been caused by the wagon standing for a few minutes on the side of the road. That may have been so, but because one offence which was not charged was not proved to have been committed, I fail to see how that can be used as an argument by the defendant that another and totally different offence with which he was charged was not committed by him.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Nicholson, Graham, & Graham*, for *J. O. Swift & Co.*, St. Helens.

Solicitors for the respondent, *Ridsdale & Son.*

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) March 19.

In re SMITH AND LOGAN.
Ex parte FLETCHER *v.* BRANDON. (*a.*)

Bankruptcy—Practice—Secured creditor—Valuation of security—Notice to trustee to elect to redeem—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Schedule* 2, *rr.* 11, 12.

By rule 11 *of schedule* 2, "*If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date at which it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.*"

Held, that, when sending in a proof in accordance with this rule, a creditor need not state which particular securities he holds against which particular debts, nor need he separately assess the value of each security he holds, but may value his securities in a lump against the total amount of his debt.

Motion by the trustee for an order that the money due upon two policies of insurance upon the life of the bankrupt Logan held by Brandon, a secured creditor, should be declared to be the property of the trustee upon his paying Brandon his debt in full with interest and costs and repaying the premiums paid by him on the policies.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Upon the 9th of August, 1889, Brandon lent the bankrupt Logan the sum of £200 at six per cent. interest and took as security for the same a charge upon two policies of insurance on Logan's life for the amounts of £1,500 and £1,000 respectively, which were held by the insurance company as security for a loan of £1,000. Logan was adjudicated bankrupt in July, 1890, when Cooper was appointed trustee. He subsequently died, and was succeeded by Fletcher, the applicant in this case.

Upon the 2nd of December, 1891, Brandon sent in a proof for £458 13s. 9d., and in accordance with rule 11 of schedule 2 stated therein the particulars of the various securities he held and the dates when they were given, and assessed them all in a lump at the value of £440.

Upon the 18th of December the proof was admitted at £18 13s. 9d., and Brandon was paid a dividend thereon.

Upon the 29th of December Brandon gave notice in writing to the trustee in accordance with rule 12: "Provided that the creditor may at any time by notice in writing require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realized, and if the trustee does not within six months after receiving the notice signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption or any other interest in the property shall vest in the creditor and his debt shall be reduced by the amount at which the security has been valued."

The trustee did not give any notice to Brandon of any intention to redeem the security at the assessed value, nor did he call upon Brandon to realize it, and, consequently, after six months had elapsed, the trustee's interest in the policies vested in Brandon.

Upon the 17th of September, 1894, Logan died, and it was discovered that there would be a balance of £1,758 payable to Brandon on the policies after payment off of the loan from the insurance company.

The trustee thereupon launched this motion.

Muir Mackenzie, for the trustee.—My first contention is that rule 12 does not apply to a security of this kind at all, which is merely a charge which could not be foreclosed: *Tennant* v. *Trenchard*, L. R. 4 Ch. App., at p. 542. Secondly, the trustee never had a fair chance of redeeming this security, because the creditor in his proof did not set forth separately the value of each of the securities he held, nor state which securities he held against which debts. The trustee might have been very glad to redeem this particular security against the particular debt which it secured, though he did not care to redeem all the creditor's securities against all the debts. I submit that in any case the ordinary right of a mortgagee to redeem on payment in full ought not to be excluded by the operation of rule 12, and that the trustee should be allowed to redeem this security on payment of the debt in full, with interest and costs, and repayment of the premiums paid by Brandon.

Herbert Reed, Q.C., and *Carrington*, for the respondent.—As to the first point, it is not at all clear that a charge with a covenant for further assurance is not foreclosable: Seton on Decrees, 4th ed., p. 1133. We submit that the doctrine laid down in *Walsh* v. *Lonsdale*, 26 SOLICITORS' JOURNAL, 346, 21 Ch. D. 9, applies to a charge with an agreement for a mortgage. Furthermore, section 168 of the Bankruptcy Act, 1883, defines a security as a "mortgage, charge, or lien upon the property of the bankrupt." There is no authority in the books for the second contention, that the securities should be separately assessed, and the practice is certainly not so. There is also a *dictum* in our favour in *In re F. Du Bedat*, 29 L. R. Ir. 324, 41 W. R. Dig. 17. The trustee took no exception to the form of the proof, and should not be allowed to object to it now.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—What I have got to determine in this case is the question who is entitled, the trustee or the creditor, under this section of the Act.

To my knowledge it very often happens, or I will say it sometimes happens, that the words of an Act of Parliament are not quite clear, and that a construction may be put upon an Act of Parliament, either as the one side contend for, or in accordance with the contention on the other side, without anyone having in justice the right to say that particular construction is wrong, and that seems to me to be the case here. Really the rules attached to this schedule are not particularly clear. I am not quite sure that the draftsman in drawing them up was of the same mind all the way through, or whether he was not of one mind at one time and of a different mind at another. The very natural result is that there is a good deal to be said for both constructions.

Now when that is so, what is the duty of the court? I think one of the duties of the court is to see what construction has in fact been put on the rules, and then to follow that. I say that because it is a very inconvenient thing, when people have been in the habit of treating rules as if they meant one particular thing, merely because there may be in the mind of the judge a slight balance in favour of another construction, to go and adopt that other construction. Here everybody who is familiar with bankruptcy practice knows perfectly well that the ordinary course is for all the securities to be constantly put together and the debt lumped together. Very often it is not done, and it is very often much more convenient that it should not be done, but nevertheless it has been a matter of constant practice, without objection from anyone, for creditors to lump their debts and lump their securities in one proof, and therefore I am not prepared to say that Mr. Brandon was not entitled under rule 11 of this schedule to deal with his security in the way in which he has done, and to assess the value of his various securities as if they constituted one security.

That being so, it seems to me that I do not necessarily shut out the right of the trustee to have the different securities for the different debts separately valued afterwards. It may be that the *primâ facie* right of Mr. Brandon was to lump the debts due to him, and to lump the securities together, and then assess the value of the securities and prove for the balance of the total debts, but that having been done, we will suppose that the trustee desired to redeem a particular security for a particular debt. I have not got to determine it, but I am not at all sure that the trustee could not have called upon the creditor to separate the values and to assess the value of each security separately, but whether he has or not that right he has not done it, and under the circumstances it seems to me that, Mr. Brandon having acted on his strict rights in proving in the way in which he did under the conditions of rule 11, he had the right to go on under sub-section (*c*) of rule 12, and to require the trustee to elect whether he will or will not exercise his power to redeem the security, or require it to be realized, and if the trustee does not, within six months after receiving notice signify in writing to the creditor his intention, the trustee, shall not be entitled to exercise it. It seems to me that as long as the trustee acquiesced in the proof standing in the way it did, he could

object to the statutory consequence following on the lapse of time. I am particularly anxious here to say nothing that should negative the right of the trustee to call upon the creditor to value the securities separately, or to limit the right of the creditor to insist on the trustee dealing with the whole of each security, because both in sub-sections (*b*) and (*c*) of rule 12 I find words which seem clearly to point at the security being dealt with separately, according as each security is in fact a separate security for each debt.

Those words are, in (*b*): "If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale." I think that "any security" there does not mean any security mentioned in the proof as covering the whole of the debts proved, for I think it means any security that existed as one security, irrespective of, and prior to, the proof.

Similar words occur in (*c*): "Provided that the creditor may at any time by notice in writing require the trustee to elect . . . . and the equity of redemption or any other interest in the property comprised in the security . . . shall vest in the creditor." I think that that, again, means a single security which existed as such before the Act, and for that reason, although I am upholding the right of Mr. Brandon to prove in the form in which he did, lumping the debts and lumping the securities, I do not wish to be taken as having decided that either creditor or trustee have not the right to have the securities separated according to the section for the purposes of rule 12 and the clauses of that rule.

Having said thus much, I have only a word or two more to add about the other points which were made by Mr. Muir Mackenzie. He urged that all that was lost to the trustee by neglecting to act on this notice was the right to redeem at the assessed value, and that that left in the trustee the right to redeem on payment of principal, interest, costs, and allowances. I cannot agree at all in that. If that was the intention of the Legislature nothing was simpler than for them to have said so, and nothing that can be imagined would be more contradictory to that than the words which are actually used: "and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor." It is quite plain that if the interest of the mortgagor is to vest in the mortgagee, that negatives altogether any subsequent redemption, either at the assessed value or otherwise. I do not think it necessary for me to say any more. I hold that Mr. Brandon's proof is in a form that he was entitled to make it in, and that, having made it in that form, he was entitled to give the notice following the form of proof, and, having given that notice following the form of proof without any objection, that the result is that, after this lapse of time, the interest of the trustee, as representing the mortgagor and his creditor, has become vested in Mr. Brandon as creditor.

Motion dismissed.

Solicitors for the trustee, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for Mr. Brandon, *G. S. & H. Brandon.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 7.

"THE ARGO." (*a.*)

County court—Ship—Salvage—Practice—Affidavits of value—County Court Rules, 1892, *ord.* 39*B*, *rr.* 30, 31, 32.

The defendant in a salvage suit instituted in a county court having admiralty jurisdiction, is required in the ordinary course of practice, to prove by his affidavit of value the value of the property proceeded against, and this practice is not to be departed from unless under a special order of the judge made in his discretion, having regard to the special circumstances of any particular case before him.

This was an appeal from the county court of Yorkshire holden at Kingston-upon-Hull (admiralty jurisdiction).

By the decree appealed against His Honour Judge Bedwell, in an action of salvage instituted in his court on behalf of the Humber Steam Trawling Co. against the British fishing smack *Argo* had awarded to the plaintiffs £80 for salvage services rendered to *The Argo*, and overruled a tender of £75 made in the suit by the defendants, the owners of *The Argo*.

By the process transmitted from the registrar of the county court for the purposes of the appeal it appeared that the defendants had brought in an affidavit of value of their vessel stating her value to be £140, and that the judge of the county court, notwithstanding objection taken on behalf of the defendants, had allowed a witness called for the plaintiffs at the hearing to give oral evidence as to her value, and that such witness estimated her value in the condition she was then, to be £400, and no more.

The judgment of the court below, so far as material to this report, was in substance as follows:—

His Honour Judge BEDWELL.—1. On the point of procedure and as to letting in evidence at the hearing as to value after affidavit once put in under ord. 39B, rr. 31, 32, of the County Court Rules of 1892*, and allowed to pass unchallenged—on this point I held that, subject to granting an adjournment if required, I was bound to let the evidence in. It was urged before me that the inflexible practice of the Admiralty Division is to reject such evidence at the hearing; but, as I pointed out, the jurisdiction of the county courts is a mere creation of Acts of Parliament and orders, and has no inherent rights of its own as to procedure, like those which attach to the proceedings in the High Court, and the words of the rule 96 I have referred to seem to me to be solely connected with the question of arrest; and as the rule does not in positive words say that the county court judge is not to let further evidence in at the hearing, I feel bound to admit it.

2. On the merits I decided the value of the vessel and fish salved was £320. I allowed an eighth for salvage services and added £40 for loss of fish through absence from the fishing ground, making £80 in all, the £80 to include the £75 in court, with costs.

Nov 6.—The appeal now came on before the President (Sir Frances Jeune) and Bruce, J. (the latter sitting as a judge of the Probate, Divorce, and Admiralty Division in the absence of Barnes, J.), and the hearing was continued on November 7.

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* These rules are set out in the judgment of the appellate court.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Sir W. Phillimore and *Nelson*, for the appellants, defendants in the court below.

Butler Aspinall, for the respondents.—*The Argo* was never arrested, and there is no rule in the County Court Rules, 1892, requiring plaintiffs in salvage suits to refrain in cases where the salved property is not under arrest from bringing before the court the best evidence they can at the trial as to the value of that salved property.

Sir W. Phillimore was not called on to reply.

JEUNE, P.—In this case the sum of £75 was tendered and paid into court, and there was an affidavit as to the value of the vessel, fixing her value at £140. No agreement was come to as to the value, and no appraisement was asked for by the plaintiffs, but it would seem, from the notes of the learned judge of the court below, that, after a time—on the 22nd of November—the solicitors for the plaintiffs wrote as follows:—"We have received affidavit. You cannot expect us to accept your affidavit as to value." To this the solicitors for the defendants reply: "Our estimate is ample. If you intend to dispute this at the trial, we must ask you to give us notice, that we may be ready at the trial."

The result is, I think, that no formal notice was given; but, when the trial came on, evidence was tendered to show that the salved smack was of greater value than the value mentioned in the affidavit. The learned county court judge considered whether or not he ought to receive the evidence as to value then tendered, and he held, undoubtedly, that he was bound to receive it. After hearing it, he came to a conclusion which put the value of the vessel considerably higher than £140.

The County Court Rules now in force which apply to this case are rules 30, 31, and 32 of order 33B of the County Court Rules of 1892, and these rules provide as follows:—

Rule 30.—Where, in an admiralty action, the amount sued for is paid into court, together with costs, or the security completed, or the plaintiff requires it, the registrar shall deliver to the party applying for the same an order directed to the high bailiff of the court, authorizing and directing him, upon payment of all costs, charges, and expenses attending the custody of the property, to release it forthwith.

Rule 31.—Notwithstanding the last preceding rule, the property in an admiralty action for salvage shall not be released, except with the consent of the plaintiff, until its value has been agreed, or an affidavit of value filed on behalf of the party seeking the release, unless the court or the judge shall otherwise order.

Rule 32.—If the plaintiff is dissatisfied with the value mentioned in the affidavit filed under the preceding rule, he shall be entitled to have the value ascertained by appraisement, and for such purpose shall file a *præcipe*. The costs of such appraisement shall be in the discretion of the court.

I do not think it necessary to compare those rules with the earlier rules. I agree that the main difference is the addition in rule 32, which made it clear that the plaintiff has the right of appraisement if he is dissatisfied with the value given in the affidavit of value. Nor do I think it necessary to compare these rules with the rule of the High Court, because the latter rule is not a perfect expression of the law on the subject, since it is intended as a complement to the well-known practice of the High Court.

These rules stand as the code by which the county court is to be governed, and it is contended by counsel for the respondents, following the view which presented itself favourably to the learned judge, that the words of rule 31 are solely connected with the subject of arrest. I am unable to agree with that view. The rules refer to arrest because they prescribe that, notwithstanding the provision as to release, under rule 30, in the one case of salvage, the release is not to take place until the value has been agreed upon or an affidavit of value filed; but it appears to me that the power and effect of the rules are not exhausted or intended to be exhausted by their application to cases where a release is required. They provide, further, for a determination of the value of the *res* before the trial in the case of salvage, because they lay down that, notwithstanding that the full amount may be paid into court and security for costs given, the release shall in salvage cases not be allowed until the value has been determined by agreement, by affidavit, or by appraisement. Now, why is that provision made? Clearly, it seems to me, for the purpose, first, of tender, and, secondly, of determining what the value of the *res* is to be taken to be at the trial.

Having got so far, it appears to me clear that a plaintiff who is dissatisfied with the affidavit ought to demand an appraisement, and in every ordinary case—I do not like to go so far as to say in every case—the judge ought to insist upon the value being determined, either by affidavit if the value is uncontested, or by appraisement if the value is contested. I do not say that the court has no power to go beyond an appraisement, or, where there is no appraisement, that the court has no power to try the value of the *res*. I am not saying that no such case is possible, because the circumstances may be such as to justify that course; but the rules appear clearly to me to point to a regular course to be pursued, and it is wise, I think, to insist that, as a regular practice, there shall be, in case of dispute, an appraisement. It is obvious that, not only is that following as closely as possible what is the practice in the High Court, but it is extremely important that the value of the *res* shall be determined at the moment when it may best be determined, and in a way which is economical, rather than be left to the disputed evidence of experts at the trial. I think, therefore, that the rules point to the course which ought to be followed in almost every case. The learned judge's view, as expressed in the judgment he has delivered, clearly was that he was bound to take the evidence, and, as I have said before, his reason was that he thought rule 31 was solely connected with the release of salved property. I am obliged to say that the learned judge was mistaken in that view. He should, I think, have exercised his discretion whether, in the particular case, the plaintiff should not be held bound by the affidavit.

The learned judge did not exercise that discretion and therefore, I think, we are bound to consider the matter, and to exercise the discretion which he should have exercised. Exercising that discretion, in the circumstances of the case it seems to me clear that the evidence ought not to have been gone into. The learned judge ought to have said that the rules gave ample opportunity to the plaintiffs of challenging the affidavit if they chose; that they had not chosen to avail themselves of those rules; that, under the circumstances, no injustice would be done by holding them bound by the affidavit; and that, on the contrary, injustice would be done to the defendants by taking the evidence. Therefore, I think he ought to have held the affidavit to have been conclusive evidence of the value of *The Argo*.

But there is another question. Assuming that the judge was right in going into that evidence, ought one to say that his conclusion was not right? I observe that the only evidence given by the plaintiff

was the evidence of a person interested, and the evidence on the other side was the evidence of several witnesses; one, at last, was disinterested, and another was connected with the insurance. I am quite unable to come to the conclusion, on the whole of the evidence, that the learned judge was right in taking the higher value; and, if it were necessary, I should be prepared to decide that the value given in the affidavit was approximately the real value.

There are two grounds for allowing this appeal—first, that the learned judge ought to have held the plaintiffs bound by the affidavit; and, secondly, that, on the evidence taken, the value was put too high by the learned judge.

The result is that, inasmuch as the learned judge in taking the higher value thought that £80 was the proper amount to be awarded, if he had considered that the true value of the vessel was only £140 he would undoubtedly have considered that £75 was sufficient. Therefore I think the tender was sufficient, and under those circumstances the decision of the learned judge must be varied by declaring accordingly.

BRUCE, J.—I agree with the President, and I have nothing to add to his judgment.

Appeal allowed; cause retained and tender pronounced for.

Solicitors for the appellants, *Laverack & Sons.*

Solicitors for the respondents, *Jackson & Co.*

Court of Appeal.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — March 14.

In re BOWLING AND WELBY'S CONTRACT. (*a.*)

Company—Unregistered building society—Company of less than seven members—Winding-up order—Jurisdiction—Sale by liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.

The court has no jurisdiction under section 199 *of the Companies Act,* 1862, *to make an order for the winding up of an unregistered building society whose members are not more than seven in number. Such an order, if made, might be binding on the society, but would not be binding on an outsider who challenged it.*

Held, therefore, that the liquidator appointed in pursuance of such an order cannot make a good title to property of the society so as to force his title on a purchaser.

Decision of Stirling, J., ante, *p.* 216, *affirmed.*

In re Padstow Total Loss, &c., Corporation, 30 *W. R.* 326, 20 *Ch. D.* 137, *explained.*

Appeal from a decision of Stirling, J. (reported *ante*, p. 216), where the facts sufficiently appear.

The liquidator appealed.

Buckley, Q.C., and *Percy Wheeler*, for the appellant.—The society consisted, in fact, of more than seven members, because the estates of deceased members must be reckoned. The word "members" in section 199 of the Companies Act, 1862, does not necessarily mean shareholders. The past members of an unregistered society remain liable all their lives for debts contracted during their period of membership. Moreover, the executors of a deceased member are liable to be put on the list of contributories to the extent of the assets in their hands.

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

They referred to *New Zealand Gold Extraction Co.* v. *Peacock*, [1894] 1 Q. B. 622; *In re South London Fish Market Co.*, 37 W. R. 3, 39 Ch. D. 324; *In re Bolton Benefit Loan Society*, 28 W. R. 164, 12 Ch. D. 679; *Alexander* v. *Mills*, 19 W. R. 310, L. R. 6 Ch. App. 124; *In re Doncaster Permanent Benefit Building Society*, 15 W. R. 102, L. R. 3 Eq. 158; *In re Sheffield and South Yorkshire Permanent Benefit Building Society*, 22 Q. B. D. 470, 37 W. R. Dig. 29; *In re Blackburn and District Benefit Building Society*, 32 W. R. 159, 24 Ch. D. 437; *Part's case*, 18 W. R. 977, L. R. 10 Eq. 622; *Ex parte Blakeley's Executors*, 3 Mac. & G. 726.

Warrington, Q.C., and *Dibdin*, for the purchaser.—The liability for past debts may still exist, but that does not constitute continuing membership: *In re West Riding of Yorkshire Permanent Benefit Building Society*, 39 W. R. 74, 45 Ch. D. 463. The executors of deceased members cannot be members.

Wheeler replied.

LORD HALSBURY.—I am of opinion that this appeal ought to be dismissed, with costs. I look upon the 199th section as having enacted what there must be, in order to start this machinery of winding up—namely, the required number, that is exceeding seven, of persons who are actually members. I think that the language is susceptible of no other construction. I cannot read it as meaning either "actual members, or persons who, once having been members, are liable to be contributories"; and those are the words which must be put in in order to give it that construction. The statute itself draws a distinction between past members, whether past members be persons once members, and who, thereupon, are contributories, and actual members. It is, therefore, to my mind, impossible to give the construction contended for to the 199th section.

That leads me to consider what is the effect of the order that has been made for winding up, and which in some sense may be said to have been *res judicata.* I should think it probable that that order until appealed against is binding on the association as an association, and on everybody claiming under the association or taking a title under it, but I cannot agree that it is binding or incapable of being challenged by persons who have rights outside the association, and therefore I think it cannot be considered a judgment *in rem* for all time and as against all persons. If it can be challenged by an outside person, of course the result is conclusive against the present application. I have said that, because that is enough to decide this case, but I do not desire to be understood to say that if I had come to a different conclusion, all the difficulty would be removed. I do not wish to conclude myself by any abstract proposition on the subject, but in a case of this sort, bristling with difficulties of facts to be determined, and then questions of law to be determined upon those questions of facts, I should be very sorry to be a party to a decision which would force upon an unwilling purchaser any such title as this is. I ask myself what would happen if he wanted to raise money on such a title as this with regard to any property. I know full well the practical answer of a man of business would be that he would not look at such a piece of property with such a title. Therefore, I am of opinion that the judgment of Stirling J., is right, and that this appeal ought to be dismissed, with costs.

LINDLEY, L.J.—I am of the same opinion. This case has raised questions of some importance, and I will deal with those which are really materia to the decision of the appeal.

In form the question is whether the liquidator of the

company, which I will refer to presently, can make a good title to some land which purports to be vested in him under section 203 of the Companies Act, 1862. That will depend on whether this company is one which could be properly wound up under part 8 of the Act, section 199. The liquidator's case is this: "Here is a company which has been ordered to be wound up. I have been appointed its liquidator, I have got an order under section 203 vesting in me the property of the company which is held by trustees for the company, and I desire to sell under the direction of the court; I thereupon put this property up for sale, and the purchaser declines to complete." The purchaser declines to complete because he is not satisfied that he will get a good title; and when I look into it I am not satisfied that he will get a good title; indeed, I think he will get a bad one.

The question turns on the validity of the winding-up order. If that is right, no one quarrels with the appointment of the liquidator, or with the vesting order made under section 203. In order to investigate this question about the winding-up order we must look at the jurisdiction. The company itself is the Leeds and Yorkshire Benefit Building Society, which came into existence in 1851 under the provisions of the then Building Societies Act, 6 & 7 Will. 4, c. 32. That has been repealed by a subsequent Act passed in 1874, but the repeal need not be further alluded to. The society never was registered under the Companies Act, or any part of it, and it was formed in the way I have mentioned. A petition to wind it up as an unregistered company was presented under section 199. Now, then, what are the conditions which must be complied with in order to give the court jurisdiction to wind up what is here called an unregistered company. It must be some partnership, association, or company "consisting of more than seven members." It seems to me that the only interpretation of that is "consisting of more than seven members at the time of the winding up." I threw out a suggestion that it might have a wider meaning, but I do not think, for a reason I will give presently, that that can be the right meaning. What is the meaning of "members"? It must mean members of all partnerships or associations (except railway companies) which are not registered under this Act. You must find out what is meant by the statute. You cannot say that there is any definite meaning given to "members" as applying to all particular societies to be wound up under this Act. The Building Societies Act of Will. 4 does not throw any light upon it. Building societies' rules are not very intelligible, framed as they usually are, and it is not very easy to find out what constitutes a member of this particular society; but if you do look at the rules, it means, I think, a person who subscribes to the funds of the association, and who is admitted a member on the payment of a certain fee; and every member who pays his fees is entitled to a share. Now, did this society then consist of seven members when this winding up happened? It seems to me that the answer to that is unquestionably, No. [His lordship then considered the questions of membership of deceased members, and trustees of bankrupt members, and pointed out that they could not become members, and continued:—]

The conviction at which I have arrived is that which was entertained by the Master of the Rolls in the *Bolton Society's case* and in *The South London Fish Market Co.'s case*. Then comes the question, What jurisdiction is there? I see none. That raises another question. Is the order a binding order on every one as long as it lasts? If it is, that will enable the liquidator to go on. I cannot find anything of the kind. There are some expressions of the present Master of the Rolls in the case of *In re Padstow Total Loss and Collision Association Corporation*, 30 W. R. 326, 20 Ch. D. 145. There is this passage which I will read. Brett, L.J. (as he was then), says: "In this case an order has been made to wind up an association or corporation as such. That order was the order of a superior court, which superior court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made, it is a mistake as to the facts of the particular case, and not the assumption of a jurisdiction which the court had not. I am inclined, therefore, to say that this order could never, so long as it existed, be treated either by the court that made it, or by any superior court as a nullity, and that the only way of getting rid of it was by appeal." I have read that passage because I think that is the strongest expression of opinion that can be found in the books to the effect that a winding-up order can only be disputed on appeal. Now the court, in deciding that case, was dealing with an appeal from a winding-up order, and it was an appeal by a contributory. It was a case of one of those illegal companies which, being illegal, there was no jurisdiction to wind up; and the winding-up order having been made, what I think Brett, L.J., must have meant was that, until the order was set aside by the appeal, the company could not be prejudiced, nor could any person paying under it. I do not think he could have intended to go the length of saying that any person who was no party to the litigation at all and was not claiming through the company at all was to be bound by a winding-up order being made, which there was no jurisdiction to make. A purchaser cannot be bound at all unless it is a judgment *in rem*, and I do not think the present Master of the Rolls thought there was one. I allude to that because it is very important; because, if the liquidator made out that this was unimpeachable, he would make out a perfectly good title; but a purchaser is entitled to look into it and see whether it is so. If he can show that this order has been made by a court which had no jurisdiction to make it, it cuts away the title of the liquidator who claims under it. The consequence is that this appeal must be dismissed.

A. L. SMITH, L.J. — In this case the true question depends upon the true construction of section 199 of the Act of 1862. The point may be very shortly stated. The words are these, "any partnership, association, or company consisting of more than seven members may be wound up." What is the meaning of that? Does it mean that any partnership, association, or company consisting of more than seven persons who may at one time have been shareholders, but have withdrawn, and are still liable as contributories; or does it mean any company consisting of seven members who are actually members at the time when the winding up order is sought to be obtained? This section does not, in my judgment, stand alone on this point, because if you look at section 48 and if you turn to section 79 it seems to me that both sections 48 and 79 point to the fact of there being less than seven members—that is, actual members—at the time when the section points to; and in section 199, of there being more than seven members at the time which is there suggested. It seems to me, therefore, that as regards the construction of this section the matter is tolerably clear. I am clearly of opinion that this order was made by the learned county court judge without jurisdiction, and that on the true construction of the section there were not more than seven members.

But then it is said that the winding-up order is a judgment against all the world. It may be that it

is a judgment binding on those who were members of the company—and the company itself, but it is not a judgment binding on a person who is a stranger, and who is now attempting to resist having a title forced upon him, through an order which the court holds to be invalid and made without jurisdiction. In my opinion it does not bind the purchaser at all, and under those circumstances the purchaser is entitled to take the objection which he does, and that, therefore, the judgment of Stirling, J., should be affirmed.

Appeal dismissed.

Solicitors for the appellant, *A. Scott Lawson*, for *Jones, Son, & Tannett*, Leeds.

Solicitors for the respondent, *Vincent & Vincent*, for *North & Sons*, Leeds.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) March 4.

GUARDIANS OF WEST HAM UNION, *Appellants*. CHURCHWARDENS, OVERSEERS, AND GUARDIANS OF ST. MATTHEW, BETHNAL GREEN, *Respondents*. (*a*.)

Poor law—Costs—Limitation of time—Judgment ordering guardians to pay costs—Taxation—"Debt, claim, or demand incurred or become due"—Poor Law (Payment of Debts) Act, 1859 (22 & 23 *Vict. c.* 49), *s.* 1.

By section 1 *of* 22 & 23 *Vict. c.* 49, "*With respect to any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred by or become due, or within three months after the expiration of such half-year, but not afterwards.*

Held, that a judgment of the House of Lords ordering guardians to pay the costs of an appeal creates a "debt, claim, or demand" within the meaning of the above section from the time when the judgment is pronounced, and not from the time when the costs are taxed; and therefore the liability of the guardians to pay the costs is barred at the end of three months after the expiration of the half-year within which the judgment was pronounced, though the costs are not taxed until after the expiration of that half-year.

Appeal from an order of the Queen's Bench Division (Wills and Wright, JJ.)

On the 20th of March, 1894, the House of Lords reversed the decision of the Court of Appeal in a poor law settlement case, and ordered the respondents to pay the costs, the cause to be remitted to the Queen's Bench Division (see 42 W. R. 573, [1894] A. C. 230). A question having arisen as to whether the House of Lords had power to make any order as to costs, the House refused to alter their judgment, saying that if it turned out that *per incuriam* costs had been given when there was no power to give them or to enforce them they would not be enforced (see [1894] A. C., at p. 242).

The judgment was accordingly drawn up on the 18th of June, being dated as of the 20th of March, and on the 10th of July the costs in the House of Lords were taxed at £298, and on the 3rd of August the taxing officer's certificate was issued.

On the 24th of October the judgment of the House of Lords was made a rule of the Queen's Bench Division for the purpose of enforcing payment of the costs so taxed.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The Divisional Court on the 20th of December, on the application of the respondents, granted a stay of execution in respect of these costs, upon the ground that, as they had not been paid within the poor law half-year in which they were incurred (namely, the 25th of March) or within three months' afterwards, the time for their payment had elapsed.

Section 1 of 22 & 23 Vict. c. 49: "With respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, . . . such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. . . ."

The appellants appealed.

Jelf, Q.C., and *R. Cunningham Glen*, for the appellants.—The judgment of the House of Lords did not make the costs a "debt" until the costs were taxed on the 10th of July. It is similar to a case where an amount is to be settled by arbitration, in which case no debt arises until the amount is so settled. That being so, the "debt" was incurred in the poor law half-year ending on the 29th of September, and the three months had not expired when the stay of proceedings was granted on the 20th of December. [LOPES, L.J., referred to Seton on Decrees, 5th ed., p. 747, which says that the House of Lords may enforce its own order as to costs while sitting.) The appellants could not have taken any steps to make the judgment of the House of Lords a rule of the Queen's Bench Division until the formal judgment was drawn up and the costs taxed. The appellants used all due diligence and took all necessary proceedings, and even if they are out of time under section 1 of 22 & 23 Vict. c. 49 they are protected by section 4.

Finlay, Q.C., and *Beven*, for the respondents, were not called upon.

Lord ESHER, M.R.—In my opinion the order of the Divisional Court was right. The judgment of the House of Lords on the 20th of March created a judgment debt. It was an absolute judgment the moment the question was put to the House, and the resolution taken upon it. The House does not assume at that moment to state the precise formal terms in which its judgment is to be drawn up. The officer of the House may have to lay its terms before the solicitors or counsel in the case before it is finally settled, but when finally settled it is the judgment of the House as originally pronounced. That judgment in this case was pronounced on the 20th of March, and it created the debt for costs. That is a debt incurred by, or become due from, the guardians of the union within the meaning of section 1 of 22 & 23 Vict. c. 49, and the guardians cannot be compelled to pay that debt after the expiration of three months from the end of the half-year within which it was incurred or became due. It comes within the plain words of the section, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The question as to whether the House of Lords had power to give these costs does not arise. In my opinion this debt for costs became due on the 20th of March, when the judgment of the House of Lords was pronounced. That was five days before the end of the poor law half-year, and therefore the debt should have been paid within the three months after the expiration of that half-year. It is said that this creates a hardship. I do not know whether it does or not; we have only to construe the statute. The object of the statute is to prevent subsequent ratepayers from having to pay

debts incurred in previous years. I am therefore of opinion that the decision of the Divisional Court is right.

RIGBY, L.J.—I am of the same opinion. I am inclined to think that the House of Lords had power to order the respondents to pay the costs of the appeal in that House, but the question does not arise, because it seems to me that the judgment of the House of Lords of the 20th of March created a "debt, claim, or demand" within the meaning of section 1 of 22 & 23 Vict. c. 49, and the time limited for enforcing payment was three months from the 25th of March; nor have the appellants brought themselves within the exemption contained in section 4. The truth is, that the appellants, when they found the time passing within which they could enforce payment, ought to have applied to the House of Lords to enforce its own order as to costs. They are now too late to enforce payment.

Appeal dismissed.

Solicitor for the appellants, *F. E. Hilleary.*

Solicitor for the respondents, *R. Voss*, for *W. T. Howard.*

High Court of Justice.

Chan. Div. North, J. — March 30.

PARKINSON v. WAINWRIGHT & CO. (LIMITED) AND WAINWRIGHT. (a.)

Company—Practice—Debenture-holder's action—Form of order.

A debenture-holder suing on his own behalf to enforce his security is not entitled as a matter of course to a declaration similar to that in Perry v. Clutton Coal Co., *Seton, 5th ed., p.* 1685; *but, where all persons interested are parties, such a declaration is a convenient preface to the judgment of the court, and should be inserted according to the usual practice of the Chancery Division.*

Action by a debenture-holder, brought on as a short cause.

Parkinson, the plaintiff, was the holder of the only first mortgage-debentures issued by the defendant company. The defendant, G. E. Wainwright, was the holder of all the second mortgage-debentures except £200, which was held by one Church, who was not a party.

The defendant company were engaged in working a colliery, and at the beginning of 1895 made default in payment of the plaintiff's interest. He thereupon commenced this action for sale or foreclosure, and, no defence having been put in, the action now came on upon motion for judgment.

The minutes, as prepared, contained a declaration that the plaintiff was "entitled to a charge upon all the undertaking, property, and assets of the company, including uncalled capital," and directed an immediate sale, but directed no inquiry as to the existence of other incumbrances.

Wright Taylor, for the plaintiff.—Williams, J., in *Charlwood* v. *Leasehold Investment Co.*, 39 SOLICITORS' JOURNAL, 316, W. N., 1895, p. 47, refused to make such a declaration as is now asked for, but in *Brinsley* v. *Lynton and Lynmouth Hotel Co.*, W. N., 1895, p. 53, such an order was made.

He also referred to *Perry* v. *Clutton Coal Co.*, Seton, 5th ed., p. 1685, and ord. 51, r. 1*b*.

W. H. Jackson, for both defendants, consented to the order.

NORTH, J., said that the proposed declaration was a convenient preface to the judgment of the court, and that he would still continue to follow the usual practice of the Chancery Division, and insert such declarations.

The case differed from *Perry* v. *Clutton Coal Co.*, because in that case the plaintiff was suing on behalf of himself and all other debenture-holders, instead of holding the only first mortgage debentures. The inquiry as to persons interested could be quickly answered, and leave to apply in chambers for a sale would be given. If a consent brief on behalf of Church could be obtained, the order for an immediate sale might go, otherwise he must be added as a defendant. There must be an inquiry as to other incumbrances.

Solicitors for the plaintiff, *S. S. Seal*, for *Wade, Bilbrough, Booth, & Co.*, Bradford.

Solicitors for the defendant, *Barton & Pearman*, for *Scatcherd & Hopkins*, Leeds.

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. Stirling, J. — March 14.

In re PYLE.
PYLE v. PYLE. (a.)

Will—Conversion—Specific devise of real estate—Lease of same by testator, with option of purchase—Option exercised after testator's decease — Destination of purchase-money.

A testator by his will specifically devised certain freeholds to A. for his life, with remainder over, and subsequently made a codicil, in which (inter alia) *he confirmed his said will, but made no reference to the specific devise aforesaid. On the same day that he executed the codicil, but whether before or after that event did not appear, he granted to B. a lease of the said freeholds, with an option of purchase. B. exercised the option after the testator's decease.*

On the question whether the proceeds of the sale ought to be paid to the tenant for life and remaindermen or fall into residue,

Held, that, whether the execution of the lease preceded that of the codicil or not, it must in either event have been on the eve of execution, and therefore present to the testator's mind when he made the codicil, and this showed a sufficient intention on the part of the testator to pass all his interest in the said freeholds to the specific devisees, and took the case out of the general rule laid down in Lawes v. Bennett, 1 *Cox*, 167.

Rule in Weeding v. Weeding, 9 *W. R.* 431, 1 *J. & H.* 424, 431, *applied.*

A testator by his will, dated the 20th of March, 1886, specifically devised certain freeholds to his brother, John Pyle, for life, with remainder to his sons absolutely as tenants in common in equal shares. His residuary real and personal estate he gave to trustees upon the trusts therein mentioned. By a codicil to his will dated the 10th of June, 1890, which did not contain any reference to the freeholds in question, he made some slight alterations in the disposition of his residuary estate, and subject thereto he expressly confirmed his said will. By an indenture of lease

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

dated the said 10th of June, 1890 (being the date of the execution of the codicil above-mentioned), the testator granted a lease of the said freeholds to A. for a term of five years from the 24th of June, 1890, and by the said lease an option was given to the lessee to purchase the reversion in the said premises for the sum of £500.

There was no evidence as to whether the codicil or the lease was executed first.

The testator died on the 30th of September, 1890, without revoking his said will and codicil, and the lessee of the said freeholds afterwards exercised his option of purchase, the property being duly conveyed to him by a conveyance dated the 27th of September, 1893. The net proceeds of the sale amounted to £480.

This was a summons taken out by the executor of the testator to have it determined whether such proceeds of sale ought to be paid to the tenant for life and the remaindermen the specific devisees of the said property, or whether such proceeds fell into residue.

D. Stewart Smith, for the summons.

J. Ashton Cross, for the specific devisees.—The court will not presume that the lease was executed after the codicil, but will treat both instruments as valid, so far as is possible: *Taylor d. Atkyns* v. *Horde*, 2 Sm. L. C., 9th ed., pp. 632, 699. I rely on *Weeding* v. *Weeding*, 9 W. R. 431, 1 J. & H. 424, and *Emuss* v. *Smith*, 2 De G. & Sm. 722. The principle is in effect stated by Woods, V.C., in *Weeding* v. *Weeding*, at p. 431 of the report in 1 J. & H. as follows: Where a testator devises property which is subject to an option of purchase, knowing of that option, that is a sufficient indication of an intention to give to the devisee thereof all the testator's interest therein. In the present case both the lease and the codicil were executed on the same day, and hence the testator must have known of the option of purchase even if the codicil were executed first.

R. M. Pattison, for the residuary legatees.—The effect of the option of purchase is to make the proceeds of the sale of the freeholds go as personalty for all purposes: *Lawes* v. *Bennett*, 1 Cox, 167; *Collingwood* v. *Row*, 5 W. R. 484; *In re Adams and The Kensington Vestry*, 32 W. R. 883, 27 Ch. D. 394. The principle of these decisions does not depend on priority of execution of the will over the instrument creating the option, or *vice versa*. The authorities—*Drant* v. *Vause*, 1 Y. & C. C. C. 580, and *Emuss* v. *Smith*—to which Wood, V.C., referred in *Weeding* v. *Weeding* were decided on the ground that there was an intention shown in each case that the proceeds of sale should devolve in the same way as the property itself. The republication of the will by the codicil is not enough in itself to show an intention to take the case out of the general rule of conversion by exercise of an option of purchase, and I submit that the general rule should apply.

D. Stewart Smith in reply.—I also represent one of the residuary legatees, and in that capacity I support Mr. Pattison's argument. A codicil is not a republication for all purposes, as it does not revive a legacy which has been ademeed: *Cowper* v. *Mantell*, 4 W. R. 500, 22 Beav. 223, and *Booker* v. *Allen*, 2 Russ. & Myl. 270.

STIRLING, J.—The question is whether the devisees of certain freeholds are entitled to the purchase-moneys arising from the exercise by the lessee thereof of an option to purchase vested in him by the terms of the lease. [His lordship, after stating the facts as above set out, proceeded:—] The general principle is laid down in *Lawes* v. *Bennett*, and was recently followed by Chitty, J., in *In re Isaacs, Isaacs* v. *Reginall*, 42 W. R. 685, [1894] 3 Ch. 506.

In *Lawes* v. *Bennett* the decision in effect was that where there is a contract giving an option to purchase realty, and the option is not exercised until after the death of the person creating it, the purchase-money devolves as personal estate; but this being merely a rule, it may be altered by an expression of intention to the contrary appearing in the will—*e.g.*, by an express direction that the property, whether remaining in its specific state or whether sold under the option, should, nevertheless, go in the same way. It is not necessary for a testator to use exact language in order to do this, and in a series of cases where the testator clearly showed an intention that the general rule should not apply, the court has given effect to that intention. This was recognized in *Weeding* v. *Weeding*, in which case Wood, V.C., thus states the principle of the cases:—"When you find that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, then it is considered that there is a sufficient indication of an intention to pass that property, to give to the devisee all the interest, whatever it may be, that the testator had in it."

The case which is nearest to the present case, and which seems very close to it, is *Emuss* v. *Smith*. [His lordship stated the facts and read the judgment of the case at length, and proceeded:—] That decision was grounded upon three points (1) the specific devise by the will; (2) the optional nature of the contract, and (3) the republication of the will by the codicil. All these three circumstances exist in the present case, and, if anything, more forcibly, for here the testator expressly confirms his will by his codicil. True, in the present case the lease and the codicil were executed on the same day, and it is doubtful which was executed first, but, whichever was first, it seems to me that, even if the lease had not been actually executed when the testator made his codicil, yet he must have been on the eve of executing it, and it must have been present to his mind when he executed the codicil. I am of opinion, therefore, that there is sufficient to take the present case out of the rule in *Lawes* v. *Bennett*, and I hold that the tenant for life and remaindermen under the specific devise in the testator's will are entitled to the proceeds of the sale of the freeholds. Costs out of the fund.

Solicitors, *C. G. Algar; H. E. Barren; Sismey & Sismey*, for *Arnold, Essell, & Baker*, Rochester.

Chan. Div. Stirling, J. } Feb. 25; March 12.

FAIRTLOUGH v. WHITMORE. (*a.*)

Gaming—Unlawful game—"Baccarat chemin de fer"—33 Hen. 8, c. 9, s. 11—17 & 18 Vict. c. 38, s. 4—Lessor and lessee—Breach of covenant.

The game of "chemin de fer" is a form or variety of the game of baccarat, and is an unlawful game within the meaning of 17 & 18 Vict. c. 38.

Jenks *v.* Turpin, 13 *Q. B. D.* 505, 32 *W. R. Dig.* 84, *considered and approved.*

This was a motion by the plaintiff for the committal of the defendant for a breach of an undertaking by

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

him not to carry on or allow or permit the game of baccarat to be played on certain premises, No. 87, St. James's-street.

The plaintiff was the lessee of the house in question, and he had sublet to the defendant a portion of the premises for the purpose of carrying on a club called the Argosy Club under an agreement made in December, 1894, which contained the following clause:—"The tenant will not permit games of baccarat, hazard, or roulette to be played in the said premises, but will use the said premises as a private club only, and so carry on the club as not to contravene any laws of the land for the time being in force."

The plaintiff, who alleged that the defendant had infringed this provision of the agreement, commenced this action to restrain him from so doing, and on the 11th of January, 1895, an order was made by consent, whereby, *inter alia*, the defendant undertook not to carry on or permit to be carried on upon the premises any game of baccarat, hazard, or roulette.

The plaintiff now moved to commit the defendant to prison, on the ground that the latter had broken the said undertaking by allowing baccarat to be played in the club.

The defendant admitted that a game resembling baccarat called "chemin de fer" had been played in the club, but he contended that the playing of this game was not a breach of the undertaking.

The plaintiff filed evidence to show that "chemin de fer" was really "baccarat," there being two varieties of the game of baccarat—viz., "baccarat banque" and "baccarat chemin de fer."

The defendant produced evidence to the effect that "chemin de fer" was not "baccarat" at all, but was a legal game, whereas "baccarat" was illegal, and that there were many differences between the games, "baccarat" being played on a specially prepared table marked with certain lines, the banker holding the bank so long as he pleased or his finances lasted, while "chemin de fer" was played on an ordinary table, and the banker only kept the bank so long as he won, the deal (viz., the bank) passing to the player sitting on his left hand whenever a hand went against the bank.

It was contended that this constituted a material difference between the games, the reason being that in "baccarat" the chances were in favour of the banker, but in "chemin de fer" they were equally distributed amongst all the players.

Various authorities on the game were referred to in the course of the arguments, *inter alia*, a book entitled "Baccarat, Fair and Foul," by Professor Hoffmann, according to which the two games of "baccarat banque" and "baccarat chemin de fer" were merely varieties of the same game—*i.e.*, "baccarat."

The issue for the court to decide was whether or not the word "baccarat" in the undertaking above mentioned included "chemin de fer."

Graham Hastings, Q.C., and *Elgood*, for the motion.

Buckley, Q.C., and *Shearman*, for the defendant.

March 12.—STIRLING, J., after stating the facts as above set out, delivered judgment as follows:—By the terms of the agreement between the plaintiff and defendant the defendant agreed "not to permit games of baccarat, hazard, or roulette to be played on the premises, but to use the said premises as a private club only, and so carry on the club as not to contravene any laws of the land for the time being in force." Now it is admitted by the defendant that, after he had given the undertaking not to carry on or permit the game of "baccarat" on the said premises, he took part in playing thereon a game which he called "chemin de fer," and the question is whether that game is "baccarat" within the meaning of the undertaking. The first point is, What is the difference between "baccarat" and "chemin de fer"? It is admitted that there are differences, but whether these differences constitute a substantial difference between the two games is disputed. The most material difference is that, whereas in "baccarat" the bank is kept by one of the players until his funds are exhausted — an event which might not happen in the course of an evening —in "chemin de fer" the bank is kept by each player in turn, and might, and in fact generally does, change hands very frequently. Moreover, in "chemin de fer" the number of players is generally smaller than in "baccarat," and there are other differences of detail. Now, in my opinion, these differences do not constitute a substantial distinction between the two games, and I think that "chemin de fer" is merely a form or variety of "baccarat." It is said, however, that the names of the two games are different, and that "chemin de fer" is not known in England as "baccarat." As to that, neither "baccarat" nor "chemin de fer" is a name of English origin, and the latter is apparently of French origin. [His lordship here referred at length to the definitions of "baccarat" given in various modern dictionaries and in treatises on the game, and continued:—] I am of opinion, after a careful consideration of these definitions, that "baccarat," as ordinarily understood in England in 1894 (the date of the agreement between the plaintiff and defendant), includes both forms of the game, and that there is no reason why the term "baccarat" should be limited to "baccarat banque." It is contended, however, that, whereas "baccarat" has been held to be an unlawful game, "chemin de fer" is a lawful game, and that therefore the game mentioned in the agreement must be taken to refer to the unlawful game only. It might very well be, however, that the plaintiff intended and desired to prohibit "baccarat" in every form, not caring to run any risk on the subject of its illegality.

But I go further than this, for it is clear, on the authority of *Jenks* v. *Turpin*, 13 Q. B. D. 505, 32 W. R. Dig. 84, that "chemin de fer" is just as unlawful as "baccarat" — neither more nor less. In that case Hawkins, J., in reference to "baccarat," said: "All such games (*i.e.*, dice or cards), if they are games of chance or games of chance and skill combined (which cannot be called games of mere skill), are, in my opinion, clearly within the meaning of the words 'unlawful games' in 17 & 18 Vict. c. 38"; and lower down on the same page (p. 524) he says: "It is a game of cards. It is a game of chance, and though, as in most other things, experience and judgment may make one player or banker more successful than another, it would be a perversion of words to say that it was in any sense a game of mere skill. It is, therefore, in my opinion, an unlawful game within the meaning of the statute. It is said that it is a game of modern invention. That may be; and, assuming it to be so, it is just what the Legislature intended to include in the phraseology of the 11th section of 33 Hen. 8, c. 9 as 'a new unlawful game hereafter to be invented.'" In my opinion every word of that judgment applies to "chemin de fer," which is an unlawful game in the same sense and under the same circumstances as "baccarat." Whether either "baccarat banque" or "baccarat chemin de fer" would be an unlawful game if played under the circumstances of which evidence has been given in the present case I am not called upon to say

because both forms of the game are, in my opinion, absolutely prohibited by the covenant.

His lordship granted an injunction restraining the defendant from permitting the game of "chemin de fer" to be played on the premises, and declined to suspend the operation of the injunction pending an appeal.

Solicitors, *Tyrrell, Lewis, Lewis, & Broadbent; Bagot, Harte, & Co.*

Q. B. Div.
(Cave and Wright, JJ.) March 29.

REG. v. JUSTICES OF DURHAM. (*a*.)

Justices—Appeal—Recognizance—"A court of summary jurisdiction"—Summary Jurisdiction Act, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-section* 2.

The recognizance into which an appellant has to enter under section 31, *sub-section* 2, *of the Summary Jurisdiction Act*, 1879, *may be fixed and entered into before any court of summary jurisdiction, even though it is done at a court in another county to that in which the order or conviction was made.*

It is not essential that the order or conviction, or a copy thereof, be produced to the court before whom the recognizance is entered.

Rule *nisi* for a *mandamus* commanding the justices of the county of Durham to hear and determine an appeal against a bastardy order.

The order was made at the petty sessions held at Houghton-le-Spring, in the county of Durham.

Section 31, sub-section 2, of the Summary Jurisdiction Act, 1879, requires that a person desiring to appeal from an order of the justices shall, within a certain time after the order was made, enter into a recognizance before a court of summary jurisdiction.

Within due time the putative father went before a magistrate of the county of Northumberland, sitting in the petty sessional division of Haltwhistle in that county, and entered into a recognizance with one surety to prosecute the appeal. A copy of the notice of appeal was laid before the magistrate who took the recognizance, and the facts of the case were stated to him, but neither the order nor a copy thereof were shown to him.

The magistrates at quarter sessions refused to hear the appeal, on the ground that the recognizance had not been properly entered into.

Scott Fox showed cause.—The recognizance is bad because it was not entered into before the court which made the order, or, at any rate, before a court within the same county. The Act, it is true, says that the recognizance is to be taken before "a court of summary jurisdiction," but that cannot be taken to mean any court. The usual practice is to go before the court who heard the case. In this case the appellant gained a special advantage by entering into his recognizance in another court, for at Houghton-le-Spring it was always the practice to require two sureties. Further, the recognizance was bad because the magistrate before whom it was made had not sufficient information before him on which to fix the amount, and he should also have heard the other side.

Strachan, in support of the rule.—All the requirements of the Act have been fulfilled, and the magistrate had ample material before him whereon to fix the amount. The words of the Act do not require the recognizance to be taken in the court which heard the summons, for in all cases where the Legislature requires the applicant to go to the same court as the court who heard the former matter, or to a court in the same county or petty sessional division, it is careful to say so. Instances of this are to be found in sections 9, 26, and 31 sub-section 2. Under 8 & 9 Vict. c. 10, s. 3, notice of having entered into a recognizance had to be sent to the justices who had made the order, but the Legislature have not re-enacted that provision. It would be a hardship if a man who lived (say) in Cornwall should have to come up to Durham with his sureties to have the amount of his recognizance fixed.

CAVE, J.—The *mandamus* ought to go. The statute which governs the case is the Summary Jurisdiction Act, 1879. Section 31 provides that "where any person is authorized by this Act, or by any future Act, to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court subject (*inter alia*) to the conditions and regulations following: (3) The appellant shall, within the prescribed time, or, if no time is precribed, within three days after the day on which he gave notice of appeal, enter into a recognizance before a court of summary jurisdiction, with or without a surety or sureties, as that court may direct." The question is, Does that enactment require the recognizance to be taken before the court which made the conviction or order, or before a court in the same county? I think the words "a court" mean any court. The rest of the section makes it perfectly clear. "The appellant may, if the court of summary jurisdiction before whom the appellant appears to enter into a recognizance think it expedient, instead of entering into a recognizance, give such other security, by deposit of money with the clerk of the court of summary jurisdiction, or otherwise, as that court deem sufficient." The "court" is qualified. Sub-section 4 says: "Where the appellant is in custody the court of summary jurisdiction before whom the appellant appears to enter into a recognizance may, if the court think fit, on the appellant entering into such recognizance or giving such other security as aforesaid, release him from custody." Again, in sub-section 5, we have: "The court may adjourn the hearing of the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter, with the opinion of the court of appeal thereon, to a court of summary jurisdiction acting for the same county, borough, or place as the court by whom the conviction or order appealed against was made . . ." So, in the very same section, we have the three expressions "a court," "the court before whom the appellant appears to enter into a recognizance," and "a court of summary jurisdiction acting for the same county, borough, or place as the court by whom the conviction or order appealed against was made." The Legislature appears to have been quite aware of the distinction between these expressions, and therefore the words "a court" must be taken to have been used in their *primâ facie* meaning—namely, "any court," and not the same court or a court in the same county, borough, or place.

Reason points in the same direction; for by the time the appellant had made up his mind to appeal it might be impossible to collect together the same court as the court who convicted him. Again, he might live in a distant county, and might have to come all the way from Cornwall with his sureties to tender recognizances before a court which neither knew him nor his sureties. On the other hand, a

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

magistrate of the county where the appellant lives is far better qualified to judge of the means of the appellant and of his sureties.

WRIGHT, J.—I am of the same opinion. In the absence of authority we must be guided by the bare letter of the statute. The *primâ facie* meaning of "a court" is any court, and, on general considerations, it is more in accordance with the public convenience that the appellant should be able to resort to a court in the county where he resides. I think the magistrate had all the materials before him which were requisite—namely, the facts of the case, the grounds of the appeal, and the notice of appeal.

Rule made absolute.

Solicitor for the appellant, *H. Nelson Paisley.*

Solicitors for the respondent, *Belfrage & Co.*

Q. B. Div.
(Cave and Wright, JJ.) March 28.

GUARDIANS OF THE POOR OF WEST HAM UNION *v.* GUARDIANS OF THE POOR OF CARDIFF UNION. (*a.*)

Poor law — Settlement — Irremovability—Residence of wife—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.

In estimating the period of three years during which a pauper acquires the status of irremovability, there cannot be included a period during which the pauper's wife resided by herself within the union before the pauper himself commenced his residence in that union.

Case stated pursuant to 12 & 13 Vict. c. 45, s. 11.

Richard Taylor, whose occupation was that of a ship's cook and steward, was living in March, 1888, in Stepney, together with his wife. On the 14th of March he started on a voyage which lasted till the 1st of October, 1889. In the meantime his wife gave up the lodgings in Stepney and went into service. After other changes of residence she went to live with her mother, and she moved with her, on the 12th of November, 1888, to 15, Khartoum-road, in the parish and union of West Ham. Subsequently, on the 10th of August, 1889, she took lodgings by herself at 37, Braemar-road, in the same parish. Taylor, on his return from sea, went to live with her at 37, Braemar-road, and continued to do so till he went to sea again. Between this and the 3rd of September, 1892, he went on several voyages, but always on his return went to live with his wife at 37, Braemar-road; and on the 3rd of September the residence in West Ham terminated.

Taylor subsequently became a pauper lunatic chargeable to the union of Cardiff, and on the 12th of February, 1894, the respondents obtained an order from two of the justices of Glamorganshire adjudging that West Ham was the place of the last legal settlement of Taylor, and ordering the appellants to pay certain sums of money in respect of his maintenance.

Notice of appeal was given, and this case was stated by consent of both parties for the opinion of the High Court.

Jelf, Q.C., and *Morten,* for the appellants.—The residence of the husband is said to have commenced on the 12th of November, 1888, when the wife went to reside in West Ham. But it cannot be said in this case that the residence of the wife was the constructive residence of the husband, for a man cannot have an *animus revertendi* to a place he has never lived in. It is not even stated that the wife took the lodgings on the 10th of August, 1889, by the direction of her husband.

Macmorran and *C. F. Pritchard.*—Taylor's intention was to return to his wife wherever she might be living. Therefore he had an *animus revertendi* to West Ham: *Reg.* (*on the prosecution of Merthyr Tydvil Union*) v. *Stepney Union,* 54 L. T. M. C. 12, 33 W. R. Dig. 152. [CAVE, J.—You maintain *ubi uxor ibi domus?*] Yes.

CAVE, J.—Our judgment must be for the appellant. The cases with regard to constructive residence have gone a long way. But I am not aware of any case that has gone the length of saying that the residence of the wife is the residence of the husband. We cannot in this case assume even that the wife went to live in West Ham by the direction of her husband. She might have been residing in a place her husband had never heard of.

WRIGHT, J., concurred.

Appeal allowed.

Solicitors for the appellants, *Hillearys.*

Solicitors for the respondents, *Crowders & Vizard.*

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Q. B. Div.
(Cave and Wright, JJ.) March 27.

JONES *v.* JONES. (*a.*)

Husband and wife — Voluntary separation—Offers to resume cohabitation by wife—Alleged desertion—Lapse of years between "desertion" and application for maintenance.

In 1880 *the appellant, a labourer, married the respondent. In the following year a child was born, and the wife went, with her husband's full consent, to her mother's house for her confinement. During her absence the appellant broke up their home and took a room in his father's cottage, where the wife refused to live with him, on the ground that the accommodation there was insufficient. Subsequently the husband refused her requests to take her back to live with him as his wife. The husband was in* 1894 *convicted on a summons for desertion of his wife.*

Held, that the husband's wish that the wife should live with him at his parents' house was not unreasonable, and that there was no evidence of desertion within the meaning of section 1 *of the Married Women Act,* 1886, *to warrant the justices in making an order against him after the lapse of so many years from the time they ceased to live together.*

Special case stated by the justices of the city of Winchester, who had convicted Jones of deserting his wife, and had made an order against him for alimony.

The material facts were as follows:—In June, 1894, the husband was summoned under section (1) of the Married Women Act, 1886, for deserting his wife, and convicted. It appeared from the evidence that the parties were married in May, 1880, and lived as man and wife in lodgings. In February, 1881, as the wife expected her confinement, she went with her husband's approval to her mother's cottage, leaving her things in her husband's charge with the full intention of returning. The child was born on the 4th of March. Her husband on several occasions came to see her, but never supplied her with any

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

money. After the birth of the child the mother had a long illness, and during that time Jones gave up their lodgings, and removed her things with their furniture to a room in his father's cottage, where he arranged that she should come and live with him. The wife refused to do so, however, alleging that in her then state of health the place was not a suitable home for her to go to, because the cottage contained only two bedrooms, and was occupied by the father, mother, and an unmarried brother of her husband. The child died on the 5th of August. After she regained her health, on two or three occasions she asked Jones to make a home for her elsewhere, but no dates when these requests were made were given. The wife stated in her evidence that her continued refusal to live with her husband at his father's cottage, was because there were only two bedrooms, although she admitted he never told her that if she returned with him there she would occupy their room with anyone beside himself. The husband in his evidence said the cottage contained three bedrooms. Some three years after the death of the child her husband again asked his wife to return to him, but she again refused, saying she believed that it was God's will that they should live apart. In 1888 she wrote to her husband a letter which showed that she was suffering from a strong religious infatuation, and while regretting that her past conduct had given him pain and broken up their happy home, stated that it was impossible for her ever to return to him. The husband in his evidence said that on the 4th of May, 1881, he asked his wife to come back, and that she then refused to do so. He subsequently placed an advertisement in the *Hampshire Chronicle* to the effect that he would not be answerable for any debts she might contract in his name. In 1892 they again met, when the wife expressed her desire to return to him. In 1894 she asked him to come and live with her, and he replied that he must take time to think about it. Lately Mrs. Jones' health had been failing, and it was evident that she would not be able much longer to support herself by her own exertions as hitherto. And this fact formed the ground of her application for maintenance. Suggestions of misconduct during the period of separation were made by each party against the other, but the allegations were not gone into as counsel on neither side relied on them. With regard to the social position of the parties, it was stated that at the time of the marriage the husband was engaged as a farm labourer, but that he had since risen, and was described on the summons as a steam-tackle-owner.

The justices, having regard to the advertisement in the *Hampshire Chronicle*, the letter of 1888 from the wife, her subsequent efforts to renew cohabitation, and the husband's evasions, found as facts that Mrs. Jones went to her mother's house with the consent of her husband; after this the husband removed his wife's property and things, and broke up their home in lodgings; that the home he offered at his father's cottage was not one that any woman, under the circumstances, could be expected to accept; that Mrs. Jones had not incurred debts in her husband's name when the advertisement was inserted in the local paper; that after the letter of 1888 she wrote and asked her husband to make a home, and he put her off; and that all through he never really intended to live with his wife again. They found, therefore, that Jones had deserted his wife.

Bankes, for the husband, contended that the order of the justices was wrong, for the husband's conduct did not amount to desertion within the meaning of the Act of 1886. [He cited *Reg.* v. *Leresche*, 40 W. R. 2, [1891] 2 Q. B. 418, where it was held that in order to constitute desertion within the meaning of the Act the parties must be living together as man and wife when the desertion took place.] If the separation was not voluntary, it was the wife, and not the husband, that was to blame. The fact that the husband refused his wife's offers to return to him could not be construed as evidence of desertion on his part in the absence of other proof. [He referred to *Fitzgerald* v. *Fitzgerald*, 17 W. R. 264, L. R. 1 P. & D. 694, where it was laid down that no one could desert who did not actually or wilfully bring to an end an existing state of cohabitation.]

He cited also *Pape* v. *Pape*, 36 W. R. 125, 20 Q. B. D. 76. [He was stopped.]

Bullen, in support of the conviction, relied on the case of *Chudley* v. *Chudley*, 62 L. J. M. C. 97, 41 W. R. Dig. 132. The husband sent his wife away, not intending to have her back again, or he would not have got rid of their home. [CAVE, J.—A woman leaving her husband's house for her confinement cannot be construed as an act of desertion. What you have to get over is the number of years that have elapsed. We must be very careful before making an order for maintenance when a long period of separation has intervened, in case, in the words of an old authority, the court might unwittingly set up a precedent that would encourage a woman to withdraw herself from her husband's society for all the best years of her life, and then, so soon as she became a worthless old woman, summons her husband to support her. That is good law, and I agree with it.] The wife refused to go back after her illness because her husband did not provide a suitable home for her. The justices have found that was so. It was a question solely of fact. It is immaterial, there being evidence of desertion, to fix the actual day when that desertion began: *Wilkinson* v. *Wilkinson*, 58 J. P. 415. [WRIGHT, J.—In deciding the question whether the only home the husband was willing to provide for the wife was one which she ought to have accepted, the social position of the parties at the time that the offer was made must be considered.] There was no evidence to rebut the woman's assertion that the house was unsuitable, nor did the husband contend that it was the only home his means enabled him to provide for her.

CAVE, J.—In my opinion the appeal must be allowed, because upon the facts as stated there is no evidence upon which this court can hold that the justices could reasonably come to the conclusion that the husband had deserted his wife. The parties were married as long ago as 1880, and in 1881 the wife went to her mother's house for her expected confinement. There was nothing in her doing that which could be construed as evidence that the parties desired to live apart, and the fact that she left her things behind at their lodgings was evidence, if any were needed, that she intended shortly to return. We are, therefore, only concerned with what took place afterwards. The husband during her absence gave up the lodgings and moved his wife's things to a room in his father's cottage, and on his wife's recovery from a long illness made arrangements for her to return to him there. The wife refused, alleging that there was not sufficient room for themselves and infant. Within reasonable limits it is certainly the right of the husband to decide in what style he and his wife should live. If, therefore, Mrs. Jones refused to go to the house which Jones thought was suitable to their condition, and which in fact was not disreputable, that was not any act of desertion by him. In this particular case there is no reason to suppose that they would have shared their room in

the cottage with anyone else; and having regard to the social position of the parties, there was nothing unreasonable in the husband's offer. The matter, however, did not stop there, for later on when her husband asked her to return she again declined, not on the ground this time of want of proper accommodation, but because she considered that it was God's will that they should not live together.

We have been referred to the case of *Wilkinson* v. *Wilkinson*, where the court decided that it was not necessary to fix the actual date on which the desertion commenced so long as there was evidence on which they could hold that there had been actual desertion. With that decision I agree, for I think that the exact fixing of the date is immaterial. In the present case the question is not from what date the desertion should be said to have begun, but whether in fact there ever was a date at all on which the husband deserted his wife. No proof of such a day had been given; in fact, it was the wife who, for some reason or other, refused to return to her husband.

WRIGHT, J.—I am of the same opinion. I see nothing unreasonable for a person in the position of a labourer living with his wife in a house such as the applicant offered to Mrs. Jones. The husband asserted, indeed, that there were three bedrooms in the cottage. Then we have his uncontradicted evidence that in 1884 or 1885 the wife refused to live with him, and the letter of 1888 is still stronger evidence against the wife. In the special case, moreover, there is no finding that the wife really was willing to again live with her husband. It seems to me that there was no evidence to justify the finding of the justices that the wife was justified in refusing to return to her husband in 1881, or that since that time the husband had wilfully deserted her. The order made by them against the husband is therefore wrong, and must be set aside.

Solicitors for the appellant, *Prior, Church, & Adams.*

Solicitors for the respondent, *Stocken & Jupp*, for *Ed. Godwin.*

Q. B. Div.
(Wills and Wright, JJ.) Feb. 7.

SINGLETON (*Appellant*) *v.* ELLISON (*Respondent*). (*a.*)

Criminal law—Brothel—Meaning of—House occupied by one woman who receives men for purposes of prostitution—House not frequented by other women—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 13, *sub-section* 1.

A house occupied by a woman who receives men there by day and night for the purpose of having illicit intercourse with her for payment, where no other woman resides in the house or visits or uses the same for immoral purposes, is not a brothel, and such woman does not "keep a brothel" within the meaning of sub-section 1 *of section* 13 *of the Criminal Law Amendment Act*, 1885.

Case stated by justices of the peace for the borough of Preston.

An information was preferred by the appellant against the respondent that she did unlawfully keep a brothel in a certain street, contrary to section 13, sub-section 1, of the Criminal Law Amendment Act, 1885.

It was proved that the respondent, between the dates specified in the information, occupied a house, numbered No. 35, Everton-gardens, within the borough of Preston; that the house was frequented by a number of men by day and night, but principally by night, and that these men came there for the purpose of having illicit intercourse with the respondent, and that fornication and indecent acts were seen to have taken place between some of the men who resorted there and the respondent.

There was evidence that the respondent received money from the men who frequented the house, but there was no evidence that the house was used by women other than the respondent.

For the respondent it was contended that there was no evidence that the respondent was a prostitute; that the definition of the words "keeping a brothel" in *Reg.* v. *Justices of Parts of Holland, Lincolnshire*, 46 J. P. 312, was "a house kept for people of opposite sexes to come there and have illicit sexual intercourse"; that the respondent did not keep the house for people of opposite sexes to go and have illicit sexual intercourse; that there was no evidence that any women were allowed to come there for sexual intercourse, and that the house was not a brothel.

The justices were of opinion that, in order to constitute the offence of keeping a brothel, it was necessary for the appellant to prove that the house was frequented and used for the purpose of prostitution by men and women other than the woman occupying the house, and they found that no woman other than the respondent lived at, visited, frequented, or used the house in question for the purposes mentioned, and they decided that the house was not a brothel within the meaning of the statute, and dismissed the information, subject to this case.

The question for the opinion of the court was whether, on the facts proved before them, the decision of the justices was correct in point of law.

Geooge Elliott, for the appellant.—Upon the facts proved the justices ought to have found that this house was a brothel. The house was used for the purposes of prostitution, and that is sufficient to constitute it a brothel within the meaning of sub-section 1 of section 13 of the Criminal Law Amendment Act, 1885. A brothel is the same as a bawdy house, and in Stephen's Digest of the Criminal Law, 5th ed., p. 142, a "common bawdy house" is defined as "a house or room, or set of rooms, in any house kept for purposes of prostitution." In 1 Hawk. P. C., 8th ed., p. 717, it is said that "a lodger who keeps only a single room for the use of bawdry is indictable for keeping a bawdy house."

He referred to *Reg.* v. *Peirson*, 2 Ld. Raym. 1197, and *Reg.* v. *Justices of Parts of Holland, Lincolnshire.*

F. H. Mellor, for the respondent, was not called upon to argue.

WILLS, J.—I am of opinion that the justices were right in their decision. A brothel is the same as a bawdy house, which is a term well known to our law and in Acts of Parliament, and according to its legal meaning it is a place resorted to by persons of opposite sexes for purposes of prostitution. It certainly does not apply to a place where one woman is accustomed to receive men. The appeal must therefore be dismissed.

WRIGHT, J.—I agree.

Judgment for respondent.

Solicitor for the appellant, *David Nimmo*, for *Herbert Lewis & Davies*, Liverpool.

Solicitors for the respondent, *Kime & Hammond*, for *W. & A. Blackhurst*, Preston.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams and Kennedy, JJ.) April 4.

In re BASSETT.
Ex parte LEWIS. (*a.*)

Bankruptcy — Company — Petition by liquidator of a limited company—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (g)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10 (1)—*Companies (Winding-up) Act*, 1893 (56 & 57 *Vict. c.* 58), *s.* 1—*Bankruptcy notice containing two judgments.*

The liquidator of a limited company cannot present a bankruptcy petition on behalf of the company in his own name, but must present it in the name of the company, though he may issue a bankruptcy notice in his own name on a judgment making a sum payable to him.

A bankruptcy notice is bad which calls upon a debtor to pay a sum due under a final judgment and also the costs of an unsuccessful appeal against such judgment.

Appeal from the refusal of the registrar of the county court of Birmingham to make a receiving order.

The debtor had been a director of Bassett's Plaster Co. (Limited), which went into liquidation in October, 1892. In his capacity as a director he had received £139 18s. 11d., which sum he retained, whereupon the liquidator applied to the court as provided by section 10 of the Companies (Winding-up) Act, 1890, and obtained an order compelling the debtor to repay the moneys so retained. The debtor failed to pay these moneys, and the liquidator, taking advantage of section 1 of the Companies (Winding-up) Act, 1893, which makes an order under section 10 of the Companies (Winding-up) Act, 1890, equivalent to a final judgment for the purposes of section 4 (*g*) of the Bankruptcy Act, 1883, issued a bankruptcy notice in the style of "Joseph Lewis, liquidator of Bassett's Plaster Co. (Limited)," against the debtor, calling upon the debtor to pay the sum due under the order, and the costs of an unsuccessful appeal to the Divisional Court against the order, to "Joseph Lewis, as such liquidator aforesaid."

The debtor did not comply with the requirements of the bankruptcy notice, and the liquidator presented a petition in his own name against him, stating that the debtor was "indebted to me as such liquidator aforesaid." The registrar held that the petition ought to have been in the name of the company, and refused to make a receiving order.

The liquidator appealed.

Muir Mackenzie, for the appellant.—Although the debt is really owing to the company, the liquidator is by statute the proper person to present the petition. The order under section 10 of the Companies (Winding-up) Act, 1890, calls upon the debtor to pay to the liquidator. By section 1 of the Companies (Winding-up) Act, 1893, this order is made equivalent to a final judgment. The liquidator is the only person entitled to enforce this final judgment, and therefore by section 1 of the Bankruptcy Act, 1890, he "shall be deemed a creditor who has obtained a final judgment within the meaning of section 4 of the Bankruptcy Act, 1883." The bankruptcy notice must follow the terms of the judgment and call upon the debtor to pay the sum due to the liquidator, otherwise it would be bad: *In re Howes, Ex parte Hughes*, 40 W. R. 647, [1892] 2 Q. B. 628. The Legislature has said that he is to be "deemed a creditor," and has thereby given him power, although he is not the real creditor, to issue a bankruptcy notice and present a petition.

F. C. Willis, for the respondent.—These proceedings were taken in the name of the liquidator in order to prevent the debtor from raising a set-off against the company. In proceedings under section 10 of the Companies (Winding-up) Act, 1890, no set-off can be raised. There is a further objection—viz., that the bankruptcy notice is bad because it calls upon the debtor to pay both the amount due under the order and the costs of the unsuccessful appeal against the order. A bankruptcy notice must not contain two judgments: *In re Low, Ex parte Central Argentine Goldfields Co. (Limited)*, 39 W. R. 181, 7 Morr. 302, [1891] 1 Q. B. 147. The registrar's decision on the other point is supported by *In re Shirley, Ex parte Mackay*, 58 L. T. N. S. 237, 36 W. R. Dig. 16, which was cited to him at the hearing of the petition.

Muir Mackenzie, in reply.—The order of the Divisional Court dismissing the appeal with costs is not a judgment, and therefore the bankruptcy notice does not contain two judgments. If the debtor had any set-off it could have been raised upon the hearing of the petition.

VAUGHAN WILLIAMS, J.—I understand that in this case the registrar dismissed the petition upon the ground that the proceedings were in the name of the liquidator, but now we find that there is another objection to them—namely, that two sums are demanded in the bankruptcy notice, one due in respect of an order under section 10 of the Companies (Winding-up) Act, 1890, which by section 1 of the Companies (Winding-up) Act, 1893, is made equivalent to a final judgment, and the other due in respect of an order in the nature of a final judgment in the Queen's Bench Division. Even if the contention that the latter order is not a judgment were right the notice is bad. A bankruptcy notice claiming one sum under a judgment and another sum under something else is misleading, and cannot be allowed to stand.

The other objection to the proceedings is also good. The order was one made under section 10 of the Companies (Winding-up) Act, 1890, which by section 1 of the Companies (Winding-up) Act, 1893, is equivalent to a final judgment for the purposes of section 4 (*g*) of the Bankruptcy Act, 1883. That does not affect the nature of the debt or the mode of getting it in. The debt is only payable to the liquidator as collector of the assets of the company, therefore the form of proceedings usual in the Bankruptcy Court in London is the proper form, which is, that, although the liquidator takes out the summons and obtains the order directing the defaulter to pay to him, it is to pay the sum to him as a contribution to the assets of the company; the debt is to the company, and the bankruptcy notice and petition should be headed "*ex parte*" the company.

As to the bankruptcy notice, I think that the liquidator is the right person to issue it, as he is the person to whom the judgment goes, but I do not think he is the right petitioner. It might be said that this is a mere matter of form; but I am not of that opinion, because in proceedings under section 10 of the Companies (Winding-up) Act, 1890, the respondent has no right of set-off: *In re Anglo-French Co-operative Society, Ex parte Pelly*, 32 W. R. 748. If the bankruptcy notice and petition were made out in the name of the liquidator alone, without "*ex parte*" the company, the debtor would think he could not raise a set-off against the company.

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

There must be something to show that the debt is due to the company.

KENNEDY, J., concurred.

Solicitors for the appellant, *Charles Capron.*

Solicitors for the respondent, *F. Hatton.*

Q. B. Div. (Vaughan Williams, J.) March 19.

In re FOSTER.

Ex parte OFFICIAL RECEIVER *v.* BYRNE. (*a.*)

Bankruptcy—Deed of assignment—Right of trustee of deed to remuneration—Discretion of official receiver.

A trustee of a deed of assignment has no right to remuneration out of the estate of the assignor, upon the bankruptcy of the latter within three months of the date of the execution of the deed, for services rendered to the estate; but, if the official receiver is of opinion that valuable services have been rendered, he may, in his discretion, grant the trustee some remuneration, and the court will rarely override his discretion.

Motion by the official receiver for an order that Byrne, the trustee of a deed of assignment which was the act of bankruptcy upon which the receiving order in this case had been made, should hand over to the official receiver the balance of the moneys belonging to the debtor's estate remaining in his hands. Byrne claimed to retain £10 as remuneration for his services while acting as trustee under the deed of assignment.

Muir Mackenzie, for the official receiver.—The cases clearly show that the trustee has no right to any remuneration: *In re Richards, Ex parte Official Receiver*, 32 W. R. 1001, 1 Morr. 242; *In re Martin*, 36 W. R. 698, 21 Q. B. D. 29; *In re Spackman*, 38 W. R. 497, 24 Q. B. D. 728; *In re Forster, Ex parte Rawlings*, 36 W. R. 144, 4 Morr. 292.

G. Herbert Smith, for Byrne.—I admit that Byrne is not entitled as of right to claim remuneration, but he has rendered valuable services in this case, and the official receiver ought to allow him something. [VAUGHAN WILLIAMS, J.—The official receiver may allow you something in his discretion, which discretion the court may, but rarely will, override.] The services rendered in this case were exceptional. Byrne sold the goodwill of the business for £60 when the creditors thought it quite unsaleable.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—You ought to pay him something, though he is not entitled to any remuneration of right; but the official receiver may, if the estate has been benefited by the services of a trustee, allow him in his discretion some payment, though, if the official receiver is in doubt, he is quite right to come to the court. Here the estate has been benefited to some extent, and I think Mr. Byrne ought to have £5.

Respondent ordered to pay over the money in his hands, less £5.

Solicitor for Byrne, *A. Blott.*

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Probate. Dec. 10, 21.

In the Goods of ANNE COOKE. (*a.*)

Probate—Administration—Lunacy of sole administrator—Practice—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.

Where letters of administration have been granted to a next of kin, and such next of kin becomes insane, the practice is: (1) *where lunatic so found, grant to committee for use of lunatic so long as he shall remain so (first grant not impounded);* (2) *lunatic not so found, but person appointed with general powers under section* 116 *of the Lunacy Act*, 1890, *such person treated in same way as committee;* (3) *person appointed with only specified powers under section* 116, *not entitled to the grant, and grant made, in this case, to another of the next of kin of the deceased for the use of the lunatic administrator (the first grant being impounded).*

Motion for a grant of letters of administration of the personal estate of Anne Cooke deceased, to Frederick Cooke, one of her next of kin, during the lunacy of William James Cooke, the present administrator.

The deceased died on the 5th of February, 1891, intestate, a spinster, without parents, leaving two brothers and two sisters. William James Cooke, one of the brothers, took out administration, and had since become insane, but had not been found a lunatic by inquisition. No committee had been appointed, but Otho William H. Cooke had been appointed under section 116 of the Lunacy Act of 1890 with powers, not of general nature, but relating only to certain specified property of the lunatic. Frederick Cooke, the present applicant, was the other brother.

Dec. 10.—*Deane*, in support of the motion.—Where there is a committee, the practice is to make the grant to the committee for the use and benefit of the lunatic during his lunacy (see *In the Goods of Phillips*, 2 Add. 335, Note (*b*) on p. 336), and where there is no committee, then to the next of kin; this was the practice of the Ecclesiastical Court: see Williams on Executors, 9th ed., p. 441; see also *In the Goods of Lewis*, 19 W. R. 1038.

Cur. adv. vult.

Dec. 21.—JEUNE, P.—The question is, What grant should, according to the practice, be made? The practice as to administration where a grant has been made to a next of kin, and such next of kin becomes insane, appears to be as follows:—First, where such a lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic so long as he shall remain a lunatic. The first grant is not in such case impounded. Secondly, where the lunatic is not so found by inquisition, but under section 116 of the Act of 1890 a person has been appointed with general authority over the lunatic's property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic's estate. Thirdly, if a person appointed under section 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant. Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next of kin of the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

deceased for the use of the lunatic next of kin so long as he remain a lunatic, and the precaution in that case is taken of having the first grant impounded. There is an authority for this practice in the case of *In the Goods of Binckes*, 1 Curt. 286. Fifthly, I am informed that the practice has not hitherto been to inquire whether the lunatic is likely to recover, and in the event of its being held that he is not likely to recover, to revoke the old grant and to make an absolute grant to the other next of kin. There appears to me to be good reason for this. It must always be doubtful, and often highly doubtful, whether an insane person is or is not likely to recover, and the inquiry whether he be likely to recover might be one attended with considerable difficulty and expense, nor can I see any practical objection to the grant being limited to the use of the lunatic, so long as he remains such. He is not likely to seek again to act, unless a marked improvement takes place in his condition.

I think, therefore, that the proper course is, in this case, to make a grant to Frederick Cooke as a next of kin of the intestate, limited to the period of lunacy of the present administrator; and the present grant of administration to the lunatic will be impounded.

The above view is expressed with regard to the case of a single administrator becoming insane. It is not necessary to consider the case of a defect in legal representation occasioned by the lunacy of one of several administrators.

Motion allowed.

Solicitor, *T. Bowker.*

Prob. Div. & Adm. Div. Probate. } Dec. 11, 16.

YOUNG *v.* HOLLOWAY AND ANOTHER. (*a.*)

Probate—Practice—Proof in solemn form—Subsequent action—Knowledge of prior proceedings—Right to intervene—Frivolous and vexatious action.

In the Probate Court a person is bound by proceedings to which he is no party only when he was cognizant of, and capable of making himself a party to, such proceedings.

The plaintiff, who knew of prior proceedings in which a will of 1883 *was proved in solemn form in an action in which undue execution, unsoundness of mind, and undue influence was alleged, now alleged that will to be a forgery, and set up a prior will of* 1876, *the contents of which had come to his knowledge since the first trial. On a motion by the defendants, the executors of the will of* 1883, *to dismiss this action as frivolous and vexatious, the plaintiff filed an affidavit of an expert in handwriting, in support of the allegation of forgery, and, in support of the will of* 1876, *affidavits by himself, by a law stationer's clerk, and by a former clerk to a solicitor in whose office the will of* 1876 *was alleged to have been prepared and executed. The solicitor denied all knowledge of the will, which, however, the plaintiff alleged had been fraudulently suppressed by the defendants.*

The court refused the application to dismiss the action as frivolous, and held that the plaintiff was not bound by the prior proceedings.

Motion by the defendants to dismiss the action on the grounds that that plaintiff was bound by prior proceedings, and that the action was frivolous and vexatious.

The defendants were executors of the will of Thomas Holloway, deceased, dated the 11th day of October, 1883, of which the court granted probate in solemn form on the 27th of May, 1887, in an action in which the mother of the present plaintiff was the plaintiff, and in which she alleged undue execution, unsound mind, and undue influence. The present plaintiff alleged that the will of 1883 was a forgery, and that he was a legatee under an earlier will of the 20th of April, 1876, which the defendants had fraudulently suppressed, and the existence of which only came to his knowledge after the trial in 1887; he also claimed as nephew and one of the next of kin of the deceased. There were contradictory affidavits as to whether the plaintiff took part in the prior proceedings. The evidence of the execution of the will of April 20, 1876, was contained in affidavits of the plaintiff, a law stationer's clerk, and a former clerk to the solicitor who it was alleged prepared the will at the request of the deceased, made at an interview in the solicitor's office, where the will was subsequently, after being drafted by counsel, executed. An affidavit of this solicitor was filed on behalf of the defendants denying these statements. The allegation of forgery was supported by an affidavit of an expert in handwriting.

Dec. 11.—*Sir E. Clarke, Q.C., Bayford, Q.C.*, and *Bargrave Deane*, for the defendants, in support of the motion, in addition to the cases mentioned in the judgment, cited *Lawrance* v. *Norreys*, 38 W. R. 753, 15 App. Cas. 210, and *Willis* v. *Earl Beauchamp*, 34 W. R. 357, 11 P. D. 59.

R. H. Pritchard (*Willis, Q.C.*, with him), for the plaintiff, *contrà.*

Inderwick, Q.C., for the Corporation of London, who were said to be devisees under the earlier will, said he was instructed to take no part in the discussion.

Cur. adv. vult.

Dec. 16.—JEUNE, P.—This is an application on behalf of the defendants to dismiss the action with costs and stay all further proceedings. The action is brought to try the validity of the will of Thomas Holloway, dated the 11th of October, 1883. That will was established at a trial, before Sir Charles Butt and a special jury, on the 27th of May, 1887. In that action the person disputing the will was the mother of the present plaintiff, and was a sister and one of the next of kin of Thomas Holloway. It is abundantly clear to me that the present plaintiff was fully cognizant of, and assisted in, these proceedings. But it is also clear that, acording to his affidavits, he had not then, so far as he knew, any interest in the suit, and could not have intervened. He says that, in fact, he had an interest as being a legatee under an earlier will of 1876, but that this has come to his knowledge only since the trial in 1887. This state of facts gives rise to the first question to be decided. It was argued that by reason of his connection with the suit in 1887 he is bound by its result. But, on the authorities, while it appears to me to be well established that if a person who can himself intervene, and take part in proceedings in which a will is questioned, abstains from doing so, he is bound by them, though he be no party to them, it would seem that the reason for this rule is that such a person has the power to intervene.

In the case of *Newell* v. *Weeks*, 2 Phillim. 224, the leading case on the subject, one of the next of kin, who was fully cognizant of proceedings in which a will was contested by other next of kin, was held bound by the decision. But the *ratio decidendi* of the judgment of Sir John Nicoll is therein expressed in this passage of his judgment: "Spectators to the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

whole and privy to the whole, if they had been dissatisfied, they might have intervened at any moment of the proceedings. This right of intervention, coupled with their privity to the proceedings, is decisive to show that they can have sustained no prejudice by not having before been cited and not having before given a formal appearance. In the former cause they had not only a right, but it was their duty, to intervene, if they meant not to abide by the decision: their interests were directly affected; if the will had been set aside they would have established their claim. The *lis pendens* served as a public notice, on which they were bound to act." This case was followed in *Ratcliffe* v. *Barnes*, 2 Swa. & T. 486, 10 W. R. Prob. Dig. 9, in which Sir Cresswell Cresswell said:—"the general principle, as I collect it, is this—that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision. That was not a mere *dictum*, but the express decision of a very learned judge, Sir John Nicoll." In the case of *Wytcherley* v. *Andrews*, 19 W. R. 1015, L. R. 2 P. & D. 327, Lord Penzance drew a distinction between a person being bound by the decision in a suit and by a compromise made between the parties to it, and in the course of his judgment said: "There is a practice in this court by which any person having an interest may make himself a party to a suit by intervening, and it was because of the existence of that practice that the judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest he should be bound by the result, and not be allowed to reopen the case." The learned judge proceeded, indeed, to illustrate this rule by reference to the practice in Chancery, of allowing one, as member of a class having common interests, to represent the whole. Perhaps the principle on which these representative actions are permitted is somewhat different from that of the rule in the Probate Court, but I think that Lord Penzance clearly intended to lay down that in the Probate Court the rule of a person being bound by proceedings to which he was no party depends on his cognizance of the proceedings and his capacity to make himself a party, and further than this I do not think the authorities go. I think, therefore, that as the present plaintiff could not, so far as he knew, have intervened in the proceedings in 1877, though fully cognizant of them, he cannot be held bound by them.

There are two further points to be considered. First, is the case now intended to be set up against the will so clearly frivolous that to put it forward would be an abuse of the process of the court? The plaintiff says in his affidavits that what he purposes to prove is not a repetition of the case set up in 1877, but an allegation that the will is a forgery. I will not examine in detail the evidence by which he suggests he will seek to prove this, because it may be my duty to try the case. I will only say that I cannot, on the evidence as it stands, hold it to be frivolous.

Secondly, is the evidence by which it is proposed to show that there was an earlier will of 1876, and that under it the plaintiff took a benefit as legatee, frivolous? This lies, of course, at the foundation of the plaintiff's present proceedings, because, inasmuch as he cannot assert any right as next of kin, or as entitled in distribution, he has no interest to oppose the will of 1883 unless he can establish a former will in his favour. I have had doubts on this point, especially because, apparently, no will of 1876 is likely to be forthcoming, and the plaintiff will have to produce strong evidence of its execution and contents. In the words of Lord Herschell in *Woodward* v. *Gouldstone*, 35 W. R. 337, 11 App. Cas. 469, at p. 475: "In order to support a will propounded when it is proved by parol evidence only, the evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator." At present the plaintiff produces some evidence to establish the existence of such a will containing a legacy to him, and a conspiracy to suppress it, but there is nothing to indicate the amount of such legacy, nor, except in a very general way, the contents of the will. If, however, there be any truth in the statement that such a will was prepared in the manner alleged, it may possibly be that further details of its contents may come to light. It is so important not to shut out a litigant from what may even possibly be the assertion of a just right that I cannot take on myself, at this stage, to say that this part of the case is so clearly frivolous that I should stop the proceedings. If it had been desired by the present defendants, I should have ordered that this question of the plaintiff's interest should be tried first; but they prefer that the whole matter should be tried at once. The motion will therefore be dismissed, but the question of costs will be reserved.

Motion dismissed.

Solicitors for the plaintiff, *Douglas, Norman, & Co.*

Solicitors for the defendants, *Clarkson, Greenwells, & Co.*

Privy Council.

Nov. 10.

(*On appeal from the Supreme Court of Victoria.*)

MAYOR, &c., OF CANTERBURY *v.* WYBURN AND OTHERS. (*a.*)

Charity—Mortmain—Testator domiciled in colonies—Bequest to erect buildings in England—Mortmain Act, 1888 (51 & 52 *Vict. c.* 42).

A domiciled Victorian, who died in June, 1891, *bequeathed* £10,000 *to the mayor and corporation of an English city for the purpose of their buying a suitable piece of land and erecting thereon a free library. Under the law of Victoria the corporation were able to lawfully expend the money as directed by the testator.*

Held, that the English Mortmain Act, 1888, *only applied in so far as that the assurance of the land purchased must be in accordance with the provisions of the Act, and that the bequest was valid.*

Attorney-General *v.* Mill, 2 *Dow. & Clark*, 393, *explained.*

This was an appeal from the Supreme Court of Victoria.

The facts are given in their lordships' judgment.

Sir J. Rigby, A.G., and *Methold*, for the respondents, the Melbourne Hospital, who represented the residuary legatees under the will, were by consent heard first.

Everitt, Q.C., and *Dauney*, for the appellants.

C. E. James and *Dunlop Hill*, for the executors.

Sorresby v. *Hollins*, 9 Mod. 221; *Oliphant* v. *Hendrie*, 1 Br. C. C. 571; *Attorney-General* v. *Day*, 1 Ves. sen. 218; *Attorney-General* v. *Stewart*, 2 Mer.

(*a.*) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

143; *Mackintosh* v. *Townsend*, 16 Ves. 330; *Whicker* v. *Hume*, 6 W. R. 813, 7 H. L. Cas. 124; *Attorney-General* v. *Graves*, Amb. 155; *Attorney-General* v. *Mill*, 2 Dow. & Cl. 393, were cited or referred to.

The judgment of their lordships (The Earl of SELBORNE, Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS and SHAND, and Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE.—On the 13th of June, 1891, J. G. Beaney, an inhabitant of Melbourne and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—"I direct my said trustee to pay to the mayor and corporation of the said city of Canterbury for the time being the sum of ten thousand pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beaney Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid." By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, of whom the respondents, the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of £10,000 to the appellants must fail by reason of the English statute law, which restricts gifts to charitable uses.

The case was argued before A'Beckett, J., upon certain questions propounded for the court to answer; and by his answers that learned judge maintained the validity of the gifts and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to forbid such a testamentary gift. He adds:—"If it had been shown that under the law as it stands in England the corporation of Canterbury could not lawfully spend £10,000 in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shown. It appears that the corporation could lawfully have expended £10,000 in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will."

The residuary legatees appealed, and the full court varied the decision of the first court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned judges are in substance identical. They considered that as the £10,000 is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argued, justly enough, that nobody can so operate on English land. From their order, holding the bequest of money invalid, the present appeal is brought; and their lordships have to consider whether it is right.

Of course there is no doubt of the competency of the English Legislature to forbid such gifts. The question is whether it has done so. It would seem that this is the first occasion on which such a question has come into court for decision.

It appears to their lordships that the arguments relied on by the full court, and by the respondents' counsel at this bar, err in exaggerating the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. 2, c. 36, passed in the year 1736:—"An Act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the Act; but it is manifest from the preamble and the operative parts of the Act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. c. 42), and, according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an Act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. 2, c. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds:—"Nevertheless this publick mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof be it enacted." This, then, was the mischief which the Legislature desired to abate: the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class, at that date a much larger relative class than now, of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore in all cases of wills to which the statute applies such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *The Attorney-General* v. *Stewart*, decided by Sir Wm. Grant in the year 1817 (2 Mer. 143). He considered that both the mischief struck at by the Act and the methods prescribed for lawful gifts, were of a local character, peculiar to England. Therefore he held that the Act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation (*Whicker* v. *Hume*, it was applied to a gift of land in New South Wales.

In that state of the law the present Act of 1888 was passed. By section 4, sub-section 1, it is enacted thus:—"Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

The requirements of the Act are substantially those of the Act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed twelve months before the death of the assurors. By the interpretation clause the term "assurance" includes a will. This Act, therefore, subject to some special exemptions, prohibits "death-bed" gifts as strictly as does the earlier Act. But it is impossible to suppose that the English Legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the Act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England, may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible without express words to suppose that there was any intention of affecting the colonies by the new statute. Moreover, Sir William Grant's other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid.

Indeed the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word "assurance" in the Act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail; not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their lordships cannot find such a prohibition in the Act. They have reached the conclusion that this will is not invalidated by section 4, sub-section (1). At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees; by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian court of justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General* v. *Mill*. In that case the testator was a native of Montrose. He spent many years in the island of Cariacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scotch trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Cariacou, now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England, and were administered under the direction of the Court of Chancery, and were the subject of a decree which paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotchman, and that the case decides that a bequest of money in a Scotch will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scotch domicil is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicil, and the counsel for the Attorney-General, who was contending for the validity of the gift, did not suggest any other domicil. The word "domicil" occurs only twice in the reports of the case. In one of them (2 Dow. & Cl. 394) the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicil in Montrose, an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scotch origin of the testator, and his connection with Montrose, were only used as arguments to show that he contemplated the purchase of land in Scotland, a conclusion which one of the reasons appended to the appellant's case urged the House to adopt "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their lordships.

It is true that Story, J. (Conflict of Laws, s. 446), and Mr. Westlake (Private International Law, s. 165) both treat the decision as covering the case of a foreign will. But, on examining the case, that

appears to their lordships to be a misapprehension of the point really decided. So far as they know the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their lordships can hardly suppose that anyone would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But however that may be, their lordships must construe the words of the statute according to their plain meaning, and leave it to the Legislature to enact further prohibitions, if found expedient.

The result is that their lordships will humbly advise her Majesty to discharge the order of the full court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of A'Beckett, J. It has seemed right to both the courts below that the costs of all parties to the litigation should be paid out of the testator's estate; those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their lordships have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their lordships will order accordingly.

Solicitors, Speechley, Mumford, & Co.; Phelps, Sidgwick, & Biddle; Anderson & Sons.

Lunacy.

(Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) March 19.

In re GREHAN (A LUNATIC). (a.)

Lunacy—Practice—Transmission of record to Ireland—Percentage on clear annual income—Payment in Ireland—Remittance to England of sum for maintenance—Lunacy Regulation (Ireland) Act, 1871 (34 *Vict. c.* 22), *ss.* 109, 114, 116—*Lunacy Act,* 1890 (53 *Vict. c.* 5), *ss.* 107, 148, 149—*Lunacy Act,* 1891 (54 *& 55 Vict. c.* 65), *s.* 27 (2) (3)—*Rules in Lunacy,* 1892, *r.* 126.

Where a transcript of the record of an inquisition has been transmitted from England to Ireland, and percentage has been paid in Ireland upon the clear annual income of the lunatic, no further percentage is payable in England upon a sum ordered by the Lord Chancellor of Ireland to be remitted to England for the maintenance of the lunatic.

So held by Lord Halsbury *and* Lindley, L.J.; A. L. Smith, L.J., *dissenting.*

APPEAL from the decision of the master in Lunacy. Mary F. Grehan was a lunatic so found by inquisition in England, where she resided, and where committees of her estate and person were appointed. The property of the lunatic was situated in Ireland, and order was made, under section 107 of the Lunacy Act, 1890, transmitting a transcript of the record of the inquisition to the registrar in Lunacy in Ireland. The income of the lunatic's estate was £1,120, and upon this sum percentage at the rate of four per cent. was charged and paid in Ireland under the Lunacy Regulation (Ireland) Act, 1871. The Lord Chancellor of Ireland made an order remitting to the committee in England a sum of £1,065 for the maintenance of the lunatic.

The master in Lunacy in England decided that percentage was payable in England upon the £1,065 under rule 126 of the Lunacy Rules, 1892.

The committee appealed.

Section 109 of the Lunacy Regulation (Ireland) Act, 1871, after reciting that it would greatly facilitate and simplify the practice in Lunacy, and would be attended with convenience, that the charges incident to the Lunacy Office and the administration of the estates of lunatics should be defrayed by means of a percentage, enacts that "a percentage on the respective clear annual incomes of all lunatics shall be paid according to the rates following, that is to say . . . (3) The rate of £4 per cent. per annum for each annual income amounting to £1,000 or upwards."

Section 114 provides that the provisions respecting percentage shall be applicable to the proceedings (*inter alia*) "in the matter of and to the property of a lunatic under the protection of the Lord Chancellor entrusted as aforesaid by virtue of the transmission of the record of an inquisition from England, and its entry of record in the Chancery of Ireland."

Section 148 of the Lunacy Act, 1890, provides that "the Lord Chancellor, with the concurrence of the Treasury may make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates, and regulating the mode in which the same are to be ascertained and paid."

Section 149 of the Lunacy Act, 1890, was repealed by the Lunacy Act, 1891, section 27 of which provided that "in the case of lunatics under the protection of the judge in Lunacy by virtue of the transmission of the record of an inquisition from Ireland and its entry of record in the High Court . . . no percentage shall be levied except upon income arising from property within the jurisdiction of the judge in Lunacy and administered under his direction."

Rule 126 of the Lunacy Rules, 1892, is as follows: "There shall be paid a percentage at the rate of four per cent. per annum on the clear annual income, amounting to £100 and upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any case in any one year than £400."

Vernon Smith, Q.C., and *Stewart Smith,* for the appellant.—The percentage has been rightly paid in Ireland under the Irish Act, and is not payable again in England. The sum remitted to England is not "clear annual income," but is ear-marked by the order of the Lord Chancellor of Ireland for a particular purpose, the maintenance of the lunatic.

They referred to the Lunacy Regulation (Ireland) Act, 1871, ss. 109, 114, 116; Lunacy Act, 1890, ss. 107, 148, 149; Lunacy Act, 1891, s. 27 (3); Rules in Lunacy, 1892, r. 126.

Ingle Joyce, for the Attorney-General.—A good deal of work is done by the office in England, and it is reasonable that the percentage should be charged.

He referred to *In re Talbot,* 30 W. R. 386, 20 Ch. D. 269.

Lord HALSBURY.—I confess I have had very great difficulty indeed in construing these different sections. Of course, on the surface, one would say that the Acts had been passed without sufficiently considering the converse cases of those that actually have been provided for; but I doubt if that is the proper mode of construing an Act of Parliament.

The ground upon which I should proceed is this:

(a) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

I find, taking the two sets of Acts together, that the real substantial provision is this: that within certain limits the payment should be made to the Lunacy Office, in respect of the work done there, by some percentage. A question arises in the present case, where the Lord Chancellor in England has, by the machinery by which it is done, obtained the control and disposition of the lunatic's property, the person of the lunatic being in England, and the property being situated in Ireland. When the property is in Ireland, there is an Act of Parliament dealing with the property there, and giving the Lord Chancellor power to administer, I think, in the strictest sense of that word, the produce of that property. Now, speaking generally, without coming for the moment to the particular difficulty that arises here, the administration has to be paid for by a sum of £4 per cent. in this particular case, because the property exceeds the amount that is therein described as the limit upon which four per cent. is to be charged, and the Lord Chancellor in Ireland has accordingly made an order. When I say he has made an order, I agree with Mr. Ingle Joyce's construction of the two Acts put together, that the Lord Chancellor in Ireland adopts what has been done in England as the order for maintenance, and sends over to this country for the maintenance of the lunatic in England the amount of maintenance which has been already ascertained in England, and which the Lord Chancellor in Ireland adopts as the basis of the order that he makes, and remits the amount, impressed with the necessity of maintaining the lunatic. That is the administration of the whole estate of the lunatic, which is situated in Ireland. Then I find that a rule in England has made subject to the percentage the clear annual income of the lunatic. There are two or three possible constructions. Does that mean the whole annual income of the lunatic in England, in which case the four per cent. would be charged in England again, although the whole estate had been chargeable in Ireland? Or does it mean that you must assume it is but one administration, although operated upon by two equal authorities, both in England and in Ireland? If so, the sum which is transmitted from Ireland to England is a sum which is not the clear annual income of the lunatic, but is a sum specially devoted by the order to his maintenance, and with respect to which no power of charging it is given, because the only power of charging is the power of charging the whole clear annual income.

I confess, looking at the policy of the Act, and what it is, to my mind, apparent was intended to be the charging power, I have come to the conclusion, although with some difficulty and hesitation, that the rule, which is to be treated as an Act of Parliament, justifies us in saying that the "clear annual income" is that which has already been taxed in Ireland, and paid four per cent.; and that, therefore, there is no obligation to pay the four per cent. again, in England upon what is not the clear annual income of the lunatic in any sense, but is a part of that clear annual income which has been transmitted from Ireland, charged with the performance of a particular duty. Under those circumstances I think that this four per cent. is not again chargeable, but that the amount which has been received must be acquired by the committee for the purpose for which it has been sent over by the Irish Chancellor to the English committee—namely, that of the maintenance of the lunatic.

I say I have come to this conclusion with some difficulty. The principal difficulty in my mind is not that the words themselves and the policy of the Act would not naturally justify one in coming to that conclusion, but that the possibility of two sets of charges being made seems to have been in the mind of the Legislature, who appear to have provided for it in some cases, and prevented the double charge being made, but have not provided for this case. Nevertheless, looking at the language of the rule, which is equivalent to an Act of Parliament, looking at the policy of the Act, and to the machinery which is interchangeable between the English and the Irish Chancellors, I am justified in coming to the conclusion that only one percentage is chargeable.

LINDLEY, L.J.—I think this case is one of difficulty. It turns upon the true construction of three Acts of Parliament passed by the Parliament of the United Kingdom—one of them relating to Ireland, and two of them relating to England. The real question is, What is the true construction of the expression "clear annual income" in the rule 126 having regard to the machinery provided by those three Acts of Parliament relating to lunatics? There are sections which have been referred to, sections 109 and 114 of what is called the Irish Act of 1871, but is really a United Kingdom statute applicable to Ireland, and sections 107 and 148 of the Lunacy Act, 1890. It is obvious that wherever Parliament foresaw there was a possibility of taxing the property of lunatics subject to the jurisdiction of England and Ireland twice, they provided it should not be done. That is obvious. But this is a case which is not absolutely foreseen, not contemplated, and not provided for, and it is left out. Now we are asked to say that, because it has been left out, two percentages have to be deducted—one in Ireland and one here. I think that would be contrary to the true construction of the three Acts of Parliament.

That is the view I have arrived at, not without some doubt. Certainly we are not dealing with a case of money remitted from Paris or a colony or any place not governed by these three Acts of Parliament. We have to construe these three Acts of Parliament together, and make them work if we can, and it seems to me it would be contrary to the true construction of the Acts if we held that rule 126 authorizes the masters, or the proper authority in England, to levy a percentage of four per cent. on a portion of the clear annual income already charged under one of the three Acts of Parliament with four per cent. in another country. In other words, I do not think the words "clear annual income" in rule 126 apply to a sum remitted in substance by the Irish authorities to England to be applied by the committee here. I think there may be a little difficulty in it, but the difficulty on the other side is very formidable. The difficulty on the other side is to say: "There is a transparent blot, and a blot so difficult to get over that we are compelled to say that two charges ought to be made, when it is quite obvious that Parliament never intended that." The true way out of it appears to me to be this, that the true construction of these Acts and rules is that the clear annual income, which is sought to be made the subject of the charge of four per cent. in England, having paid that four per cent. once in another country under an English Act of Parliament, ought not to be made payable again here. I think that is the true view, and I think it is sounder, on the whole, than to say that the Treasury ought to put it right.

A. L. SMITH, L.J.—I am sorry to say I cannot go so far as Lord Halsbury and Lindley, L.J., have gone in the construction of these Acts and rules. Two questions arise here. The first is, Can the four per cent. be charged on this sum of money (call it £1,000) in Ireland? and the second is, can it be charged with another four per cent. in England? Those two questions are the questions that have to be decided

here. The transcript of the record having been sent to Ireland from England, where the lunatic was so found by inquisition, I have no doubt, under section 114 of the Lunacy Act (Ireland), 1871, that the four per cent. can be charged there. I have no difficulty in determining that. I do not think there can be any substantial doubt about that, considering the facts of this case.

But now comes the other question, namely, whether the £1,000, having paid the four per cent. in Ireland and being transmitted here to England for the maintenance of the lunatic, is within the taxing provision of the Act relating to lunatics in this country. I wish to point out that my brethren have come to the conclusion that, apart from the rule which I will deal with in a moment, there would not be the exemption of four per cent. in this country, or, in other words, that four per cent. would be payable on this £1,000 when it came here. That is, as I say, apart from the rule. Taking the Lunacy Act of 1890, ss. 148 and 149, it appears to me to be manifest from those two sections that, in the case of a lunatic found lunatic by inquisition here, the four per cent. is to be levied, I will say on the £1,000 if it was received by his committee in this country, and the proviso which will be found at the end of section 149, when read with sub-section (*a*) of section 149, runs thus: "Four per cent. is payable on the property of a lunatic found by inquisition in this country, except in a case of transmission of the record from Ireland to this country, in which case the four per cent. is not to be paid here." Now, there is no correlative sub-section to this section exempting four per cent. in the case of a transcript of the record of the inquisition being sent from England to Ireland, as in this case, and although I perfectly agree with Lord Halsbury and Lindley, L.J., as to what I surmise to be the policy of the Legislature, I must say it does seem to me that a blot has been hit here, and I do not feel inclined nor can I bring myself to heal a blot by stretching language or giving to it a construction which I do not think it reasonably bears. So much for the Act of Parliament, and if this case had rested there, it appears to me, in my judgment, this point would be absolutely unarguable. I pass over the Act of 1891 because, as regards that, I infer it does not in any way advance the point that arises under the Act of 1890.

Now we come to the rule. What is the meaning of this rule? The Lord Chancellor may make rules under the Act of 1890, and by the Act of 1891 may also make rules. Now what, in my judgment, is the true reading of this rule? It is a rule applicable to a lunatic found lunatic in this country and to his property in this country. It says, "There shall be paid a percentage at the rate of four per cent. per annum on the clear annual income" (I will read in) "of such lunatic." What does it matter where his income comes from? The four per cent. is charged when the income is in this country of the lunatic so found in this country. It seems to me that this £1,000, although it may have been taxed and has been properly taxed in Ireland by this four per cent., and, although it has paid that sum, yet when it comes here it is the clear annual income of the lunatic in this country, although by an order of the Lord Chancellor it has been allocated to the maintenance of the lunatic whilst he remains as a lunatic in this country. This is the difficulty I have. I cannot myself say that this £1,000 was not clear annual income of the lunatic when it came to this country simply because it has had to pay four per cent. under the Irish Act in Ireland, any more than if there had been any other tax peculiar to Ireland which would have fallen upon this income. It could not make it any the less, as it seems to me, clear annual income when it comes here, simply because it has paid a tax that has been imposed upon it in the country in which it has been levied. That is the difficulty I have. I think the blot does exist, and that, as the law now stands, this four per cent. is payable on this £1,000 in this country.

Appeal allowed.

Solicitors, *Palmer, Eland, & Nettleship; Hare & Co.*

Court of Appeal.

Original motion.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — April 2.

BLACK AND OTHERS v. DAWSON. (*a*.)

Practice—Writ—Service out of jurisdiction—Application to set aside order—Ord. 12, *r.* 30—*Judicature Act,* 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1.

An application by a defendant to set aside an order of the judge at chambers, made ex parte, *giving leave to serve the writ of summons out of the jurisdiction, must now be made at chambers, and not by motion either in the Divisional Court or in the Court of Appeal.*

Motion by the defendant under ord. 12, r. 30, to set aside an order of the judge at chambers, made *ex parte*, giving leave to serve the writ of summons on the defendant out of the jurisdiction.

The notice of motion was originally served for the Divisional Court, but upon the motion coming on the court intimated that it was a "matter of practice and procedure" within section 1 of the Judicature Act, 1894, and should be brought on in the Court of Appeal. The motion was accordingly set down in the Court of Appeal.

Crump, Q.C., and *Arthur Russell*, for the defendant.

Joseph Walton, Q.C., and *A. J. Walter*, for the plaintiffs.

Lord ESHER, M.R.—In this case an *ex parte* application was made to the judge at chambers for leave to serve the writ upon the defendant out of the jurisdiction, and the learned judge made the order. That was a step in the procedure. We have consulted the other members of the Court of Appeal upon the point, and we all think that the proper practice in future will be for the defendant to take out a summons before the judge at chambers to set aside the order giving leave to serve the writ and the service, and, that being also a matter of procedure, an appeal will lie to this court from the order of the judge upon that summons if leave to appeal is granted. That will be the practice in future, and a motion ought not to be made either in the Divisional Court or in this court.

LOPES and RIGBY, L.JJ., concurred.

Solicitors for the plaintiffs, *Faithfull & Owen.*

Solicitors for the defendant, *Lattey & Hart.*

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

App. Bankruptcy. (Lord Esher, M.R., and Rigby, L.J.) March 27.

SEATON v. DEERHURST. (a.)

Bankruptcy—Scheme of arrangement—Rejection of proof on judgment debt—Release of debtor—"Debts provable in bankruptcy"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-section* 8; *s.* 37, *sub-section* 3.

By section 18, *sub-section* 8, *of the Bankruptcy Act,* 1883, "*A composition or scheme accepted and approved in pursuance of this section shall be binding on all creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy.*"

The trustee under a scheme rejected a proof for the amount due under a judgment against the debtor upon the ground that the consideration for the judgment was a gambling debt.

Held, that the judgment debt was a "debt provable in bankruptcy" within the meaning of section 18, *sub-section* 8, *and that the scheme was binding upon the judgment creditor and released the debtor, and that the judgment creditor could not issue execution upon the judgment.*

Appeal from an order of Pollock, B., at chambers.

On the 17th of June, 1889, the plaintiff signed judgment against the defendant for £1,021 in default of defence. In July the plaintiff paid £400 on account. In February, 1890, a receiving order was made against the defendant, and the defendant proposed a scheme of arrangement which the creditors accepted, and upon its approval by the court the receiving order was rescinded. The scheme provided for the immediate payment to the trustee appointed under the scheme, of a sum sufficient to pay the creditors a dividend of 10s. in the £ upon all debts provable under the receiving order, and for the payment of the balance of 10s. in the £ on such provable debts upon the defendant coming into possession of certain settled estates on the death of his father, security being given for such payment; and upon the scheme being approved by the court it should be accepted by the creditors in full satisfaction and discharge of all debts due from the debtor and provable under the receiving order.

A proof for the balance due under the judgment, sent in by the plaintiff, was rejected by the trustee upon the ground that the consideration for it was a gambling debt, and this decision was confirmed by the judge in bankruptcy and the Court of Appeal (see *In re Deerhurst, Ex parte Seaton*, 8 Morr. 97, 39 W. R. Dig. 24). The defendant thereupon issued execution upon the judgment. Pollock, B., at chambers, made an order setting aside the execution and staying all proceedings by way of execution of the judgment.

The plaintiff appealed.

Muir Mackenzie, for the plaintiff.—The judgment debt, after the decision of the Court of Appeal, was not a "debt provable in bankruptcy," and the defendant is not released from it under section 18, sub section 8, of the Bankruptcy Act, 1883. The plaintiff can therefore issue execution upon it.

He referred to *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351.

Scott Fox, for the defendant.—A debtor is released by a scheme from the same debts and liabilities as he would be released from by a discharge in bankruptcy: *Flint* v. *Barnard*, 37 W. R. 185, 22 Q. B. D. 90. This judgment debt is a debt or liability provable in bankruptcy under section 37, sub-section 3, of the Bankruptcy Act, 1883; and by section 30, sub-section 2, an order of discharge releases the debtor from debts and liabilities provable in bankruptcy. Section 18, sub-section 8, makes the scheme binding on the creditors, and the defendant is released. The rejection of the proof merely meant that the plaintiff could not be allowed to prove against the estate in competition with the other creditors.

He also referred to *Brandon* v. *McHenry*, 39 W. R. 372, [1891] 1 Q. B. 538.

Muir Mackenzie replied.

Lord ESHER, M.R.—The effect of the acceptance and approval of the scheme, and the rescission of the receiving order is the same as if a discharge in bankruptcy had been obtained. The plaintiff contends that the judgment debt is not a provable debt. That depends upon section 37, sub-section 3, of the Bankruptcy Act, 1883, which specifies what are provable debts and liabilities. The defendant was subject to this judgment debt at the date of the receiving order. It came within the very words of that section as a "debt provable in bankruptcy." By section 18, sub-section 8, the scheme is binding on the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy. The consequence is that the scheme binds the plaintiff as regards this judgment debt and releases the defendant from it. The effect of the rejection of the plaintiff's proof was that the plaintiff could not claim to receive a share in the dividends under the scheme with the other creditors. It in no way touches the provision in the Act under which a scheme of arrangement binds the creditors as regards provable debts, and releases the debtor.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Hadden, Woodward, & Co.*

Solicitors for the defendant, *Williams & James.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Chan. Div. (Lindley and A. L. Smith, L.JJ.) and Chan. Div. North, J. March 25.

In re CLIFFE.

EDWARDS v. BROWN. (a.)

Practice—Originating summons—Order made in proceedings commenced by originating summons—Service out of the jurisdiction—R. S. C., 1883, *ord.* 16, *r.* 40; *ord.* 55, *r.* 35.

The court has no power to order service out of the jurisdiction, upon a person not a party to an action, of notice of an order made in an action commenced by originating summons.

The proper procedure is for the party having the conduct of the proceedings to give notice to the absent person of the proceedings in the action, and then, if such person fails to appear, upon proof that such notice has been given, the court will dispense with service upon him, under ord. 55, *r.* 35.

So held, affirming the decision of North, J.

This was an appeal from a decision of North, J., and raised the question whether an order could be made for the service out of the jurisdiction of notice of an order made in an action commenced by an originating summons.

(a.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

By his will E. Cliffe, who was an English subject domiciled in France, devised and bequeathed his property upon trust for conversion into personalty, and for division into seven equal shares. The funds representing four of such shares were transferred to this country and lodged in court. As to one of such last-mentioned shares there was, in the events which happened, an intestacy, both according to the laws of England and of France.

The action was commenced by an originating summons, and, by an order of the 11th of December, 1893, it was declared (*inter alia*) that the domicil of the testator at the time of his death was French, and inquiries were directed in order to ascertain who were the persons entitled under the intestacy.

The inquiries were proceeded with in chambers, and by the chief clerk's certificate it was found that one of such persons was a Mr. W. Cliffe, residing in France. Owing to the fact that the said W. Cliffe would have to bring into hotchpot an amount exceeding the sum to which he would be entitled under the intestacy, he had not taken any part in the proceedings at chambers, and was in no way bound by the proceedings in the action.

In order to bring the case within ord. 16, r. 40, the plaintiff applied to North, J., in chambers for leave to serve notice of the order of the 11th of December, 1893, upon the said W. Cliffe, but his lordship, on the 23rd of March, refused such leave, and delivered the following judgment in court:—

NORTH, J.—This case was argued before me in chambers, but as Mr. Terrell desires to take the opinion of the Court of Appeal, I think it better to put into writing and state in court my reasons for the conclusion at which I have arrived.

The action was commenced by originating summons, and the court has declared that part of the property of a testator goes to his next of kin according to the law of France, and has directed certain inquiries to ascertain who are such next of kin, and who are now entitled to their shares. In prosecuting the inquiries it transpired that a person residing in France, not a party to the proceedings, is interested therein, and I agree with the applicant that such person ought to have some information as to what is being done. Indeed I might possibly decline to divide the fund until such information had been conveyed to him, and the party having the conduct of the proceedings ought to give him such notice forthwith. He can do this without any leave from the court. But I am now pressed to give such leave in order to bring the case within ord. 16, r. 40. As the person in question is out of the jurisdiction, I have no power to give leave to serve any such order upon him. It is now quite settled that, apart from the authority of a statute, or of rules authorized by a statute, the court has no jurisdiction to give leave to effect service of process abroad; that order 11 is, since the orders of 1883 came into force, a complete code on the subject of service out of the jurisdiction, superseding the previous practice (*In re Eager, Eager* v. *Johnstone*, 31 W. R. 33, 22 Ch. D. 86; *In re Busfield*, 34 W. R. 372, 32 Ch. D. 123), and that such service can only be allowed when the process is within the precise language of order 11, or is by the rules directed to be served "according to the rules relating to the service of writs of summons," as in the case of a third-party notice under ord. 16, r. 48, or a counter-claim under ord. 21, r. 12. Accordingly it was held in *In re Busfield* that leave could not be given to serve an originating summons out of the jurisdiction; and if there is no jurisdiction to allow service of such summons abroad, I do not see how leave to serve proceedings in an action commenced by such summons can be given either. In *In re Gordon's Settlement Trusts*, W. N., 1887, p. 192, Chitty, J., following a decision of Kay, J., gave leave to serve out of the jurisdiction a petition for payment out of court of funds paid in under the Trustee Relief Act, pointing out that the effect merely was to intimate to the parties served, that there was a fund in court in which they might be interested, and to give them proper notice in order that they might be present at the hearing, but not for the purpose of exercising any jurisdiction over them.

As to the propriety of giving such notice I heartily agree, and a very convenient mode of giving it is by handing to the party a copy of the petition; but this is a very different thing from serving him with process by delivery of an order indorsed with a notice (following ord. 16, r. 40) that he will be bound by the proceedings as if he had originally been made a party, which the case of *In re Busfield* decided could not have been done in such a case as the present. Respectfully differing from the view that leave to serve such a petition could be given by the court, I in *In re Jellard's Trusts*, 39 Ch. D. 424, 37 W. R. Dig. 191 (also a case under the Trustee Relief Act), declined to follow *In re Gordon's Settlement Trusts* in that respect, intimating that the parties could give notice without leave if they pleased, but that I could not fortify such proceedings by giving leave to serve the petition abroad. On appeal from that refusal the court did not express any dissent from my view. But it appeared that the funds belonged to Mr. Jellard and his three children, who had joined in a petition under the Act, by the order on which petition the funds had been carried to separate accounts, with directions for payment of income, and the petition was by the assignee of the income and part of the capital, seeking for payment out to him. The Jellards then being in Australia, the court held that, as the petition did not seek to originate any jurisdiction against them, as they had submitted to the jurisdiction by their own petition, and as the petition only sought to give full effect to an order which they had themselves obtained, it could be served on the solicitors in this country who represented them on the first petition, and whose names appeared on the record. The court did not decide that leave to serve the solicitors was necessary, though to prevent all difficulty it gave leave, but this service, it will be noted, was not out of the jurisdiction. I am not aware of any case of more recent date in which leave to serve such a petition abroad has been given by the court. In *In re Stanway's Trusts*, W. N., 1892, p. 11, Kekewich, J., refused to give such leave. In proceedings under the Patents, Designs, and Trade-Marks Acts it seems quite settled that a petition cannot be served out of the jurisdiction, but that if the party who would have been served if he had been within the jurisdiction has notice of what is going on, and does not think fit to come in and contest the case, it can and will be disposed of in his absence, and the notice given does not require any leave of the court, which has no jurisdiction to give such leave: *In re Drummond's Patent*, 43 Ch. D. 80, 38 W. R. Dig. 148; *In re Compagnie Générale d'Eaux Minerales*, 40 W. R. 89, [1891] 3 Ch. 451; *In re King & Co.*, 40 W. R. 580, [1892] 2 Ch. 462. I do not say that the proceedings under those Acts are governed by the general orders and rules of the High Court, but these cases recognize the fact that the court cannot give leave to effect service abroad, except so far as it is authorized by statute.

Again, under the Companies Acts it has been held that the court has no jurisdiction to serve orders, notices, &c., upon persons resident out of the jurisdiction: *In re Anglo-African Steamship Co.*, 34 W. R.

554, 32 Ch. D. 348; *In re Nathan Newman & Co.*, 35 W. R. 293, 35 Ch. D. 1. Little practical difficulty arises from absence of interested persons abroad; when they have had notice they generally appear. If they do not, the court can dispense with service upon them, and will feel no difficulty in doing so where a man, with full information of what is going on, stands aloof and will not come in. In the present case I should not, under such circumstances, feel the slightest hesitation in dispensing with service of the order under ord. 55, r. 35, though I could not order substituted service in the absence of evidence that the party had gone abroad to avoid service: *Fry* v. *Moore*, 37 W. R. 565, 23 Q. B. D. 395; *Wilding* v. *Bean*, 39 W. R. 40, [1891] 1 Q. B. 100.

The embarrassment which does sometimes exist was deemed worthy of solution by statutory rule, and accordingly order 7 of the Rules of the 28th of November, 1893, provided that ord. 16, r. 40, should be so amended as to authorize service of notice of a judgment or order upon any person interested, "whether within or without the jurisdiction," but, unfortunately, this was undone by the subsequent order of the 10th of January, 1894, annulling the amendment I have just referred to, and for the present the remedy has been abandoned, and the former defective proceeding has been restored. I cannot ignore the fact that, first, such legislation was considered to be requisite in order to warrant service abroad, and, secondly, that it was subsequently held that such legislation as to service abroad was not desirable, and the provision authorizing it was promptly recalled.

I was asked to give leave in the present case because, if it was stretching a point, it could do no harm. But, in my opinion, leave ought not to be given when the giving it confers no advantage, and does not enable a party to do what, without such leave, he could not do. As Cotton, L.J., said in *In re Anglo-African Steamship Co.*, "It is not a question of practice but of jurisdiction whether this court has power to serve notice of an order upon persons resident abroad so that the order may be enforced against them when they do come to this country. It is said that leave may be given saving all rights of the persons served. But if what is done is wrong, in my opinion the court ought not to do it, leaving the person served to take an objection the court itself ought to have taken."

The applicant appealed.

H. Terrell, for the appellant, cited *The Credits Gerundeuse (Limited)* v. *Van Weede*, 32 W. R. 414, 12 Q. B. D. 171; *In re Busfield*; and *In re Naylor*, 28 L. T. N. S. 18, 21 W. R. Dig. 195; and argued that upon the cases there is the distinction that where service out of the jurisdiction is required in order to institute proceedings leave will not be given; but if the service is merely required of some order made in an action which has been properly commenced in such a case leave will be given.

The COURT (LINDLEY and A. L. SMITH, L.JJ.) dismissed the appeal. Their lordships pointed out that leave to serve an originating summons out of the jurisdiction could not be given, and that the appellant's proper course, if he would not issue a writ, was that he should give to the person out of the jurisdiction notice by letter or otherwise informing him of the proceedings in the action, and pointing out that if he failed to appear the court would act in his absence. Their lordships expressed their opinion that upon proof being furnished to the court that such notice had actually been received by the person out of the jurisdiction, and that he failed to appear, the court would be able to act in his absence. They stated that in their opinion Wickens, V.C., in *In re Naylor*, laid down the proper rule to be followed in such cases. The order set out in the 5th edition of Seton, at p. 13 (No. 12), was, in their opinion, based upon a misconception of the law.

Appeal dismissed.

Solicitors, *Sawbridge & Sons.*

From Q. B. Div. (Lord Esher, M.R., and Lindley and Rigby, L.JJ.) — March 8.

MAYOR, &c., OF MANCHESTER, *Appellants.* MCADAM, *Respondent.* (a.)

Inland Revenue — Income tax — Allowances — Public library—Urban authority—"Building the property of any literary or scientific institution"—Public Libraries Act, 1892 (55 & 56 *Vict. c.* 53)—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *r.* 6 (*Schedule A*).

Section 61, *rule* 6, *of the Income Tax Act*, 1842, *provides for allowances to be made in respect of duties charged "on any building the property of any literary or scientific institution used solely for the purposes of such institution."*

Held, by Lindley *and* Rigby, L.JJ. (Lord Esher, M.R., *dissenting*) *that the above exemption does not extend to a public free library established by a municipal corporation as the urban authority under the Public Libraries Acts, such library not being the property of a "literary or scientific institution" within the meaning of the enactment.*

Andrews *v.* Mayor of Bristol, 61 *L. J. Q. B.* 715, *approved.*

Appeal from the judgment of the Queen's Bench Division (Wright and Collins, JJ.) on a special case stated by the Income Tax Commissioners for Manchester.

At a meeting of the commissioners held on the 16th of October, 1893, for the hearing of income tax appeals, the Corporation of Manchester appealed against four assessments of £2,000, £70, £150, and £63 respectively, made under Schedule A of the Income Tax Act, 1842, as the annual values of four buildings—namely, a reference library, two free libraries, and a public reading-room, all in the city of Manchester—which were used as free libraries and were known as the Manchester Public Free Libraries. The annual values of the several buildings were not in dispute. It was contended that the appellants were not liable to pay income tax in respect of these buildings, on the ground that they were exempted under the Income Tax Act, 1842, s. 61, r. 6, by which an allowance is directed to be made for the duties charged "on any building the property of any literary or scientific institution used solely for the purposes of such institution, and in which no payment is made or demanded for any instruction there afforded by lectures or otherwise, provided also that the said building be not occupied by any officer of such institution, nor by any person paying rent for the same."

Each of the four buildings was used solely for the purpose of a public free library duly established under the Public Libraries Act, 1850, and now maintained under the Public Libraries Act, 1892. All the requirements of the said Acts had been complied with in respect of each of the four buildings, and such buildings were now vested in the appellants as

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

a library authority under the Public Libraries Act, 1892. The libraries were under the management of a committee appointed in pursuance of section 15, sub-section 3, of the Act of 1892, and all the powers and duties of the appellants as such library authority had been delegated to the committee. Separate accounts were kept of the receipts and expenditure of the appellants as such library authority under section 20, sub-section 1, of the Act of 1892, and the four buildings were maintained by a rate not exceeding the prescribed limit. No payment was made or demanded for any instruction there afforded by lectures or otherwise, nor for the use of the libraries, nor was any profit derived therefrom. Each of the buildings was, during the day, in charge of a superintendent, and at night was unoccupied. The reference library was used exclusively for the consultation and reading of books; the two free libraries were used as lending libraries, and for reading books and papers on the premises; and the public reading-room was a place where books, magazines, &c., were read, but not lent out.

The commissioners considered that the present case was not distinguishable from *Andrews* v. *Mayor, &c., of Bristol*, 61 L. J. Q. B. 715, 41 W. R. Dig. 208, and that the appellants were not entitled to the allowance claimed, and confirmed the assessments, subject to a case.

The Divisional Court dismissed the appeal.

The corporation appealed.

T. Lawson Walton, Q.C., and *G. P. Macdonell*, for the appellants.—The Divisional Court felt bound by their own decision in *Andrews* v. *Mayor, &c., of Bristol*, to hold that these libraries were not "the property of any literary or scientific institution" within the meaning of section 61, rule 6, of the Income Tax Act, 1842. The Divisional Court held that the buildings belonged to the corporation, who are not a literary institution. A municipal corporation, however, is, by section 4 of the Public Libraries Act, 1892, the "library authority," and as such has a separate existence and is a "literary institution." In a rural district commissioners are appointed as the library authority and the property is vested in them, and it cannot be said that they are not a literary institution. In an urban district the corporation is the library authority in whom the property is vested, and as library authority they are a literary institution, though they may occupy other positions as well. Secondly, the words "the property of" do not imply ownership, but mean appropriated to the literary institution. The institution means the thing instituted—viz., the free library with its governing body. In this sense these buildings were appropriated to the use of a free library under the control of the library authority. The exemption in the Act therefore applies, and the decision in *Andrews* v. *Mayor, &c., of Bristol* is wrong.

They also referred to *Bradford Library Society* v. *Churchwardens of Bradford*, 1 E. & E. 88.

Sir R. T. Reid, A.G., and *Danckwerts*, for the respondent.—The buildings are the property of the library authority, who are the representatives of the ratepayers. Neither the ratepayers nor their representatives are a "literary institution." The library authority is created for the purpose of managing a literary institution. A scientific or literary institution means a body of persons banded together for the promotion of science or literature. The library authority is the corporation. It is one body having various duties: *Andrews* v. *Mayor, &c., of Ryde*, 23 W. R. 58, L. R. 9 Ex. 302; *Pedder* v. *Mayor, &c., of Preston*, 10 W. R. 773, 12 C. B. N. S. 535. There is no entity called a library authority; the corporation in an urban district and the commissioners in a rural district are the library authority. The "institution" cannot mean the thing instituted, as the thing instituted cannot hold property. The building must be the property of a body which is itself a literary or scientific institution: *Sulley* v. *Royal College of Surgeons, Edinburgh*, 19 Court of Sess. Cas., 4th series, 751. Therefore neither the corporation in an urban district nor the commissioners in a rural district are a literary institution. Moreover, these public libraries and reading-rooms are provided for recreation and amusement, and are not literary institutions: *Russell Institution* v. *Vestry of St. Giles*, 2 W. R. 169, 3 E. & B. 416; *Marylebone Vestry* v. *Zoological Society*, 2 W. R. 491, 3 E. & B. 807; *Reg.* v. *Jones*, 8 Q. B. 719.

They also referred to *Blake* v. *Mayor, &c., of London*, 35 W. R. 791, 19 Q. B. D. 79.

Cur. adv. vult.

March 8.—LINDLEY, L.J.—This is an appeal from the judgment of the Divisional Court, dismissing an appeal against certain assessments made in respect of four buildings used as free libraries. The question is whether those free libraries are within the exemption contained in section 61, rule 6, of the Income Tax Act, 1842. Under the Public Libraries Act, 1892, the corporation, as the urban authority, is constituted the library authority. The Income Tax Commissioners came to the conclusion that these buildings were not "the property of any literary or scientific institution," though they might be used solely as literary or scientific institutions, and that therefore the exemption did not apply. The Divisional Court held that they were bound by their own decision in *Andrews* v. *Mayor, &c., of Bristol*, and dismissed the appeal. The corporation thereupon appealed to this court.

I cannot think that a municipal corporation or body of ratepayers who, by adopting the Public Libraries Act, have become liable to be rated in order to maintain a free library, is a literary institution within the meaning of that phrase in Schedule A, Part 6, of the Income Tax Act, 1842. By literary or scientific institutions were meant such as were known to exist in 1842, and such others like them as might come into existence thereafter. But a literary or scientific institution supported by rates is not, in my opinion, such an institution as was contemplated by the Legislature. The object of exempting scientific and literary institutions from income tax was to encourage private landowners to give land or allow it to be used by literary or scientific institutions supported by voluntary gifts or subscriptions, and so to encourage such institutions. Even if the library authority in this case were a distinct corporation, which it clearly is not (see *Andrews* v. *Mayor, &c., of Ryde*), I should still be of opinion that, being supported by rates, it was not a literary institution within the meaning of those words in the Income Tax Acts. It follows that, in my opinion, a library authority in a rural district is not such an institution. But even if a difference, material for the present purpose, can be drawn between an urban library authority and a rural library authority, still, to call the Corporation of Manchester, even in its character of library authority, a literary institution is to misapply that expression, and to extend the exemption to a class of cases to which it was never intended to apply. This was the view taken by the court below and by the Scotch court in the case of *Sulley* v. *Royal College of Surgeons, Edinburgh*.

The appeal must be dismissed, with costs.

RIGBY, L.J.—I am of the same opinion. The question is whether the owners of free libraries are

exempt from income tax. It is argued that the case comes within section 61, rule 6, of the Income Tax Act, 1842. I must say that I have tried to bring this case within the words of the Act because it appears to me that, if it had been possible for this case to have been present to the mind of the Legislature, they would have brought it within the exemption. At the time of the passing of the Income Tax Act, 1842, there were no such things as these free public libraries. The first statute authorizing their creation was the Public Libraries Act, 1850. The several Acts on the subject are now repealed and consolidated in the Public Libraries Act, 1892. In 1842, therefore, this particular sort of public institution was not in existence. No doubt these free libraries are literary institutions within the meaning of the Income Tax Act, 1842. But that Act does not look merely at the character of the building, but also at the position of the owners of the building. If it is right to look at the corporation as the owners of these buildings, even on a benevolent interpretation of the Act of 1842 I cannot call the corporation, upon whom is cast the management of these free libraries, a literary or scientific institution within the meaning of that Act. We have to consider the nature and position of the owners (and I assume that the corporation are the owners) as distinct from the nature and position of the buildings. I am unable to see that a municipal corporation is a "literary or scientific institution," merely because as library authority it brings into existence that which may properly be called a literary or scientific institution. I have also considered the position of commissioners appointed to carry into execution the Public Libraries Act, 1892, in parishes not within an urban district, and it seems to me that they are merely the representatives of the ratepayers, and I cannot see that they have any literary or scientific character in themselves, and I do not think that they are covered by the exemption in the Income Tax Act, 1842. For these reasons I think that the appeal should be dismissed.

Lord ESHER, M.R.—I venture to differ from my learned brothers in this case, and from the Divisional Court in this case and in *Andrews* v. *Mayor, &c., of Bristol*, and also from the decision of the Court of Session in *Sulley* v. *Royal College of Surgeons, Edinburgh*. To my mind we must first construe the Public Libraries Act, 1892. This assessment is made upon the Corporation of Manchester as owners of the buildings, the tax to be paid out of the general rates. In my opinion the corporation are not the owners of the buildings, and are not, therefore, liable to pay this tax. The corporation had once been the owners of the buildings, but they had determined to convert them into free libraries. It is only because the corporation are the urban authority, this being an urban district, that they are the body to carry into execution the provisions of the Public Libraries Act, 1892. We have to deal with them as the urban authority, and not as the corporation. By section 4 of the Act of 1892 the Act is to be carried into execution, if the library district is in an urban district, by the urban authority, therein called the "library authority." By section 11 the library authority of any library district may provide all or any of the following institutions—namely, public libraries, &c. A public library is there described as an institution, the very word used in the Income Tax Act, 1842, and therefore, to my mind, referring to the same kind of thing. By section 12 the library authority may purchase land, and may, with the sanction of the Local Government Board, appropriate any land vested in them for the purposes of the Act, and they may, with the like authority, sell any land vested in them. By section 14 all land and other real and personal property appropriated for any library under the Act shall be vested in the library authority. These buildings, therefore, which were appropriated by the corporation for free libraries, vested in the library authority. The library authority can receive no payment for the buildings, but must use them as free libraries. The library authority, though the legal owners, are bare trustees for the persons who use the library. I agree that the corporation itself cannot be called a literary institution, but what is the library? The library is an institution for the purpose of persons enjoying literary information. It is therefore a literary institution. Of what does that institution consist? It consists of the legal owners, who are the trustees and the managers, and the persons for whose benefit it is established. The property in the institution is in law in the trustees, but in truth it may be said to be in the institution itself. It comes within the very words of the exemption in the Income Tax Act, 1842. The building is the property of the literary institution which I have described, and for the use of which no payment is made. The Legislature, in passing the Public Libraries Acts. must be taken to have had the Income Tax Act, 1842, before it; and it not merely created the thing itself, but called it by the exact name used in the Act of 1842. In my opinion the Legislature intended to bring it within the exemption in the Act of 1842, and this appeal ought to be allowed.

Appeal dismissed.

Solicitors for the appellants, *Austin & Austin*, for *Town Clerk*, Manchester.

Solicitor for the respondent, *Solicitor of Inland Revenue.*

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 7.

DYER v. MUNDAY. (*a*.)

Master and servant—Scope of authority—Assault committed by servant in course of employment—Conviction of servant—Liability of master—24 & 25 Vict. c. 100, s. 45.

The defendant, the proprietor of a furniture business, appointed an agent to be the manager of a local branch of his business. The agent, whilst engaged in removing from the plaintiff's house some furniture which he had let under a hire-and-purchase agreement to a person who had been a lodger there, committed an assault on the plaintiff, who was trying to resist the removal. For this assault the agent was convicted and fined. The plaintiff then brought an action against the defendant to recover damages for the assault.

Held, first, that the jury were justified in finding that the agent was acting within the scope of his authority; secondly, that the conviction of the agent did not, by virtue of 24 & 25 Vict. c. 100, s. 45, operate so as to release the defendant from liability to pay damages.

Application for judgment or a new trial.

This was an action against two defendants, Munday and Price, for trespass and assault. Munday was the proprietor of a furniture business, and Price was the manager of a branch of that business at Putney. Price, in the course of his employment as such manager, let some furniture under a hire-and-

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

purchase agreement to a lodger residing in the house of the plaintiffs, who were husband and wife. Before all the instalments due under the agreement had been paid, the lodger left the plaintiffs' house, and he asked Price to remove the furniture. Price called upon the plaintiffs, but they claimed to be entitled to keep the furniture as security for arrears of rent. Subsequently Price and a man named Simson went together to the plaintiffs' house and forcibly removed the furniture, and while so doing committed an assault on the female plaintiff, who was trying to resist the removal of the furniture. On the hearing of a summons before a police magistrate Price and Simson were convicted of the assault and fined. The plaintiffs having brought this action, the defendant Munday pleaded that the acts complained of had been done without his authority and without his knowledge, and it was contended that, inasmuch as Price had been convicted of the assault and had paid his fine, no damages for the same assault could be claimed by action against either Price or Munday, by virtue of the statute 24 & 25 Vict. c. 100, s. 45.

That section enacts that if any person, against whom a complaint shall have been preferred for assault, shall have obtained a certificate of dismissal, "or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour, awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

The action was tried before Lawrance, J., and a jury, when a verdict was returned for the plaintiffs, the damages being assessed at £25 for the trespass and £15 for the assault, and judgment was entered accordingly.

The defendant Munday applied for judgment or a new trial.

Montague Lush, for Munday.—The learned judge wrongly held that the statute did not protect Munday. There is a difference between being liable as an actual wrongdoer and being liable as master or principal by implication of law. If a principal tells his agent to commit an assault, he is liable as an actual wrongdoer; and in such a case the conviction of the agent would not release the principal. But where the agent has actually been the only wrongdoer, and the liability of the principal is merely implied by law, an action will not lie against the principal after the conviction of the agent; in such a case the principal can only be sued while there is an existing liability in the person who has actually done the wrong. The case of *Masper* v. *Brown*, 24 W. R. 39, 1 C. P. D. 97, shows that the effect of the action is not confined to the person who commits the assault and the person assaulted. Secondly, there is no evidence to justify the jury in finding that Munday was liable for this assault; there was no evidence that Price in committing the assault was acting within the scope of his authority. His authority was simply to manage Munday's branch business. The assault was clearly a wilful criminal act, as distinguished from a mere negligent or illegal method of carrying out his duty.

He cited *Bolingbroke* v. *Swindon Local Board*, 23 W. R. 47, L. R. 9 C. P. 575; *Poulton* v. *London and South-Western Railway Co.*, 16 W. R. 309, L. R. 2 Q. B. 534; *Lyons* v. *Martin*, 8 Ad. & E. 512; *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, 3 C. P. D. 148, 21 W. R. Dig. 148; *Edwards* v. *South-Western Railway Co.*, 18 W. R. 834, L. R. 5 C. P. 445; *Richards* v. *West Middlesex Waterworks Co.*, 33 W. R. 902, 15 Q. B. D. 660.

Montague Shearman, for the plaintiffs.—The question whether an agent was acting within the scope of his authority is always a question of fact, and it was rightly left to the jury in this case. A master is liable even for the wilful illegal act of his servant, if it is done in the course of his service and for the master's benefit: *Limpus* v. *London General Omnibus Co.*, 11 W. R. 149, 1 H. & C. 526; *Greenwood* v. *Seymour*, 9 W. R. 785, 7 H. & N. 355; *Barwick* v. *English Joint-Stock Banking Co.*, 15 W. R. 877, L. R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank*, 28 W. R. 677, 5 App. Cas. 317, *per* Lord Selborne.

Lord ESHER, M.R.—This is an action in which it was sought to make the defendant Munday liable for an assault and trespass committed by his agent. The case was left to the jury, who found that Munday was liable. It is now said that there was nothing which could properly have been left to the jury, and that the learned judge ought to have nonsuited the plaintiffs. The question therefore is, not whether the judge misdirected the jury, but whether there was evidence on which it was right for him to leave the case to the jury with a proper direction. Might he, on the evidence before him, have left the case to the jury with the direction approved of by the judges in *Limpus* v. *London General Omnibus Co.*? According to that direction the questions to be left in this case would have been as follows:—Was it part of Price's employment to let out furniture on the hire principle? And was it part of his employment that, if the instalments due on any furniture were unpaid, he was to get the furniture back into his own possession? Considering what the business was which Munday carried on, and that Munday himself did not live at Putney, where this branch of his business was, but that he had appointed Price to be the manager of that branch, I should have no difficulty in coming to the conclusion that it must have been a material part of Price's employment to get back into his possession articles of furniture on which any instalments were due and unpaid. At any rate, I have no doubt that the jury might reasonably have thought that that was part of his employment. Then the next question would be, Did Price go to the plaintiffs' house for the purpose of recovering possession of furniture on which instalments remained unpaid? I think it clear that the jury might reasonably say that he did. He was doing what he was employed to do, and though while so doing he committed an assault, a brutal assault for which he was afterwards convicted and fined, still it seems to me he must be taken, in going to the plaintiffs' house and doing as he did, to have been acting for the purpose which I have stated.

In my opinion, therefore, the judge might rightly have asked the jury, in accordance with the direction approved of in *Limpus* v. *London General Omnibus Co.*, whether Price in doing what he did was acting in the course of his employment with the intention of furthering his master's interests and of doing what he was employed by his master to do, and not for any purposes of his own. I think that the evidence in this case would support those questions, and that the jury might well answer them in the plaintiffs' favour. It was contended that if what the agent did in the course of his employment was a criminal act, that took the case out of the general rule. But in *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, and *Greenwood* v. *Seymour*, the acts complained of were criminal acts, and the courts did not take the ground that those cases were taken out of the general rule for that reason. No doubt an act done by an agent in the course of his employment might be so criminal that any jury would say that it could not

have been done in furtherance of his master's business, and must have been done quite outside his authority. And in that respect the fact of its being a criminal offence may be material for the jury to consider. But the mere fact of the excess of authority involving a criminal act does not take the case outside the rule. The question is not merely whether the act complained of as wrongful was within the agent's authority; for, of course, an agent's authority is always to do what he has to do rightly and not wrongfully. But if an agent is authorized to do a particular thing properly, and while acting within the scope of his employment he exceeds his authority by doing the thing improperly, the law of England says, though it may be hard law, that the master is liable.

As to the other question, we have merely to construe the section of the statute by itself. It is clear that it falls short of saying that, where two persons have rendered themselves liable to an action for assault, if one of them obtains relief from further liability by being punished criminally, the other is thereby also relieved. On both grounds, therefore, the application fails.

LOPES, L.J.—I am of the same opinion. As to the question of the construction of the statute, I think that it only exonerates the actual person who has been acquitted or convicted. As to the other question, I think the authorities show that acts done by an agent in the conduct of his master's business and in furtherance of that which he is employed to do are acts done within the scope of his authority, for the purpose of the rule in question, even though they be done contrary to the instructions of his master. I have come to the conclusion that for this purpose no distinction is to be drawn between a tortious act and a criminal act, provided such act be done by the agent in the course of his employment for the purpose of performing that which he is employed to do and in the interest of his employer.

RIGBY, L.J., concurred.

Application dismissed.

Solicitors for the plaintiffs, *Shearman & Rayner.*

Solicitor for the defendants, *O. H. Swann.*

High Court of Justice.

Chan. Div. } March 2-9.
Kekewich, J. }

In re KNOX'S TRUSTS. (*a.*)

Trustee—Practice—Vesting order—Request to trustee to transfer stock—Refusal of trustee to transfer within twenty-eight days after request—Petition presented within twenty-eight days—Jurisdiction to hear petition—Liability of trustee for costs—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35 (1) (ii.) (d), 38—*Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

A petition praying for a vesting order under section 35 *of the Trustee Act,* 1893, *on the ground that a trustee has refused to transfer stock for twenty-eight days after a request in writing by the person absolutely entitled, will not be entertained by the court if presented before the expiration of such period.*

The court has jurisdiction to require the defaulting trustee to pay the costs of a petition claiming such an order.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

This was a petition by the beneficiaries, one of them being also a trustee under the will of George Knox, who died in 1874, stating that the petitioners had become absolutely entitled to certain stocks, funds, and securities representing the residuary estate of the testator and vested in the petitioner-trustee, and the respondent, who was the other trustee of the will; that on the 14th of January, 1895, the petitioners had served upon the respondent a request in writing to transfer the said stocks, funds, and securities to them; and that the respondent had refused to do so; and the petition prayed that the court would make an order pursuant to section 35 (1) (ii.) (*d*) of the Trustee Act, 1893,* vesting the right to transfer or call for a transfer of the said stocks, funds, and securities, and to receive the dividends or income thereof, in the petitioner-trustee either alone, or jointly with such other person as the court might appoint; that the costs of the petitioner-trustee and the respondent might be taxed as between solicitor and client; and that the costs of the application might be paid by the respondent.

The petition was presented and served before the above-mentioned period of twenty-eight days had expired, but it was answered after the expiration of that period.

O. Leigh Clare, for the petitioners.

T. T. Method, for the respondent.—The court has no jurisdiction to make a vesting order under section 35 (1) (ii.) (*d*) of the Trustee Act, 1893, until after the expiration of the period of twenty-eight days therein mentioned. Consequently, a petition praying for such an order, if presented before the expiration of that period, ought not to be entertained by the court. The case is analogous to that of a magistrate who has been held entitled to the full period of twenty-eight days' notice of action given him by statute: *Young* v. *Higgon,* 6 M. & W. 49.

Clare, in reply.—The petition was answered after the twenty-eight days. This is merely a question of costs. If the respondent had been willing to transfer before the expiry of the twenty-eight days, the petitioners might have been liable for the costs. The section does not provide that the proceedings are to be commenced, but only that the order is to be made after the twenty-eight days. The proceeding resemble an action against an executor, which, though brought before he proves the will, is not irregular if he proves before judgment. If there is any question the petition may be allowed to stand over, and it may be re-presented and re-served.

KEKEWICH, J.—This is a small point, and a purely technical one; but it is of some importance in practice. Section 35 of the Trustee Act, 1893, gives this jurisdiction to the court. [His lordship here read the portion of the section set out above.] That gives a new right of action. No doubt it is to be enforced by petition in a summary mode; but still it is a new right of action given by the statute, and in addition to such remedies as exist at common law.

* The Trustee Act, 1893, s. 34, provides: . . . (1) If any of the following cases, namely: . . . (ii.) Where a trustee entitled alone or jointly with another person to stock . . . (*d*) neglects or refuses to transfer stock . . . according to the directions of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled . . . the High Court may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends or income thereof . . . in any such person as the court may appoint."

or under other statutes. This statutory jurisdiction must be strictly construed. The petition cannot be presented—or to turn it into an action the writ cannot be issued—till jurisdiction has arisen. To say that a man may in this case present a petition before the expiry of twenty-eight days after the request has been made to him, is to say that proceedings may be commenced before jurisdiction has arisen. That is not the proper construction of the Act. Mr. Clare invokes the analogy of an executor against whom an action is brought before he has proved the will, which is properly brought, provided the probate is in court before the court is asked to pronounce judgment, But that depends on the settled doctrine that the appointment of an executor relates back to the death of the testator. That fact distinguishes the cases completely. I think this petition has been presented before its time. That is really the only point at present raised.

As to the other question, that, namely, of the costs, my opinion, subject to anything that Mr. Methold may hereafter say, is that expressed on page 98 of the 5th edition of Mr. Ellis's book on the Trustee Act, 1893, in a note on section 38 of the Act. He there says: "The *ratio decidendi* of *In re Mills' Estate*, 35 W. R. 65, 34 Ch. D. 24, turned mainly on the fact that the Judicature Act was passed after the other Acts then under discussion. The position as regards the Trustee Act, 1893, is now reversed, and inasmuch as the above section has been passed by the Legislature with full knowledge of the existing state of the authorities, and with the express addition of the words, "and by such persons," it would seem that the court has now jurisdiction in a proper case to order a respondent to pay costs." The Judicature Act, 1890, now gives the court the largest jurisdiction as to costs, and my opinion, therefore, is that if once you have a respondent properly here, the court may order payment of costs by that respondent under the Trustee Act, 1893, just as much as in any other proceedings.

The petition will be allowed to stand over, with leave to the petitioners to re-present and re-serve it.

On the 9th of March, 1895, the petition, which had in the meantime been re-presented and re-served again, came on for hearing before his lordship.

Clare, for the petitioners.

Methold, for the respondent.—If the trustee wilfully refused to transfer, an order might have been obtained without serving him. Having been served unnecessarily, he is, therefore, entitled to his costs: *In re Third Burntree Building Society, Ex parte Armstrong and Shallcross*, 16 Sim. 296.

KEKEWICH, J., after deciding on the merits that the respondent was not justified in refusing to transfer, said: The necessity of this application, as now heard, is entirely the result of the respondent's obstinacy, and he must pay the costs of it. From the costs which he has to pay, must, however, be deducted those occasioned by the petition presented last week; but I refuse to give him the costs of that petition.

Solicitors, *Chester, Mayhew, Broome, & Griffiths; J. E. & H. Scott.*

Chan. Div. } March 8.
Romer, J. }

In re SILVESTER.
MIDLAND RAILWAY CO. *v.* SILVESTER. (*a.*)

Guarantee—Principal and surety—Provision for notice of withdrawal by obligors or their respective representatives—Death of obligor—Notice of death—Liability of estate—Express notice.

In the case of a guarantee determinable on the express notice of any of the obligors or their personal representatives, a mere notice of the death of an obligor is not sufficient to exonerate his estate from the obligation.

Trial of action.

This was an action to determine the liability of the estate of William Silvester, deceased, on a bond dated the 26th of July, 1881. Under this bond Silvester and others, who were the directors of a joint-stock colliery company called the Ystradgunalais and Swansea Colliery Co. (Limited), gave a guarantee for the payment of such sums as should from time to time become due to plaintiffs for the carriage of coal and other goods; the bond to become void if the obligors or any or either of them, their or any or either of their heirs, executors, or administrators, should pay all sums due on the account. It was also provided that the obligors or any one or more of them or "their respective representatives" might at any time determine their or his liability under the said bond by one calendar month's notice in writing to be given to the plaintiffs.

William Silvester died on the 20th of May, 1886, and on the 26th of August, 1886, the plaintiffs received notice of his death from the defendant, who was Silvester's sole executor. Down to October, 1892, the colliery company paid the sums due from them in respect of the said account. On the 8th of June, 1893, they passed a winding-up resolution, and made defaults to the plaintiffs in the sum of £594 12s. 7d. The plaintiffs received, on account of the money due from the other obligors, £250, and sued the defendant for the balance.

Neville, Q.C., and *W. Baker*, for the plaintiffs.—Silvester's estate is liable to make up the amount due on the bond. The guarantee did not terminate at the death of the obligor, and it was the intention of the contracting parties that it should continue until it was terminated by the representatives of the deceased obligor giving formal notice of the withdrawal. It is admitted that in this case no notice was given.

They cited *Bradbury* v. *Morgan*, 10 W. R. 776, 1 H. & C. 249; *Harriss* v. *Fawcett*, 21 W. R. 742, L. R. 8 Ch. App. 866; *Coulthart* v. *Clementson*, 28 W. R. 355, 5 Q. B. D. 42.

Horton Smith and *G. F. Bull* (*W. Freeman* with them), for the defendant.—The notice of the death and will of the testator was a sufficient notice to the company, and his estate is not liable. If the company had wished the deceased's guarantee to continue after his death it should have been made clear on the bond. [They referred to the remarks of Bowen, L.J., in *Coulthart* v. *Clementson*, 5 Q. B. D., at p. 48.] It is not certain that the words "their representatives" mean legal personal representatives; they mean, agents of the obligor in his lifetime. In any case, the plaintiffs having had notice of the rights of third parties, they could not run up a continuing account against the estate: *Hopkinson* v. *Rolt*, 9 W. R. 900, 9 H. L. Cas. 514; *Bradford*

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

Banking Co. v. *Briggs*, 35 W. R. 521, 12 App. Cas. 29.

ROMER, J.—I think the plaintiffs are right in their contention. The bond contains a special provision that the liability may be determined if the obligors or any or more of them or their respective representatives give one calendar month's notice of withdrawal. I have first to consider what meaning must here be given to representatives, and I am of opinion that it includes a legal personal representative. The obligation of the representative of the obligor, in whom, as I have said, we must include his executors and administrators, can only be determined in precisely the same way as the obligation of the obligor in his lifetime. The case is exactly that put by Bowen, L.J., in *Coulthart* v. *Clementson*, 5 Q. B. D., at p. 48. He says: "If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself; and such a provision will, of course, bind the estate." This is exactly what has been done in this case, and the plaintiffs can rely on the provisions of the contract to support their claim. The plaintiffs were not bound to accept the notice of the obligor's death as equivalent to a notice of the obligor's representative to determine his liability under the contract, nor were they affected by any breach of trust to the obligor's estate committed by such representative. It cannot be disputed that no notice, as stipulated for by the contract, was ever given to the plaintiffs by the representative of the obligor, and consequently the estate of the deceased obligor is still liable under the contract.

Solicitors, *Beale & Co.*; *Makinson, Carpenter, & Son*, for *C. H. Twynam*, Stafford.

Chan. Div. } Feb. 24, 25; March 7.
Romer, J. }

COOPER *v.* STEPHENS. (*a.*)

Copyright — Sale of printing blocks — Licence — No assignment of copyright—Injunction—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.

The plaintiffs were the registered owners of the copyright in certain illustrations of carriages. Their business was to print illustrations for carriage makers. Occasionally they sold the electro blocks for printing the illustrations to carriage builders who printed them themselves. The plaintiffs sold to L. some of these blocks, and he permitted the defendants to print from these blocks.

Held, that the sale of the blocks to L. did not operate as an assignment of copyright, and that L. could not authorize the defendants to print illustrations from the blocks, and that an injunction should issue to prevent them doing so.

Trial of action.

The plaintiffs carried on business as designers of carriages, and for this purpose executed designs. Some of these designs they printed and sold to carriage-builders and others for use in their own businesses. Sometimes customers bought from them electro blocks of the illustrations which they used to print illustrations themselves. The plaintiffs were also the registered owners of the copyright of certain illustrations of carriages published by them in book form. The plaintiffs in the course of their business supplied to one S. J. Lilley, a carriage-builder at Leicester, two of these blocks. No written agreement was made with reference to them, nor was any permission asked by or conceded to him to permit other persons to print from these blocks.

The defendants in this action, Gibbons & Co. and Stephens & Mackintosh, had obtained from Lilley the electro blocks in question and had printed from them two illustrations for their own purposes.

The plaintiffs brought this action claiming an injunction to restrain the defendants from printing, publishing, reproducing, selling, exhibiting, or distributing any print or illustration taken, copied, or colourably altered or imitated from any print, drawing, or illustration contained in the plaintiffs' copyright catalogues or books of designs. The evidence showed that the five illustrations complained of were copies of the plaintiffs' designs.

Scrutton, for the plaintiffs.—To entitle the defendants to use the defendants' electro blocks they must show a written licence from the plaintiffs as required by section 15 of the Copyright Act, 1842. Lilley himself cannot license the defendants to print from blocks for which he himself holds no written permission. No assignment of the copyright has taken place merely by sale of the blocks to Lilley.

Neville, Q.C., and *Dunham*, for the defendants.—The plaintiffs have sold their blocks out and out; that authorizes Lilley to do as he thought right with them: *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459; *Grace* v. *Newman*, 23 W. R 517, L. R. 19 Eq. 623. In any event, no substantial part of the plaintiffs' books have been taken, and no action therefore lies: *Chatterton* v. *Cave*, 26 W. R. 498, 3 App. Cas. 483.

Scrutton, in reply.—A substantial part of the plaintiffs' illustrations have been taken, and for a purpose not merely critical, and therefore lays them open to an action: *Campbell* v. *Scott*, 11 Sim. 31; *Bradbury* v. *Hotten*, 21 W. R. 126, L. R. 8 Ex. 1.

ROMER, J.—The plaintiffs were undoubtedly the draftsmen of the drawings of carriages forming the books the subject of this action, and the owners of the copyright in those books; and there has been due registration under the Copyright Acts enabling them to sue for infringement of their copyrights. It is clear that the five drawings, the subject of the action, which have been printed and published by the defendants are copies of the corresponding five drawings contained in the plaintiffs' books. As to three of them this was not disputed, and as to the remaining two I am satisfied that in fact they were copies from the plaintiffs' drawings made respectively by the defendants' witnesses Johnson and Wakerley, so that *primâ facie* the plaintiffs are entitled to succeed in this action.

The plaintiffs' principal business is to make drawings of carriages of novel shape, and to supply copies of these as required to members or the carriage trade for advertisement and other purposes of their trade. These copies are generally printed by the plaintiffs on sheets or other advertising forms, and supplied by them in that way. But occasionally some member of the trade wants to print one or more drawings in or on some advertisement which is not printed by the plaintiffs, and then, to enable him to do this, the plaintiffs, for a money payment, supply him with electro blocks of the drawings required.

The first ground of defence, which only relates to two of the drawings, is that the defendants were authorized to print and publish these by one Lilley, whom the plaintiffs had supplied in the manner and for the purpose above mentioned with electro blocks of the drawings, and it is said that this authority is an answer to the plaintiffs' claim. But this ground

(*a.*) Reported by J. W. GREIG, Esq., Barrister-at-Law.

in my opinion, is untenable. By supplying the blocks to Lilley the plaintiffs did not assign to him any copyright in the drawings which was previously vested in them, and section 18 of the Copyright Act (5 & 6 Vict. c. 45) does not apply. The effect of the sale of the blocks to Lilley was, in my opinion, to authorize him personally to print therefrom, and use the copies for the purposes of his advertisement and trade. It did not authorize anyone else to print or publish copies, and, in my opinion, certainly did not enable Lilley to authorize the defendants as against the plaintiffs to print and publish the two drawings in question. Lilley, in fact, had a licence from the plaintiffs, which was not assignable by him.

The defendants try to make out that the sale of the blocks had the effect of conferring on Lilley the copyright in the blocks, and not merely a licence to use them. But I cannot see how this is established. The copyright was previously existing in the plaintiffs, and the sale of the blocks could not have had the effect of an assignment of copyright, and indeed I am satisfied that the meaning and intent of the transaction as between the plaintiffs and Lilley was that the sale of the blocks should authorize Lilley personally to print therefrom for the purposes of his advertisements and trade, and should confer no other right on him, and have no other operation or effect. It is said that a difficulty arises if the effect was only a licence, or consent to copy, because the licence or consent was not in writing as required by the Copyright Act (5 & 6 Vict. c. 45), but an equal difficulty arises with regard to an assignment, for that to be valid must also be in writing.

And in truth the difficulty as to the licence is more apparent than real, for if the plaintiffs, after selling the blocks to Lilley, had (which is most unlikely) tried to prevent his personally using them or sued him in damages for having used them in his trade as intended, the court, on ascertaining the facts, would probably have considered the conduct of the plaintiffs fraudulent and refused them an injunction or any substantial damages, and made them pay costs.

The other ground of defence is that no substantial part of the books in question has been taken by the defendants. But in considering a question of infringement like this it is important to consider the intent of the copyist and the nature of his work, as was observed by Kelly, L.C.B., in *Bradbury* v. *Holten*. In the present case I observe that the defendants are using the five drawings complained of for the very purpose for which the originals were made by the plaintiffs, and so as to escape from making any payment to the plaintiffs in respect of their rights in the drawings; and I cannot help seeing that if the defendants were allowed with impunity to do what they have done the plaintiffs' copyright will be rendered practically valueless, and, in fact, destroyed. Clearly in a great many cases the trade only want one or two drawings for their advertisements, and if a member is allowed to steal one or two the result must be that the plaintiffs' rights will be wholly lost. And although in this case there is only one drawing taken from each of two books of the plaintiffs and three from another book, yet the total makes up five-sixths of all the drawings of carriages in the carriage-makers' advertisements inserted in the publication complained of. I hold, therefore, that this ground of defence also fails, and I accordingly grant to the plaintiffs the injunction asked by them, and 40s. damages and costs.

Solicitor for the plaintiffs, *W. Smee*.

Solicitors for the defendants, *Morse & Simpson*, for *Parsons & Davis*, Leicester.

Q. B. Div.
(Cave and Wright, JJ.) March 28.

REG. v. MILLS. (*a*.)

Local government—Parish council—Election of parish councillors—Mode of questioning—Mandamus—*Election petition—Powers of county council with respect to disputed elections—Demand for a poll by a candidate who is not an elector—Power of chairman*—Functus officio—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 48 (3) (5), 80 (1); *Schedule I., Part* 1, *r.* 7; *Schedule I., Part* 2, *r.* 1—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 87.

A mandamus *is not the proper mode of questioning an election of parish councillors. In the case of an election for the first parish council there are two ways of questioning such election—by an election petition, or by application to the county council under sections* 48 (5) *and* 80 *of the Local Government Act*, 1894.

Where, at a parish meeting held for the purpose of electing parish councillors, upon a demand for a poll by an unauthorized person, the chairman has announced that a poll will take place, he is functus officio, *and cannot afterwards declare the candidates who received the majority of votes at the meeting to be duly elected; and the candidates who, notwithstanding the irregularity in the demand for a poll, subsequently received a majority of votes at the poll are the persons who are properly filling the office of parish councillors.*

Rule *nisi* for a *mandamus* commanding the chairman of the parish council of Langley Burrell Without to convene a meeting of the parish council and to permit Messrs. Daniel Cole and Henry Dudley Scott to make and sign a declaration under rule 1, Part 1, of Schedule I. of the Local Government Act, 1894.

By section 2, sub-section 1, and section 44, sub-section 1, of the Local Government Act, 1894, it is provided that the parish meeting shall consist only of persons whose names appear on the register of parochial electors, and that no other persons should attend or vote at such meeting. By Schedule I., Part 1, Rule 9, a candidate for election for the position of parish councillor who is not a parochial elector, may speak at the parish meeting held for the purpose of electing councillors but may not vote.

The Parish Councils Election Order, 1894, provides that at any time before the close of the meeting held to elect councillors any parochial elector may demand a poll.

On the 29th of January, 1895, a parish meeting was held at Langley Burrell for the purpose of filling two vacancies in the parish council. Four candidates were nominated, Daniel Cole, R. T. Lawrence, John Matthews, and Henry Dudley Scott. On a show of hands Messrs. Cole and Scott received majorities. A poll was demanded by Mr. Lawrence, one of the defeated candidates, who was not a registered parochial elector. No objection was taken to Mr. Lawrence's demand, and the chairman announced that the poll would take place on the 9th of February, but after the meeting had closed persons whose attention was then for the first time directed to a doubt as to the validity of Mr. Lawrence's demand declared that they would have demanded a poll had Mr. Lawrence not done so. On the same day the chairman issued a notice to the candidates announcing that a poll had been demanded and that they were respectively candidates for election. But on the 30th of January, having come to the conclusion that the demand for a poll made by Mr. Lawrence

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

was invalid, he made a certificate whereby he declared that Messrs. Cole and Scott had been duly elected at the parish meeting. Subsequently, a further notice having been issued by the returning officer, a poll was held on the 9th of February, and Messrs. Lawrence and Matthews obtained a majority of votes. At a parish council meeting held on the 18th of February Mr. Scott asked on behalf of himself and Mr. Cole to be allowed to sign a declaration that they accepted the office of parish councillors as they are required to do by the Act, but he was not allowed to do so and was told to sit down, and Mr. Lawrence and Mr. Matthews signed the declaration.

Cyril Dodd, Q.C., showed cause.—The chairman, having ruled that a poll must take place, was *functus officio*, and whether he was right or wrong in so ruling, he had no power to withdraw it. At any rate, if a mistake had been made the proper course was either to institute an election petition or to go before the county council under section 80 of the Local Government Act, 1894. Section 48, sub-section 3, of the Act incorporates the Municipal Corporations Act, 1882, as amended by the Municipal Elections Act, 1884, and by those Acts it is provided that elections are not to be questioned except by election petition. And, further, section 80 of the Local Government Act, 1894, enacts that where any difficulty shall arise with respect to the first election of parish councillors the county council shall have power to make any order they may deem expedient.

H. D. Greene and *Gaches*, for Scott and Cole.—This is not the sort of difficulty the county council have power to deal with, they have not the power to hear evidence and adjudicate as if trying an election petition. The council's power is confined to such cases as when a difficulty has been found in obtaining a room in which to hold the meeting or to order a new election, if it has not been properly held. But here there is no need for a new election. Messrs. Cole and Scott were elected, and are the persons who fill the office of parish councillors. They cannot petition either, for it is only an unsuccessful candidate that can petition.

CAVE, J.—The rule must be discharged. I am of opinion that the proper mode of questioning the election of Messrs. Matthews and Lawrence was by proceeding under the Local Government Act itself. That Act incorporates the Municipal Corporations Act, 1882, which by section 87 provides that an election may be questioned by an election petition on four grounds, one of which is, that the person whose election is questioned was not duly elected by a majority of lawful votes, and it goes on to provide that "an election shall not be questioned on any of those grounds except by an election petition." I do not think that that was the only mode; for the Act of 1894 provides other means—namely, those in section 48, sub-section 5, and in section 80, and those sections apply where a mistake has been made. So that there was here a choice of two remedies. Where obviously a petition is the best way, the county council may, no doubt, decline to interfere; but where the time has expired for that remedy, that might be a good reason for the county council to interfere; but as to whether they would have power to do so in such a case, I do not give an opinion.

In former times the ordinary mode of questioning a Parliamentary or municipal election was by *mandamus* or by *quo warranto;* now the proper way is by an election petition; and as the same rules apply to the parish councils the remedy is the same. But it is said that Mr. Cole and Mr. Scott were the successful candidates. I doubt whether that is so. A poll was demanded by a person not qualified to demand it. The chairman, however, acceded to the demand, and everyone was under the impression that a poll was going to take place. Other persons only abstained from demanding a poll because they understood it had been demanded already. The chairman sent round a notice that a poll was to take place. He was then *functus officio*. He had no power afterwards to declare that the two candidates had been elected. It was then that the mischief was done, and it was his attempt to set matters right that led to all the confusion.

I do not think that a *mandamus* would have been the proper remedy, even under the old *régime*. There were already two persons filling the office. Rightfully or wrongfully, they at any rate appear to have been properly filling the office.

WRIGHT, J.—I am of the same opinion. First, as regards the power of the county council. Section 80 provides, among other things, that "if, from no election being held or an election being defective or otherwise, the first parish or district council . . . has not been properly constituted . . . the county council may by order make any appointment or do anything which appears to them necessary." I cannot conceive how it can be said that that section does not give the county council power to deal with this case. Again, section 48, sub-section 5, is as follows: "If any difficulty arises as respects the election of any individual councillor or guardian, or member of any such local board or vestry as aforesaid, or auditor, and there is no provision for holding another election, the county council may order a new election to be held and give such directions as may be necessary for the purpose of holding the election." It seems to me that those sections give ample power to the county council to deal with every sort of difficulty in the case of the first parish council. In the second place, the rule asks only that a meeting should be held for the purpose of permitting Mr. Cole and Mr. Scott to sign the declaration. It seems to me that they had the remedy in their own hands. Schedule I., Part 2, r. 3, provides that "every parishioner shall, at the first meeting after his election, or if the council at the first meeting permit, then at a later meeting fixed by the council, sign . . . a declaration. . . ." The council could not prevent them. Thirdly, after the chairman had made the declaration that a poll was to be held it was *ultrà vires* for him to certify that two of the candidates had already been elected. The certificate was void, and therefore Mr. Scott and Mr. Cole were never elected.

Solicitors for Messrs. Scott and Cole, *Wallis D*

Solicitors for the chairman of the Langley Bu Parish Council, *Collier & Bristowe*.

Q. B. Div. (Wills and Wright, JJ.) Jan.

GRANT v. THOMPSON. (a.)

Criminal law—Maintenance.

A criminal prosecution cannot be tainted with illegality of maintenance.

Appeal by the defendant from a judgment of Honour Judge Lumley Smith, Q.C., in the Westminster County Court.

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

The plaintiff, a solicitor, claimed a sum of £20 from the defendant for work done as a solicitor under the following written guarantee:—

"24, Bride-lane, London, E.C.,
"August 11, 1892.

"Dear Sir,—In consideration of your taking up the proceedings against Nassib A. Shibley on behalf of Mme. Holdener, I hereby undertake to agree to indemnify you to the extent of £20 toward the cost of such proceedings, it being understood that you are not to call upon me to pay you that sum for a period of twelve months from this date.

"Yours faithfully,
"T. GIBSON THOMPSON.

"G. R. Grant, Esq., solicitor,
"41, Norfolk-street, Strand, W.C."

The defendant had been in the employment of Mr. Shibley as assistant-editor of a newspaper of which Mr. Shibley was the proprietor. The newspaper was a failure, and the defendant brought an action against Shibley for his salary and recovered a certain sum from him. Shibley thereupon prosecuted the defendant for theft, and the defendant was acquitted. The plaintiff acted as the defendant's solicitor in the action and in the prosecution. After the defendant's acquittal the plaintiff informed him that Shibley had dealt with certain furniture belonging to one Bustani in a way which brought him within the criminal law. With the assistance of the plaintiff the defendant opened communications with Bustani, and, it having been discovered that the furniture dealt with by Shibley was the property of a Madame Holdener, Shibley was charged with larceny as a bailee on the prosecution of Madame Holdener, under 24 & 25 Vict. c. 96, s. 3, and committed for trial.

The guarantee above mentioned was given by the defendant after the proceedings had been commenced. Shibley was acquitted, and Bustani and Madame Holdener disappeared without paying any part of the plaintiff's bill of costs, which amounted to £72 12s. 7d. The plaintiff thereupon sued the defendant on his guarantee for £20.

At the trial in the Westminster County Court it was contended by the defendant that the agreement between the plaintiff and himself was void, on the ground that it was tainted with the illegality of maintenance. It was argued for the plaintiff that the maintenance of criminal suits was legal.

The county court judge gave judgment for the plaintiff for £20, and gave leave to appeal.

Boxall (*Willis, Q.C.*, with him), for the appellant.—Every person has a right to institute criminal proceedings in his own name, but not in the name of another.

He cited *Bradlaugh* v. *Newdegate*, 31 W. R. 792, 11 Q. B. D. 1 (see Coleridge, C.J., at p. 13); *Harris* v. *Brisco*, 34 W. R. 729, 17 Q. B. D. 504; Stephen's Dig. Crim. Law, 5th ed., p. 112; Stephen's Hist. Crim. Law, vol. 3, pp. 234-240; 1 Russ. Cr., pp. 351-359; 1 Haw. P. C. pp. 454-466; Vin. Abr., xv., 147-178; 4 Edw. 3, c. 11; 32 Hen. 8, c. 9.

Wallace, Q.C. (*G. C. Smith* with him), for the respondent.—It is the right and duty of every subject to assist the execution of justice. Maintenance applies to civil actions only.

He cited *Wallis* v. *Duke of Portland*, 3 Ves. jun. 494.

WILLS, J.—I am clearly of opinion that the county court judge was right. He gave an excellent, a well-considered, and a sound judgment, in which was contained a careful view of the law of maintenance. When one comes to consider the matter it is plain that there cannot be maintenance in the prosecution of a criminal suit. The prosecutor is only nominally prosecutor, and, in theory, proceedings are taken in the name of the Crown. The reason why every member of the community has the right to use the name of the Sovereign is, that it is for the public benefit that no impediment should be thrown in the way of a person who wishes to put the criminal law in motion. It is said that in such a case as the present one the circumstances did not demand it; but nobody can say whether that is so till the case has been tried. The real remedy of a person prosecuted, as in this case, is an action of malicious prosecution. If it turns out that there was no reasonable and probable cause for the institution of the proceedings, and that there was malice on the part of the prosecutor, the prosecutor would be liable. Therefore there is an additional protection to the person prosecuted. But in civil matters there is no such protection, there being no action for the malicious prosecution of a civil suit. When it is once grasped that every person is allowed to put the criminal law in motion, maintenance in criminal suits is gone. Maintenance applies to the case of a man who interferes where he has no concern; but it is for the public good that the criminal law should be set in motion. This seems to be the view that the county court judge took. I should scarcely have thought it necessary to say so much were it not for the observations of Coleridge, C.J., in *Bradlaugh* v. *Newdegate*, which Mr. Boxall relied upon. Probably he had not the authorities before him at the time, and it was necessary for Mr. Boxall to show us foundations in the text-books for the contention supported by Lord Coleridge. It is sufficient to say that all his knowledge was not able to support the semblance of an argument. He founded much of his case on the suggestion that criminal prosecutions are "quarrels" within the meaning of that word as used in Viner and in Comyns. "Actions," in Comyn's Digest, when used with reference to the Crown, might include criminal actions, but it has never been so held. Attainder cases are the nearest approach to criminal actions, but they have no analogy to ordinary prosecutions.

WRIGHT, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Easton & Cargill.*

Solicitors for the respondent, *G. R. Grant & Co.*

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) April 25.

In re HOWELL.
Ex parte MANDLEBERG. (*a.*)

Bankruptcy—Landlord and tenant—Distress for rent—Apportionment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9 (1), 42 (1); *Schedule II., r.* 19—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 28—*Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 4.

The bankrupt had paid his rent up to the June quarter day, and a receiving order was made against him on the 1st of September.

Held, that at the expiry of the Michaelmas quarter the

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

landlord was entitled to distrain on the goods of the bankrupt for the whole quarter's rent.

Appeal against an order of the registrar of the county court of Huddersfield restraining J. Mandleberg & Co. from distraining on goods forming part of the estate of the bankrupt at a shop let by them to the bankrupt, in respect of rent due for the period June 24 to Septembsr 1, 1894; and declaring that the sum of £16 13s. 4d., the apportioned rent of the said shop for the period September 1 to 29, 1894, with £1 1s. costs of distress, tendered to Mandleberg by the trustee, was a sufficient tender of all rent then owing to Mandleberg.

By an indenture dated the 20th of March, 1894, J. Mandleberg & Co. had let the said shop to the bankrupt from the 25th of March, 1894, for the unexpired residue of a term of fifteen years and one-half from July, 1891, less the last seven days thereof, at £200 a year, payable quarterly.

The bankrupt paid the rent up to the 24th of June, 1894. A receiving order was made against him upon the 1st of September, 1894.

Upon the 28th of September Mandleberg & Co. wrote to the trustee demanding that the quarter's rent due September 29 should be paid to them on the following morning. The trustee's solicitors replied that Mandleberg & Co. were not entitled to the whole quarter's rent, as it had not accrued due prior to the adjudication, but that the trustee was liable from September 1 to 29, and was willing to pay £16 13s. 4d. in respect of the apportioned rent for that period. Mandleberg & Co. made no reply to this letter, but put in a distress upon the 1st of October, whereupon the trustee applied to the county court, and obtained the order restraining Mandleberg & Co. from distraining and declaring the £16 13s. 4d. a sufficient tender.

Mandleberg & Co. appealed.

Lawson Walton, Q.C., and *Muir Mackenzie*, for the appellants.—The landlord has a right to distrain by section 42 (1) of the Bankruptcy Act, 1883: "The landlord . . . may at any time either before or after the bankruptcy distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt," limited only by section 28 of the Act of 1890 to six months' rent accrued due prior to the adjudication if the distress be made after bankruptcy has commenced.

Herbert Reed, Q.C., and *A. H. Carrington*, for the respondent.—The point is covered by authority: *Ex parte Lord Hastings, In re Wilson*, 10 Morr. 219. Rule 19 of Schedule II. of the Bankruptcy Act, 1883, "Where any rent or other payment falls due at stated periods and the receiving order is made at any time other than one of those periods the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order as if the rent or payment grew due from day to day," makes the two months' rent from June 24 to September 1 a provable debt, and by section 9 (1) of the same Act, "no creditor to whom the debtor is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the person or property of the debtor." Therefore, since the landlord can prove for this rent, he cannot distrain for it.

They cited *Shackell & Co.* v. *Chorlton* (*ante*, p. 394), [1895] 1 Ch. 378; *In re South Kensington Stores, Ex parte Seymour*, 29 W. R. 662, 17 Ch. D. 161; *Swansea Bank* v. *Thomas*, 27 W. R. 492, 4 Ex. D. 94. [KENNEDY, J., referred to *Ex parte Hale, In re Binns*, 24 W. R. 300, 1 Ch. D. 285; *Ex parte Hill, In re Roberts*, 25 W. R. 784.]

Muir Mackenzie, in reply, distinguished the cases dealing with companies, on the ground that distress is not allowed in such cases without the leave of the court, and cited *In re Silkstone and Dodworth Coal and Iron Co.*, 29 W. R. 484, 17 Ch. D. 158.

VAUGHAN WILLIAMS, J.—In this case a distress was put in for one quarter's rent due at Michaelmas, 1894. The order of the county court assumes that the landlord had no right of distress except in respect of the one month's rent subsequent to the receiving order. In my judgment, that order was wrong. Speaking for myself, I have no doubt that the landlord had a right to distrain for the whole quarter's rent. The short ground of my decision is that in respect of the two months' rent before the receiving order the landlord's common law right of distress is reserved by section 42 (1) of the Bankruptcy Act, 1883. In respect of the one month's rent after the receiving order the landlord's right of distress continues to exist, not because it is preserved to him by section 42 (1), but because it is not taken away from him by any statute. From the moment of adjudication the trustee becomes assignee of the lease, and by privity of estate becomes liable for the rent accrued due during his occupancy until he disclaims or assigns over. On that ground I hold that the landlord is entitled to distrain for the whole quarter's rent.

I have to examine why it is contended that he is not so entitled. It is admitted that he has a right to distrain for the last month's rent, but it is said that he has no right to distrain for the other two months' rent because it is a provable debt, and by section 9 he has no remedy but proof. The answer to that is that section 9 expressly saves the contents of the Act, therefore section 42 (1) entitles him to distrain. Then it is said that section 42 (1) applies only to rent accrued due before the receiving order. In my judgment this rent did accrue due before the receiving order by the Apportionment Act, 1870, though you could not enforce payment of it until the end of the quarter. It is also urged that section 42 (1) is a re-enactment of section 34 of the Act of 1869, which was passed before the Apportionment Act of 1870, and that it should be read as though that Act were not in existence. I think we must read section 42 (1) on the basis that the Legislature was aware of the Apportionment Act, 1870, when section 42 (1) was enacted.

Mr. Reed suggested that we were bound by the affirmative provisions of rule 19 of schedule 2, but that only re-enacts section 150 of the Act of 1861. Prior to that Act you could not prove in a bankruptcy for proportionate parts of rent, but in 1861 the Legislature tried to make all debts provable, and therefore inserted that provision.

I do not think that my decision in *Ex parte Lord Hastings, In re Wilson* was contrary to the present case. There the landlord had lost his right to distrain by an agreement he had made with the trustee.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors, *Rowcliffes, Rawle, & Co.; Bannister & Reynolds.*

House of Lords.

From C. A. (England). March 19.

WHARTON v. MASTERMAN. (a.)

Will—Accumulations—Vested interest payable in futuro *—Charities—Surplus income—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98).

The principle of Saunders v. Vautier, *Cr. & Ph.* 240*—that, where there is an absolute vested interest made payable to the legatee at a future certain event, with directions to accumulate the interest in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no other person has any interest but the legatee—applies in the case where the legatee is a charity.*

A testator bequeathed the residue of his personal estate upon trust out of the annual income to pay certain annuitants; but when and so often as the annual income should not be sufficient for the payment of the whole amount of the annuities, there was to be an abatement among the annuitants. The trustees were to invest the surplus income (if any), and after the death of the survivor of the annuitants to pay and divide the residue between certain public charities according to the amount set after their respective names.

Held, that the charities were entitled to, and could call upon the trustees to hand over at the end of each year, the surplus annual income of the residuary estate.

This was an appeal from the Court of Appeal (reported as *Harbin* v. *Masterman*, [1894] 2 Ch. 184).

John Francis Duncan, who died on the 1st of January, 1865, by his will, dated the 15th of February, 1860, gave the residue of his personal estate upon trust out of the annual income to pay a legacy and certain annuities to the persons named.

Then followed a proviso: "Provided always that in case the annual income of the said trust moneys, stocks, funds, and securities shall not be sufficient for the payment of the whole amount of the said annuities, then it is my will and desire, and I direct my said trustees or trustee, when and as often as the same shall happen, to apportion the deficiency between and amongst the said annuitants according to the amount of their respective annuities, and so as that the same shall rateably abate accordingly."

Then followed a further trust: "In every year after my decease to invest the surplus income, if any, of the said trust moneys, stocks, funds, and securities, and from and after the decease of the survivor of the annuitants to convert into money all such parts of the said trust moneys, stocks, funds, and securities, and the accumulations thereof respectively, as should not consist of cash, and to stand possessed of the money to arise from the conversion, and also such parts of the trust moneys, stocks, funds, and securities, and the accumulations thereof as should consist of cash, upon trust to pay and divide the same" (as had been decided by Wickens, V.C., in 1871) "amongst the charities named."

The ultimate trust of the residue was in these terms: "In trust to pay and divide the same into the several public charities hereinafter named according to the amounts set after their respective names—that is to say, to the treasurer for the time being of an institution known by the name of the London Orphan Asylum, for the reception and education of destitute orphans, established in London, £100; to the Public Dispensary, Carey-street, near Lincoln's-inn, £100; to the Royal Free Hospital, Gray's-inn-road, £100; to the King's College Hospital in Carey-street, Lincoln's-inn, £100; and to an institution under the patronage of the late Lord Mayor of London, Alderman Wire, the sum of £100 for the benefit of persons afflicted with paralysis."

In July, 1871, Wickens, V.C. (19 W. R. 1053, L. R. 12 Eq. 559), decided that the charities were entitled to the whole of the residuary personal estate and the accumulations during twenty-one years from the testator's death; but, being doubtful whether charities came within the principle of *Saunders* v. *Vautier*, Cr. & Ph. 240, he directed the accumulations to be continued till further order.

The period of twenty-one years from the death of the testator expired in 1886, and in 1893 the next of kin presented a petition before Stirling, J., asking for payment to them of so much of the surplus income as had been accumulated since 1886. Stirling, J., held that the charities—and not the next of kin—were entitled to the surplus income accumulated after the expiration of the twenty-one years.

The appellants, the next of kin, appealed by special leave from the decision of Wickens, V.C., and also from that of Stirling, J.; the Court of Appeal affirmed both decisions.

The next of kin now appealed to the House of Lords.

Crackanthorpe, Q.C., and *A. Hopkinson, Q.C.* (*Theodore Ribton* with them), for the appellants.

Green v. *Gascoyne*, 13 W. R. 371, 4 De G. J. & S. 565, 569; *Weatherall* v. *Thornburgh*, 26 W. R. 593, 8 Ch. D. 261; *Oddie* v. *Brown*, 7 W. R. 472, 4 De G. & J. 179; 1 Jarm. on Wills, 5th ed., 281; *Love* v. *L'Estrange*, 5 Bro. P. C. 59; *Saunders* v. *Vautier*, 4 Beav. 115, Cr. & Ph. 240; and *Gosling* v. *Gosling*, John. 265, 7 W. R. Ch. Dig. 93, were cited or referred to.

Cozens-Hardy, Q.C., and *Buckley, Q.C.* (*Samuel Dickenson* with them), for the respondents.—[Their lordships did not desire any argument on the question of construction.] Each year stands by itself, and if the income is insufficient the annuities abate. *Saunders* v. *Vautier* applies. *Weatherall* v. *Thornburgh*, *Talbot* v. *Jevers*, 23 W. R. 741, L. R. 20 Eq. 255, and *Oddie* v. *Brown* are distinguishable.

Crackanthorpe, Q.C., replied.

The House took time for consideration.

March 19.—Lord HERSCHELL, L.C.—The first question which arises in this case is whether the charities named in the will of J. F. Duncan are entitled (subject to annuities which he thereby created) to the residue of his estate, or only to the sums specified in his will in connection with each of the charities. The ultimate trust of the residue is in these terms. [His lordship read it.] The matter came before Wickens, V.C., for decision in 1871. He held that the charities had made good their claim to be residuary legatees of the testator's personal estate, and not merely legatees of five sums of £100 each. The Court of Appeal refused to disturb that finding, and I see no reason to differ from the view hitherto taken. The trust being to "pay and divide the residue into the several charities hereinafter named according to the amounts set after their respective names," it seems to me impossible to suppose that the testator intended to limit their rights to the specific sums mentioned. The only reasonable construction is, I think, that which has been put upon the clause.

The other questions raised by the next of kin, who are the present appellants, are not so simple. The testator directed the surplus income of his residuary estate, after satisfying the annuities which he provided

(a.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon the trust the terms of which I have quoted. Some of the annuitants are still living.

It is contended for the appellants that they, as next of kin, are entitled to all the accumulations which have accrued subsequently to the period for which, under the provisions of Thellusson's Act, accumulation could lawfully be directed. It has first to be determined whether, upon the true construction of the will, the surplus income accumulated, and the interest accruing from these accumulations when invested, were charged with the payment of the annuities. This depends, of course, upon the intention of the testator, to be derived from the language used in his will. He bequeaths to trustees all the residue of his personal estate, which he thereafter calls "the said trust moneys, stocks, funds, and securities," and directs them, "from and out of the annual income of the said trust moneys, stocks, funds, and securities," to pay the annuities which he specifies, subject to a proviso in the following terms:—[His lordship read the proviso and the further trust, and continued:—] Having regard to the language used, I do not think it is possible to hold that the annuitants have any claim to be satisfied out of the accumulations of surplus income. But for the provision for abatement it might have been contended (and probably successfully contended) that such a right existed, but it seems to me to be expressly excluded by the abatement clause. It is true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word "accumulation" in the clause which precedes the ultimate trust, but whether this be so or not, I think the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it results. For these reasons it appears to me that the charities have a vested interest in the surplus income, and in the accretions resulting from the investment of that surplus income.

The testator, however, undoubtedly intended to postpone the enjoyment of his bounty by these beneficiaries until the death of the last annuitant. The courts below have, notwithstanding this, determined that the beneficiaries are entitled to the immediate enjoyment of all that is not made by the will subject to the payment of the annuities. This is, to my mind, the only point of any difficulty. The courts proceeded on the doctrine acted upon in *Saunders* v. *Vautier*, which has been since often recognized. Wood, V.C., in *Gosling* v. *Gosling*, expounded the doctrine thus: "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age: unless during the interval the property is given for the benefit of another. If the property is once theirs it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them, until they attain twenty-five, but that some other person is to have that enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years." The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it. Wickens, V.C., when this case came before him in 1871, intimated an opinion, that the rule in *Saunders* v. *Vautier* was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries. I concur, therefore, in the conclusion at which the courts below arrived. The Thellusson Act has, in my opinion, for the reasons given, no application to the case. I think the judgment should be affirmed, and the appeal dismissed, with costs.

Lord MACNAGHTEN.—I am of the same opinion. It seems to me that the order of the Court of Appeal is perfectly right.

As regards the construction of the testator's will, I do not think that there is any difficulty. The five charities are clearly the testator's residuary legatees. The gift to them is awkwardly expressed. The awkwardness, however, I think arises merely from the fact that in the result they are found to take equally, though the will appears to have been prepared with a view to an unequal distribution. It may be that when the instructions for the will were given the testator had not finally determined the shares in which the ultimate objects of his bounty were to take, and that he wished to leave the matter open till the last moment. But, however that may be, there is only one result which can be brought out from the language which the testator has used.

Then I think the testator's will shows an anxious desire that the annuities should only be paid out of the income accruing from year to year on the *corpus* or capital of the testator's residuary estate as it subsisted at the time of his death. The intention seems to have been that the accounts should be closed at the end of last year. If there was a deficiency the annuitants were to bear the loss and the annuities were to abate rateably. If there was a surplus the surplus was to be put aside for the benefit of the residuary legatees. Under no circumstances, as it seems to me, were the annuitants to be at liberty to resort to the income of a future year for the purpose of making good a past deficiency. At the same time it is clear on the face of the will that the testator did not mean the residuary legatees to receive any part of what the will gives them until the death of the last annuitant.

Now if the residuary legatees were individuals there could not be the slightest doubt that they

would be entitled to call upon the trustees to hand over to them at the end of each year the surplus income of the testator's residuary estate. Does the fact that the residuary legatees are charities make any difference? Notwithstanding the doubt expressed by Wickens, V.C., when the case was before him in 1871, I do not think that it does. The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible, and they may legally apply what they take under the bequest either as capital or as income. That being so, I agree with the reasoning of Stirling, J., and the Court of Appeal. In regard to the questions which have arisen on this will, I am unable to see any substantial distinction between the case of an incorporated charity and a charity not incorporated, or between the case of a charity and an individual.

Lord DAVEY.—This case arises on the will of a testator named John Francis Duncan, who died on the 1st of January, 1865. The contest is between the conflicting claims of the testator's next of kin and those of five charitable institutions named in his will, to the accumulations of the surplus income of the testator's residuary estate subsequent to the 1st of January, 1886 (being the expiration of twenty-one years from his death), and the accruing surplus income until the death of the surviving annuitant named in the will; and also to the capital of the estate on the expiration of that period. I observe from the proceedings in the suit that two of the annuitants were infants on the 25th of May, 1868; so that, on a moderate estimate of probabilities, the period in question may extend some way into the next century.

The case came originally before Wickens, V.C., in the year 1871. At that time, however, the next of kin had not been ascertained, and their present claims were represented by the Crown. The next of kin have since been ascertained, and are the appellants at your lordships' bar.

The Court of Appeal, affirming the judgment of Stirling, J., have decided:—

(1) That the five charities are entitled to, and, when the charge of the annuities on the income has run off, will be able to, receive the *corpus* of the residuary estate.

(2) That the annuities are charged only on the annual income of the estate *de anno in annum*, and that the annuitants have no right to have the deficiency of the income of any one year to pay their annuities, made good out of the accumulations of the surplus income of past years.

(3) That the surplus income of each year is given away to other objects free from any claim by the annuitants.

(4) That what is known as the rule in *Saunders* v. *Vautier* is as applicable where the donees or legatees are charities as where they are individuals.

On the first point your lordships did not think it necessary to call upon the counsel for the respondents. All the judges before whom this case has come, including the late Wickens, V.C., have held that the will contains a gift of the capital of the estate to the charities, and that they are not confined to £100 per annum. I agree in that conclusion, and I have really nothing to add to the reasons given in the courts below, and what has been said by your lordships.

The next point is also one of construction. The testator gives the residue of his personal estate to trustees upon trust, either to permit the said residue, hereinafter called "the said trust moneys, stocks, funds, and securities," to remain in the state of investment in which the same might be at the time of his death; but, if absolutely necessary, to vary the same, or any part thereof, into or for others of the same or a like nature. I agree with the argument of the respondents, that the trust fund so constituted consists only of the capital funds which formed the residue of his estate as at the time of the testator's death, and does not include any subsequent income or income of accumulations.

The testator then declares the trusts of the annual income of his "said trust moneys, stocks, funds, and securities;" first to pay a legacy of £100, then to pay an annuity of £500 to his wife during her life, by half-yearly payments, the first of such payments to be made six months after his decease (showing that it is the income of the estate from his death that he is dealing with), and another annuity of £50. And then he directs that after his decease the following annuities be paid, and names a number of annuitants. Pausing there, it might be contended, consistently with well-known authorities, that the annuities are charged upon the capital, or at any rate upon the income of every year until they are satisfied. But then comes the abatement clause, which it is unnecessary to read again. This clause points to a recurring deficiency "when and so often as the same shall happen," and it appears to me to negative any charge upon the *corpus* of the estate, or upon any surplus income of past years, or right to resort to the accumulations of such surplus income to make good the deficiency in any year. Whether it does not also negative any right to resort to the income of any future year to make up the deficiency of past years it is immaterial to consider, as it would only affect the amount of what is called the "surplus income," and the question does not arise.

The will then proceeds in these words: "And upon further trust that they my said trustees or trustee do and shall in every year after my decease invest the surplus income (if any) of the said trust moneys, stocks, funds, and securities, whether such surplus shall arise from the falling in or determination of any annuity or otherwise."

After the decease of the survivor of the annuitants he directs a sale of such part of the trust moneys, stocks, funds, and securities, and the accumulations thereof, as shall not consist of cash, and gives the proceeds, and also such part of the said trust moneys, &c., and the accumulations thereof, as shall consist of cash upon trusts which, as I have said, import a gift to the charities.

In this will I am of opinion that the testator has carefully confined the rights of the annuitants to the annual income accruing *de anno in annum* of his capital residuary estate, and has dealt with the surplus income in each year, as it accrued, upon different trusts, and as a distinct subject of gift. It is said that the will contains no direction to invest the income of the investments of the surplus income. There is no express direction; but, in my opinion, there is an implied direction to be found as well in the use of the word "accumulations," which, in this connection, imports a continuous process of rolling up, as in the general rule of equity, which imposes upon trustees the duty of investing trust funds in their hands, of which the testator has not directed an immediate disposition. And I think that the accumulations comprise the whole fund created by the investment and re-investment by way of compound interest of the surplus income and the income derived from it. It is, however, suggested at the bar that the income of investments of surplus income falls back into the original trust fund, and follows the destination of the income of it, and is therefore subject to a trust for the annuitants. In my opinion, this is not so. When there is no express trust declared of the income of a trust fund, it

follows the destination of, and is an accretion to, the fund from which it is derived (unless there be words excluding that implication). But the source of the income in question is the investments of the surplus income; so that even if it be not impliedly given by force of the term "accumulations," it would go in the same way as the investments of the surplus income—*i.e.*, to the charities.

I am, therefore, of opinion that the annuitants have no charge upon the surplus income or the investments of it, or the income derived from such investments, all of which, I think, are included in the accumulations, and the charities have a vested title free from any claim by any other person to the surplus income; but, according to the directions of the will, their enjoyment is postponed to the death of the survivor of the annuitants, and an accumulation is directed in the meantime.

This being so, the principle of *Saunders* v. *Vautier* would at once be applicable if this were the case of a gift to an individual. That principle is this, that where there is an absolute vested interest made payable at a future certain event, with direction to accumulate the interest in the meantime, and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the court holds that a legatee may put an end to an accumulation which is exclusively for his benefit. The principle is stated, as well as elsewhere, by Lord Hatherley, in the passage from his judgment, in *Gosling* v. *Gosling*, which was read by Lindley, L.J., in the Court of Appeal. There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or who can complain of its non-execution. The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always lent against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.

But it is said that there is a difference in the case of charities; and, although there is no authority on the point, the late Wickens, V.C., expressed some doubt upon it when it came before him in the year 1871. What he said was this:—

"But having regard to the form of the will, though the annuities are amply secured, I do not think I can order a division of the fund at present. If the residuary legatees were five individuals, I should probably do so, there being nothing in the Thellusson Act to prevent it. But the legatees being charities, am I entitled to stop the accumulation? If a sum of money be given to be accumulated, say, for ten years, and then to a charity, is the charity, whether corporate or unincorporate, entitled to claim the money at once? There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision. And it is obvious that, though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence, but the distinction between an incorporated and unincorporated charity is too refined to be relied on."

Your lordships will, I am sure, regard any *dictum*, or even doubt, expressed by the Vice-Chancellor on a subject of this kind with the greatest respect and attention. But I must confess that I do not, on the fullest consideration, find sufficient grounds for the Vice-Chancellor's doubt. It is easy, of course, to speculate on the testator's motives in postponing enjoyment of a vested interest, and it is at least as easy to suggest motives for such a direction in the case of an individual as in the case of a charity. Nor can the possible difference in the actual recipients of the testator's bounty make any distinction. An individual may die, or become bankrupt, during the period of accumulation. It is difficult to attribute to the testator a particular regard for the objects of the charity—it may be in the middle of the next century—or respect for the persons who may then be the trustees or managers of the charity. And I think it unsound to make the application of a canon of construction as to the effect of particular words in a will dependent on circumstances affecting the quality or character of the donee. It will be observed that in the present case the gift is to each charity in a form which would enable the managers to spend the amount as income, or deal with it as they might think fit. We have not to deal with a fund to be created by accumulations and settled as a capital endowment at a future time—as to which different considerations would arise.

I am therefore of opinion that there is no effective direction for accumulation of any part of the surplus income in this will, and therefore the Thellusson Act has no application to it, and the judgment of the Court of Appeal should be affirmed.

The appellants' counsel, indeed, argued that the charities might be entitled during the twenty-one years from the testator's death, but in consequence of the Thellusson Act the subsequent surplus income was undisposed of. I find a difficulty in grasping the argument, because the Thellusson Act does not give anything to anybody, but merely vitiates the direction for accumulation beyond the prescribed period. But the conclusive answer is that, if there is no effective or enforceable direction for accumulation independently of the Act, then the Act has no application to the case.

The cases cited by Mr. Crackanthorpe do not seem to me to support his argument. They are cases in which the class could not be determined until the happening of the event upon which the fund was made payable, as in *Green* v. *Gascoyne*; or the shares of the legatees, though vested, were liable to be defeated by the happening of some event before the time for payment, as in *Eyre* v. *Marsden*, 2 Keen, 364; or the gift itself was contingent upon the happening of an event (such as the death of a person without male issue), as in *McDonald* v. *Bryce*, 2 Keen, 276. In the case of *Weatherall* v. *Thornburgh* the fund and accumulations were made a security for the payment of certain legacies on the happening of the given event, and the persons claiming were, therefore, only entitled to an undetermined and uncertain surplus (if any) which might be left of the fund after payment of the legacies. This is the ground stated by Cotton, L.J., and, I think, by James, L.J., also. In *Talbot* v. *Jevers* the annuities were clearly charged by the words of the will on the whole estate, capital, and income, and the accumulation was directed only for a stated period, "or as much of it as the law will allow." There was, therefore, on the face of the will no disposition of the intermediate surplus income after the expiration of the twenty-one years. The doctrine of *Saunders* v. *Vautier* did not apply, because the annuitants had an interest in the income, and, according to the scheme of the will, the residuary legatees could not take except in the form of accumulations. I think the decision of Bacon, V.C., in *Talbot* v. *Jevers* can be supported on this ground.

In the view which I take of the case it is unnecessary to express any opinion on the point which was

argued by Mr. Buckley, that even if the annuitants had a charge on the income derived from investments of the surplus income, and the doctrine of *Saunders* v. *Vautier* were therefore excluded, the charities would still be entitled to the surplus income after the expiration of twenty-one years under the words of the Thellusson Act.

I agree with your lordships that the appeal should be dismissed, with costs.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Hood Barrs & Co.*

Solicitors for the respondents, *Winter & Co.*

Court of Appeal.

From Q. B. Div. (Lopes and Rigby, L.JJ.) — April 9.

BARTLETT *v.* FORD'S HOTEL CO. (LIMITED). (*a.*)

Arbitration—Stay of proceedings—Submission to arbitration—Summons for extension of time to deliver defence—"Step in the proceedings"—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The defendants in an action on a contract, which contained a general submission to arbitration of all disputes arising therefrom, took out a summons and obtained an order for an extension of time to deliver a defence. Before delivering a defence they applied to stay the proceedings in the action under section 4 *of the Arbitration Act,* 1889.

Held, that the defendant, by taking out a summons and obtaining an order for an extension of time, had taken a "step in the proceedings" within the meaning of section 4, *and the court had no jurisdiction to make the order.*

Appeal from Collins, J., at chambers.

The action was to recover a sum of money alleged to be due from the defendant for work done under a building contract, which contained a stipulation that any disputes arising between the parties out of the contract should be referred to arbitration. The defendants took out a summons at chambers for an extension of time to deliver a defence, and an order was made giving them fourteen days further time.

Before delivering a defence the defendants took out a summons to stay the proceedings in the action, under section 4 of the Arbitration Act, 1889. Collins, J., made the order asked for.

The plaintiff appealed.

E. Boyle, for the plaintiff.—The defendants, by taking out the summons for and obtaining an extension of time to deliver a statement of defence, took a "step in the proceedings" within the meaning of section 4 of the Arbitration Act, 1889, and the judge had no jurisdiction to stay the proceedings in the action.

He referred to *Chappell* v. *North*, 40 W. R. 16, [1891] 2 Q. B. 252.

Arnold Statham, for the defendants.—A summons for time is not a "step" in the proceedings. The summons was for the purpose of avoiding a step being taken. A "step in the proceedings" must be something which advances the action. A mere summons for time, so as to leave things *in statu quo*, cannot be called taking a step in the proceedings. It is the same as if the defendants had applied to the plaintiff and obtained his consent to an extension of time, which would not have been a step in the proceedings: *Brighton Marine Palace and Pier* (*Limited*) v. *Woodhouse*, 41 W. R. 488, [1893] 2 Ch. 486; *Ives* v. *Willans*, 42 W. R. 396, [1894] 1 Ch. 68.

He also referred to *Rein* v. *Stein*, 66 L. T. N. S. 469, 40 W. R. Dig. 192.

LOPES, L.J.—The question we have to decide is whether the defendants, by taking out a summons for and obtaining time, took a "step in the proceedings" within the meaning of section 4 of the Arbitration Act, 1889. In my opinion they did. The summons was for an extension of time to deliver a defence. It was taken out to invoke the assistance of the court, so as to enable the defendants to continue their defence to the action. It is said that if the application for time had been made by letter to the opposite party, and consented to, that would not have been taking a step in the proceedings. That seems to me to be so, but I cannot accede to the further argument that the two cases are the same. In this last case the assistance of the court would not have been invoked or obtained. There is authority on this question. In *Chappell* v. *North* it was held that an application at chambers for leave to administer interrogatories was a step in the proceedings. It was also argued there, that obtaining a consent from the other side for an extension of time for delivery of a reply was a step in the proceedings, but Denman, J., drew a distinction between taking out a summons and "obtaining a consent which was asked for for the very purpose of avoiding the necessity of taking a step." That passage was cited with approval and followed by North, J., in *Brighton Marine Palace and Pier* (*Limited*) v. *Woodhouse*. In *Ives* v. *Willans* the defendant had given notice that he required a statement of claim, and it was held that he had not thereby taken a step in the proceedings. It was a mere request to have the claim more precisely formulated, that he might the better understand the nature of the case made against him. The intervention of the court was not invoked. In the present case the intervention of the court was invoked, and that amounted to a step in the proceedings within the meaning of section 4 of the Arbitration Act, 1889. The order, therefore, staying the proceedings in the action must be discharged.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiff, *W. L. Cooper.*

Solicitors for the defendants, *Munns & Longden.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From Q. B. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — April 3, 4.

FLOOD *v.* JACKSON. (*a.*)

Master and servant—Trade union—Procuring dismissal of servant—Intention to injure—Malice—Inducing third person not to contract with plaintiff—Delegate of trade union—Liability of members of union for act of delegate.

An action lies for maliciously, and with intent to injure the plaintiff, inducing the plaintiff's employers to dismiss him from their service, even though such dismissal does not involve a breach of contract.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

An action lies for maliciously, and with intent to injure the plaintiff, inducing a third person not to enter into a contract with the plaintiff.

A delegate of a trade union is not the servant or agent of the members of the union so as to render them liable for wrongful acts done by him.

Application by the defendant Allen for a new trial of an action tried before Kennedy, J., with a jury, or for judgment, and appeal by the plaintiffs from the judgment of Kennedy, J.

The action was brought by two members of the Shipwrights' Union against three members of the United Society of Boilermakers and Iron Ship Builders. The plaintiffs alleged that the defendants maliciously and wrongfully, and with intent to injure the plaintiffs, procured and induced a company called the Glengall Iron Co. to dismiss the plaintiffs from their employment, and not to engage or employ them in the future.

The headquarters of the Boilermakers' Society were at Newcastle. The defendant Jackson was the chairman of the society, and the defendant Knight was the general secretary; both the said defendants were resident at Newcastle. The defendant Allen was the London delegate of the society.

The Glengall Iron Co. carried on business as ship repairers in the port of London. In April, 1894, the two plaintiffs came to the company's yard and were engaged to do woodwork on a ship which was then in dry dock. There was no formal contract of employment, and the men were liable to be discharged at the end of any day. The plaintiffs were immediately recognized by some members of the Boilermakers' Society, who were engaged in ironwork in the same yard, as being men who had some time previously been doing ironwork in another yard. The boilermakers, after talking the matter over, determined to send for Allen, their delegate. Allen accordingly came to the yard, and, after conferring with the ironworkers, he saw the manager of the Glengall Co., and told him that if the plaintiffs were not discharged all the ironworkers would stop work. It appeared that the view of the Boilermakers' Society was that all ironwork about a ship ought to be done by boilermakers exclusively, and that shipwrights ought only to be employed on woodwork. It was stated that this practice was prevalent in the North, and was also followed in the Glengall Co.'s yard. In consequence of Allen's statement to the manager, and in order to avert a strike, the two plaintiffs were discharged from the company's employment.

The plaintiffs contended that Allen, in what he had done, had acted as the agent or the servant of the Boilermakers' Society, and that therefore the other defendants as well as Allen were liable.

At the trial of the action Kennedy, J., left four questions to the jury, which, with their answers, were as follows:—

(1) Did the defendant Allen maliciously induce the Glengall Co. to discharge the plaintiffs, or either of them, from their employment?—Yes.

(2) Did the defendant Allen maliciously induce the Glengall Co. not to engage the plaintiffs, or either of them?—Yes.

(3) Did both or either of the defendants Jackson and Knight authorize the defendant Allen in acting as he did?—No.

(4) Was the settlement of this dispute, within the rules of the union, a matter within the discretion of Allen?—Yes.

The jury assessed the damages at £20 for each plaintiff.

The learned judge, after reserving the case for further consideration, directed that judgment should be entered for the plaintiffs against Allen for £40 and costs, but held that the action failed as against Jackson and Knight, and directed that judgment should be entered for them, with costs.

Robson, Q.C., and *Morten*, for Allen, in support of the application for a new trial or judgment.—The learned judge ought not to have left the case to the jury at all. There was no evidence of any wrongful act done by Allen. The jury found that Allen induced the company to discharge the plaintiffs, and also induced them not to employ them in future. But neither of those acts was wrongful. In *Bowen* v. *Hall*, 29 W. R. 367, 6 Q. B. D. 333, it was held that a person who maliciously induced a servant to break his contract of personal service did a wrongful act, and was liable to an action. And in *Temperton* v. *Russell*, 41 W. R. 565, [1893] 1 Q. B. 715, it was held that an action lay for maliciously procuring a breach of contract. But there is no authority for holding that an action lies either for maliciously inducing a person to discharge a servant, at least where no breach of contract is involved, or for maliciously inducing a person not to enter into a contract. Allen only acted with the lawful object of promoting the interests of the union, and he did not adopt any unlawful means: *Mogul Steamship Co.* v. *McGregor, Gow, & Co.*, 40 W. R. 337, [1892] A. C. 25. Even if he were actuated by malice, no action would lie against him, because his act was not unlawful: *Corporation of Bradford* v. *Pickles*, [1895] 1 Ch. 145.

Rufus Isaacs (*Lawson Walton, Q.C.*, with him), for the plaintiffs, in support of the cross appeal.—Allen was the servant or agent of the members of the union, and all the members are liable for wrongful acts done by him as such servant or agent. The plaintiffs are therefore entitled to judgment against Jackson and Knight.

Murphy, Q.C., and *Chester Jones*, for the defendants Jackson and Knight, were not called upon.

Lord ESHER, M.R.—This is an action brought by two workmen to recover damages from three members of a trade union, because they maliciously and with intent to do the plaintiffs harm persuaded the employers of the plaintiffs to discharge them from their employment, and also persuaded them to undertake and promise not to employ the plaintiffs again. The defendant Allen is what is called the district trade delegate of the Boilermakers' Union in London, the principal seat of the union being at Newcastle. He was not appointed to that position by the executive council of the union, but he was elected by the majority of the members of the union themselves to be their trade delegate. We shall have to consider what is the meaning of being a delegate of a trade union. He was called in to render assistance, because certain members of the union, who were engaged at ironwork in the yard of the Glengall Iron Co., were offended with the plaintiffs, who were also employed in the same yard, not for anything done by them while in that employment, but for something which they had done when they were in the employment of other masters in another place. It appears that these ironworkers resolved that the plaintiffs should not be allowed to continue in the employment of the Glengall Co., and that, if they were not discharged, then they themselves would insist that their own executive council should order them to go out, that is, to leave the employment of the Glengall Co. It could not be denied that the men, if they liked, might themselves have gone out, but that was not the object. What they really wanted, and what they intended to insist upon, was that the plaintiffs should

go out. Allen, being called in to confer with the men, took upon himself to forward their wishes. It is not true to say that he was ordered by them. They could not give him any order. He could give them orders in certain circumstances, but they could not give him an order in any circumstances. He was not in any way bound to act as he did; therefore, if what he did was wrong, he must be held liable for it. He adopted the view taken by the men—viz., that as the plaintiffs had done ironwork before, they should not be allowed to do woodwork now—and, for the purpose of punishing the plaintiffs for what they had previously done, he went to their masters and intimated to them that if they did not dismiss the plaintiffs and promise further not to employ them again, all the ironworkers would go out. There can be no doubt that he meant to put pressure on the masters, and that what he so said to them was intended to be a threat. Such an intimation could have had no effect unless the going out of the ironworkers would have been an injury to the masters. The result was that the masters succumbed to the threat and discharged the plaintiffs. If Allen did that, it does not matter whether he was the agent of other persons or not. If he, as the agent of other persons, chose to do that wrong thing, he is liable.

It is said that he is not liable because he did not ask anybody to break any contract. That, however, is not the proper test. Merely to advise a man who has entered into a contract to break that contract gives no cause of action at all; but if this is done maliciously for the purpose of injuring the man to whom the advice is given, or for the purpose of injuring somebody else, the person against whom the malice is pointed and carried out has a right of action without more, not on the ground of advice to break the contract, but on the ground of the malice which was exercised towards him. Whether the advice is to break a contract or not to make a contract, the effect is just the same. A person may be thinking of making a certain contract, and another person may strongly advise him not to make that contract. There would be nothing wrong in merely giving him that advice, but if that advice were given to him with the intent of doing him an injury or of doing an injury to the person with whom he was going to make the contract, that would be malice and would make the act unlawful. The principle was clearly stated in the case of *Bowen* v. *Hall*, where it was distinctly said that the act complained of was unlawful because it was malicious. The same question came before the court again in *Temperton* v. *Russell*, and I cannot use words more clear to express my view of the matter than were used in that case by all the judges. Therefore, there is authority binding on this court to show that advice which may lawfully be given to the injury of another, if given without malice, may become unlawful if it is given with malice. I am not going to give a definition of malice; the jury are the proper tribunal to decide in each case whether the act complained of has been done maliciously. I am of opinion that the evidence was such that the jury might find that Allen had acted maliciously, and they have so found. The answers to the first two questions support the plaintiffs' right of action against Allen.

As to the case against the other two defendants, I will not attempt to lay down what is the exact position of the officers of a trade union; but I am prepared to say that the mere fact of Allen being a delegate, as it is called (which is a term not known to the law at all), does not make him a servant of anybody. As far as I can understand the rules and the practice of the union it is not intended that he shall be the servant of any member of the union. Members of the union do not intend to make him their servant, neither does he intend to be their servant. It seems to me that he is intended rather to be their adviser than their servant. In my opinion there is no evidence that Allen was a servant of anybody, even of the executive council.

Then it is said that he is the agent of the members of the union. But the relation of principal and agent must be brought about by the consent of the parties to that relation, and if neither of the parties means the relation to be that of principal and agent, they are not principal and agent. It really is preposterous to suppose that any member of the union thought that Allen was to be his agent, or that Allen intended that he would be their agent. If either of them was to be principal he was to be principal, for they were to do what he told them.

Therefore the answers to the first two questions make Allen liable; the third question ought not to have been asked, for there was no evidence to support it; and as to the fourth question, I do not know what the meaning of it is.

It seems clear to me that Allen is liable, and that therefore the first appeal fails, and that Jackson and Knight are not liable, and that therefore the second appeal also fails.

LOPES, L.J.—I am of the same opinion. The jury found that the defendant Allen maliciously induced the Glengall Co. to discharge the plaintiffs from their employment. It is said that that finding cannot be supported, because there was no evidence of malice. In my opinion any person may lawfully advise another either to break a contract or to discharge a servant; but if he gives such advice with intent to injure the other party to the contract, or to injure the servant, his act is malicious and unlawful. This seems to me to have been clearly laid down in *Bowen* v. *Hall* and *Temperton* v. *Russell*. I can see no distinction between maliciously inducing a party to a contract to break it and maliciously inducing a person to discharge a servant. I will not attempt to give an exhaustive definition of malice; but I think that, for the purposes of this case, it may be said that, where a person wilfully does an act to the injury of another without lawful excuse, that is evidence of malice. There can be no doubt that Allen went to the manager of the company for the purpose of injuring the plaintiffs, and that he had no lawful excuse for so doing. There was abundant evidence to justify the jury in finding as they did against him, and therefore his appeal fails.

As to the other appeal, the jury found that the defendants Jackson and Knight did not authorize Allen's act. That finding seems to me to be quite correct; in fact I think the learned judge would have been justified in holding, at the end of the plaintiffs' case, that there was no evidence against these defendants. They were both at Newcastle at the time, and there is no evidence that they knew anything about what was being done. The law which was cited on the plaintiffs' behalf is only applicable if they are able to show that Allen was the agent or servant of the other defendants. There was no evidence whatever of that, and this appeal fails also.

RIGBY, L.J.—I am of the same opinion. As to the question whether, in the class of cases which we are dealing with, or cases of which this is an instance, a legal act may be made an illegal act by the addition of an intention to injure another person, who is injured, I have only to say that I consider that we are governed by the case of *Temperton* v. *Russell*. In other branches of law as regards property there are well-known cases in which a man exercising a right of property, a perfectly legal right, is not made responsible because he

did it with a view to injure another person. That is contrary to the civil law, and appears to be contrary to the law of Scotland, but in our law that is established, and if the matter were *res integra* there might be something to be said in favour of extending that principle to cases of this kind. But the question has been decided in *Temperton* v. *Russell*, and we are not at liberty to go behind that decison.

As regards the cross appeal, I cannot see any principle upon which Allen can be treated as the agent or servant of each member of the union, for that is what the argument comes to. The meaning of the rules of the union seems to me to be that each member should give up his private opinion and choose persons who shall direct the opinion of the whole. They choose persons who are more like masters than servants, and more like principals than agents. I do not say they are either one or the other, but they are not agents and they are not servants; and if such a general proposition as that which has been argued before us were tenable, I see no reason why every member of every club in London should not be personally responsible, not only for the acts of the committee, but for the acts of the servants of the club, when they did anything that was an injury to an outside person. I agree in the opinion that the appeal should be dismissed, and that the cross appeal should be dismissed also.

Application for new trial dismissed; cross appeal dismissed.

Solicitors for the plaintiffs, *C. J. Smith & Gofton.*

Solicitors for the defendants, *Shaen, Roscoe, & Co.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — April 1, 2.

CHILTON v. PROGRESS PRINTING AND PUBLISHING CO. (LIMITED). (a.)

Copyright—Infringement—Sporting paper—Selections of winners.

The plaintiff was the registered proprietor of a sporting paper published on Monday in each week, in which appeared, under the heading "One-Horse Selections," the days on which races were to be run during the week, and opposite each day the name of the horse which, in the plaintiff's opinion, was likely to win the race on that day for which it was entered. The defendant published on each day upon which races were run a paper in which appeared, under the heading "The 'Specials'' One-Horse Finals," the plaintiff's name and the horse selected by him. In an action for infringement of the plaintiff's copyright,

Held, that the matter alleged to be infringed was not a proper subject-matter for copyright, and that, even if it were, there had been no infringement.

Decision of Kekewich, J., ante, *p.* 136, *affirmed.*

Appeal of the plaintiff from the decision of Kekewich, J. (reported *ante*, p. 136, where the facts are fully stated).

Warmington, Q.C., and *Waggett*, for the appellant.—First, the plaintiff's publication is a proper subject-matter for copyright. A recipe or prescription is an analogous case, and would clearly be subject-matter. The words of the Copyright Act, 1842, are wide, and should not be limited by the preamble. The publication is a book within the Act: *Trade Auxiliary Co.* v. *Middlesborough, &c., Association*, 37 W. R. 337, 40 Ch. D. 425; *Walter* v. *Steinkopff*, 40 W. R. 599, [1892] 3 Ch. 489; *Maple & Co.* v. *Junior Army and Navy Stores*, 31 W. R. 70, 21 Ch. D. 369. Secondly, the defendant has infringed our copyright. If he had published a facsimile of the plaintiff's sheet, that would have been clearly an infringement. He has appropriated a material part, and has, therefore, infringed.

They also referred to *Kelly* v. *Morris*, 14 W. R. 496, L. R. 1 Eq. 697; *Miller* v. *Wane*, 11 Times L. R. 136; and *Wilson* v. *Luke*, 1 Victorian L. R. 127. [Lord HALSBURY referred to *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459.]

Marten, Q.C., and *Gatey*, for the defendant, were not called upon.

Lord HALSBURY.—I confess I have not been able to entertain a doubt, notwithstanding the ingenious argument pressed upon us, that there is no copyright in this thing. It is really difficult to know by what name to describe it. As a matter of fact, what is really sought to be restrained is the publication of the fact that the plaintiff, who is supposed to have good judgment as to winning horses, has expressed an opinion that that horse or this horse will win. That is really the substance of the matter.

It is idle to speak of it as something or another in the nature of literary composition, as to which, of course, there would be infinite difficulty in defining the something in the nature of literary composition which is intended to be protected by the Copyright Act. I do not think it is in the smallest degree in the nature of literary composition, and if you look at what is the real test here, it is not the casting into printed words the result of this gentleman's investigation. It is not that which is sought to be protected. What is really sought to be protected is his opinion, which is susceptible of being handed down in any way, as it is admitted, except, said Mr. Warmington, in writing. Is the thing to be protected by the Act such a subject-matter? I am of opinion that it is not. It is nothing in the nature of literary composition. Although, I quite agree, the preamble of the Act cannot control the enacting part of the section in the Act itself, yet the preamble of the Act may well point out what is the subject-matter within which the Act is intended to operate, and does operate, for the protection of a book. Then comes the extended interpretation of what a book is to be for the purpose of the Act. I can find no word which properly points out that such a matter as we are now dealing with is to be a subject-matter of protection. I therefore think there is nothing here which ought to be protected within the policy of the Act. There is no subject-matter of copyright. That is the view that occurs to me upon it.

Then, with reference to the other question, I have very great difficulty in dealing with it, not that in this case I have the least doubt. I have not. But the difficulty is to give in dogmatic form a proposition which will justify my refusal to consider this an infringement, by any rule of law; and the real difficulty arises in this way, that it is essentially a question of fact. Assume a right to be protected. What is or is not an infringement of that right must in all cases depend upon the particular facts with which you are dealing, and any attempt to give any spoken or written language a definition which will include all cases must be a failure from the very nature of the thing with which one is dealing. I observe Jarvis, C.J., says, in the case to which I referred, of *Sweet* v. *Benning*: "It is undoubtedly exceedingly difficult, perhaps absolutely impossible, to lay down any general rule upon this subject. I do not assent to the argument urged by Mr. Lush: "That every publication of a portion of a work in which there is

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

subsisting copyright will afford a ground of action: it is a question of degree, which must depend upon the circumstances of each particular case." That I believe to be absolutely true, and it founds the reason which renders it impossible for me to give any abstract proposition which can comprehend all cases. All I say in this case is that there is no subject-matter, and if there were, there is no infringement.

LINDLEY, L.J.—I am of the same opinion. One's instinct is not always untrustworthy, and sometimes tells one which is the wrong side of the law. I do not think there is copyright or infringement here at all. What is the plaintiff's copyright under the Act? The copyright is in this sheet of letterpress. That does not mean that he has a copyright in every word of it, nor does it mean that he has a copyright in everything that can be found in it. Copyright has reference to some literary composition. Now I doubt very much whether, extending literary composition as widely as possible, and I do not think you can extend it wider than Wood, V.C., did in deciding the directory case (*Kelly* v. *Morris*), you can take the wording here to be a literary composition.

Now, to say a man has a copyright in an opinion which he has expressed in writing or in print appears to me to be going too far. I may express my opinion in writing. It is not my opinion that is copyright. It is a mode of expression. It is the composition. It is the language in which I express it. Anybody may be at liberty, so far as I know, to publish my opinion, although, if I publish it in the shape of literary composition, he must not copy that composition. Mr. Chilton has published his opinion that a horse named "Priestholme" is likely to win some race or other. Unless you got the "One-Horse Selection" in the shape in which he has published it, I doubt whether you can bring it within literary composition at all. Perhaps the whole of the paper might be called literary composition here, but there is no literary composition of the word "Priestholme." Now what has the defendant done? I do not think we can call it literary composition. Suppose you can, he appears to me to have set to work to produce a collection of opinions. That is not what Chilton is doing at all. The defendant has done some independent work. He thinks it will be useful. He has taken the trouble to collect the opinions of people as to the chances of horses winning particular races. I doubt very much whether he has infringed Mr. Chilton's copyright, assuming he had one. What has he done with respect to Mr. Chilton? What has he got? He has got nothing except "Priestholme," and that is the name of a horse. I doubt whether that is copyright. I do not think it is. On both grounds I think this fails, but I admit the difficulty of putting into language and defining expressly that which Parliament has left intentionally undefined as to literary composition. I think here, one can see on which side of the line this falls, and in my opinion it falls on the wrong side, and there is neither copyright nor infringement.

A. L. SMITH, L.J.—In this case Chilton, the plaintiff, asserts that his copyright has been infringed by the defendant. He asks for an injunction. The only thing he complains of is that the defendant has taken the name of a horse named "Priestholme" and added thereto Chilton's name and published it. Now, to succeed, Mr. Chilton must make out he has a copyright in the publication which he says has been infringed, and, secondly, that what has been done by the defendant is an infringement of the right of copyright which he has. I am going to confine my judgment entirely to the facts of this case, and to these only. My brother Halsbury and my brother Lindley have laid down that it is impossible to lay down words of any general definition which include every case. I do not say whether or not that paragraph in Mr. Chilton's paper, under the head of "One-Horse Selections," taking it as a whole, constitutes a literary composition or not, because it is not to be decided here. The question is whether Mr. Chilton has a copyright in the word "Priestholme" in that composition. It is impossible to say that is a literary composition. Therefore it appears to me in this case Mr. Chilton fails in the first part of what he has to do, namely, to prove he has a copyright in what he says is infringed.

Then comes the next point. Assuming the plaintiff had a copyright in "Priestholme"—and in my judgment he clearly had not—what is it the defendant has done? He has not copied the paragraph called "One-Horse Selections" in any shape at all as a paragraph, but all he has done is to collect from other prophets what they say will probably be the horse to win a given race, and among many prophets which the defendant has collected, he says that Chilton says that "Priestholme" will probably win. It seems to me that it is no infringement, even if the whole paragraph were subject-matter of copyright, to take the one word out of it and to add Chilton's name to it.

For both these reasons I think the application for an injunction fails, and that my brother Kekewich ought to be upheld.

Appeal dismissed.

Solicitors, *Chester & Co.*, for *Crofton, Craven, & Worthington*, Manchester; *J. Amery Parkes.*

High Court of Justice.

Chan. Div. North, J. — March 14.

In re ECCLESIASTICAL COMMISSIONERS AND NEW CITY OF LONDON BREWERY CO. (LIMITED). (*a.*)

Burial Acts—Construction—Union of Benefices Act, 1860 (23 & 24 *Vict. c.* 142)—*Union of Benefices Amendment Act*, 1871 (34 & 35 *Vict. c.* 90)—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34)—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72)—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32)—*Sale of site of church.*

The site of a church (in which interments have taken place) which vests in the Ecclesiastical Commissioners under a scheme made under the Union of Benefices Act, 1860, *may be sold by them for building purposes, and such power to build is not affected by the Amendment Act of* 1871.

The Disused Burial Grounds Act, 1884, *s.* 5, *is not confined only to sales made before the passing of that Act.*

Vendor and purchaser summons.

Under the Union of Benefices Act, 1860, and an Order in Council dated the 16th of May, 1893, the church of All Hallows the Great, Upper Thames-street, in the City of London, became vested in the Ecclesiastical Commissioners upon trust to pull down the church, dispose of the materials, and sell the site. The commissioners sold the site to the New City of London Brewery The conditions described the site as suitable for building.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

This was a summons by the purchasers for a declaration that the site of the church purchased by them came within the provisions of the Metropolitan Open Spaces Act, 1881, the Disused Burial Grounds Act, 1884, the Open Spaces Act, 1887, and, therefore, could not be used for building, the purpose for which it was bought; and that, therefore, the vendors had not shown a good title.

It appeared that there had been interments within the church. There had been a scheme as provided by the Act of 1860 upon the union of benefices, and all the requirements of the Act complied with.

Hall, Q.C., and *W. B. Heath*, for the purchasers.—Although under the Union of Benefices Act, 1860, the commissioners could have sold the site of the church for building, yet this is no longer so, since the amending Act of 1871, s. 4, taken in conjunction with section 3 of the Open Spaces Act, 1884, as amended by section 4 of the Open Spaces Act, 1887; for the effect of those enactments is to make the site of this church a burial ground "which is no longer used for interments," and so within the prohibition against building of the later statutes. *Ecclesiastical Commissioners* v. *Kino*, 28 W. R. 544, 14 Ch. D. 213, was decided before the Open Spaces Act, 1884, was in force, and the point that the amending Act of 1871 applied was not taken. *In re Trustees of St. Saviour's Rectory, Southwark, and Oyler*, 34 W. R. 224, 31 Ch. D. 412, shows that section 5 of the Open Spaces Act, 1884, only applies where the sale takes place before the passing of that Act.

Eady, Q.C., and *Blakesley*, for the vendors.—The Act of 1860 only applies to the dioceses of London and Winchester, and to cases of union of benefices in those dioceses. The Act of 1871 has not interfered with the provisions in the earlier Act, and was passed for different purposes, and leaves untouched the power to build. Since 1871 nine churches have been pulled down and sites built on for secular purposes.

North, J.—The first Act, which is the important one, is the Act of 1860 (c. 142). It is confined to the metropolis as defined by one of the Metropolis Management Acts. It recites the previous Acts with reference to the union of benefices, and then it provides for the union of contiguous benefices under this Act. [The learned judge read the 3rd, 7th, 10th, 14th, 15th, and 17th sections, and said that the 13th section provided that when the Orders in Council are published they are to have the full force of law, and continued:—] Therefore, in those two sections, the 14th and the 17th, it is shown first of all that a churchyard and burial-place is dealt with quite differently from the site of a church, even when the site of a church does contain the remains of persons who have been buried there. The distinction is most emphatic in this way—that, notwithstanding the fact that persons have been buried within the site of the church, the site may be sold subject to the special directions that are given as to the removal of the remains, or putting them apart in some vault in the ground itself; but, notwithstanding that nothing in the Act contained is to legalize the sale of a churchyard or burial ground.

Then under the 29th section of the Act it is provided: "Upon any Order in Council under this Act coming into full operation all churches, houses, buildings, land, and hereditaments which shall be authorized by such order to be pulled down or sold shall, without any conveyance or other form of law, be and become absolutely vested in the Ecclesiastical Commissioners in trust to deal with or dispose of the same and the proceeds and produce thereof as directed by this Act," then it goes on to deal with the freehold of the parish church of the united parish and other lands being vested as mentioned in that section.

Now under that Act, as it stands, there can be no question whatever that the site of this church which has been pulled down can be used for the purpose of being built upon, and, in point of fact, the scheme provides that it is to be sold for building, and the Act of Parliament says that what is contained in the scheme duly approved is to have the force of law. Therefore under this section it is to be sold, and there can be no doubt of the title of the Ecclesiastical Commissioners to sell it as building land to the purchaser, or of the right of the purchaser to build upon it.

Then it is said that that has been interfered with by certain subsequent Acts of Parliament. The first is the Act of 1871 (c. 90). That is an Act to amend the law relating to the union of two benefices. It refers to two Acts which are recited in the Act of 1860, but it does not recite the Act of 1860 itself. It is called "The Union of Benefices Amendment Act," and I should say with respect to this that I do not see anything to confine it to the limits of the metropolis. It seems to me to apply to England at any rate. [The learned judge read section 3, and continued:—] That seems to be something different from, and I think I may say less extensive than, the provisions of the Act of 1860. It only deals with particular cases, and what is authorized to be done by this Act may be done by a bishop by a faculty, and it is not necessary to consult the Archbishop, or the Secretary of State, or the archdeacon, or anybody else, as it is under the Act of 1860. So it gives him a special power of doing something that could not be done before, in that way at any rate. Then the 4th section is one that is said to apply here. It says, "The site of any church which shall be wholly or partly pulled down, and the churchyard belonging thereto, shall be properly fenced and preserved and kept free from desecration, and until such churchyard shall be legally closed for interments the persons for the time being having rights of burial in such churchyard shall not be entitled to rights of burial in any other churchyard within the limits of the same united or separate benefice." Then there is a proviso that I ignore for the moment. Now, it is said the phrase there "the site of any church" applies to the site of this church with which we are now dealing. My first answer is, that I do not so read the Act.

I do not think the Act of 1871 means the site of any church entirely independently of this Act. This is an Act, not reciting the Act of 1860, giving a limited power to a bishop with respect to a faculty, and that is not the place in which one would expect to find a provision made affecting the whole general scheme of the Act of 1860 without any reference to it whatever. I read the 4th section as though it ran thus: "in such case the site of any church." Those words are not there, but I think they follow from the way in which the 4th section follows on the 3rd, and goes on to deal with what is provided for in the 3rd section to a limited extent. It does not mean that the site of any church wholly or partly pulled down under any Act of Parliament, but the site of the church which the previous section has contemplated shall be wholly or partly pulled down. What is to be done with such a site? It is necessary to make some provision with respect to it, and the words of the 4th section are clear. It says: "The site of any church which shall be wholly or partly pulled down, and the churchyard belonging thereto, shall be properly fenced in and preserved and kept free from desecration." I do not think it would be right to read those two sections

together and say those first words refer to anything larger than the site of a church wholly or partly pulled down under the provisions of this Act. That is the first reason why I think this Act does not apply. There is another reason to be found in the proviso at the end of the 4th section: "Provided always that nothing in this Act contained shall apply to any proceedings for the union of benefices taken under the provisions of the 23 & 24 Vict. c. 142."

Now the proceedings that have been taken in respect to the church with which we are now dealing have not been taken under this Act at all, but they have been taken under the Act of 1860; and when it is suggested that selling the site cannot be a proceeding under the Act of 1860 I cannot imagine why it is not, because it is one of the necessary things that have to be done under the Act of 1860 in providing for the scheme—the scheme which makes it essential to proceed to a sale of the church.

Then there is yet a third reason—namely, that I think it is settled what the construction of that section is by the decision of the Court of Appeal in the case of *Ecclesiastical Commissioners of England* v. *Kino*. The whole decision proceeds on the footing that the land there was to be rebuilt upon. This was in 1860, the Act I last read having been the Act of 1871. I think it is sufficient to refer to what was said by Cotton, L.J., 14 Ch. D., at p. 226. "But then it was said here that the plaintiffs themselves cannot rebuild, and that, therefore, what they have to do is to sell the site, and the site only. I will deal with the latter part of the objection first. As I understand, they have vested in them under the Act of Parliament the building and fabric of the church and the ground on which it stood, and they have vested in them that building with every right which the church and the owner of the church enjoyed. No doubt they were required to pull down the church and sell the site, but in selling the site they could, in my opinion, convey to the purchaser all the rights they themselves would have had if they had been in the position of ordinary owners, having acquired the land with the intention or obligation to pull down the old building and put up a new one, in doing which, if they desired to continue the enjoyment of the old right of light, they would have to put up the windows in the same position as formerly. Therefore, although they themselves cannot rebuild, and are required to sell, they can, in my opinion, convey to the purchaser the same right which, if they had built, they would have had of putting up a building with windows in the old places, and entitled to the old easement." That seems to me conclusive upon the construction of the Acts of Parliament in question. The only thing that I can see suggested against it is this—that I do not notice in that case that the Act of 1871 was actually referred to; but the Act of 1860 was fully commented upon, and I cannot believe that the Act of 1871 was entirely overlooked by all parties concerned in the case. In my opinion, therefore, that Act does not interfere with the powers of the Ecclesiastical Commissioners.

Then we come to some other Acts. The first is the Metropolitan Open Spaces Act, 1877. That may be very shortly referred to. It does not bear particularly upon the present question.

Then we come to the Metropolitan Open Spaces Act of 1881 (c. 34), which is called "An Act to amend the Metropolitan Open Spaces Act" of 1877, which I have just referred to. Then it defines for the purpose of the Act what the owner of a churchyard, cemetery, or burial ground means; and then comes this: "The term 'burial ground' shall include any ground, whether consecrated or not, which has been at any time set apart for the purposes of interment, and in which interments have taken place since the year 1800." [The learned judge read sections 4, 5, 9, and continued:—]

Now, I have read those sections for the purpose of showing how very carefully throughout the Act the phrase used is—and a distinction is drawn between the words—"churchyard, cemetery, or burial ground," and whatever the definition clause may say, I cannot believe that if it was intended that the Act should apply to the site of a church it would have been simply by the use of the words "burial ground" when "churchyard" is expressly excepted from the operation of the Act, and when, in this Act, the phrase "burial ground" does not include a churchyard or cemetery. I do not say that that definition is not big enough to include them, but when you have the three things provided for separately, I think it is fair to say that the Legislature, which did provide as to churchyards and as to cemeteries expressly, did not intend to deal with them by implication calling them a "burial ground."

Then we come to the Act of 1884. The two last Acts I have read are the Open Spaces Acts. The Act of 1884 (c. 72) is an Act for preventing the erection of buildings on disused burial grounds. It does not refer to the Act of 1860 for the Union of Benefices in terms at all. It is a very short Act. It deals with the title, and it says that a disused burial ground shall mean something that has been unbuilt on. I do not stop to read it now, except to say that there is this passage: "A disused burial ground shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts." In my opinion that definition of a disused burial ground does not apply to the site of a church that has been pulled down under an Act of Parliament. Then section 3 says this: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." That is the section which is relied upon here as being the principal impediment in the way of the purchaser of the site of this church, building on this land. Before referring further to it, I will refer to the Act of 1887 (c. 32), which is not a Disused Burial Ground Act, but an Open Spaces Act, and that follows the lines of the former Act in the way I have mentioned. The 2nd section repeals part of the definition which I have read from the Act of 1881. Then it provides, in section 2, sub-section 1: "The playing of any games or sports shall not be allowed in any churchyard, cemetery, or burial ground in or over which any estate, interest, or control is required under section 5 of the Metropolitan Open Spaces Act, 1881." Again, there is the same phraseology—churchyard, cemetery, or burial ground are treated as separate and distinct things. Then in section 3 there is a provision for the removal of tombstones, and in the same way as to any disused churchyard, cemetery, or burial ground. Then in section 4 there is an alteration in the definition of "disused burial ground," and that now is to be, under the Act of 1884, any burial ground which is no longer used for interments, whether or not it has been partially closed under an Order in Council. Then there is another provision in the 11th section, that "the Metropolitan Board or the sanitary authority may exercise all the powers given to them by the Metropolitan Open Spaces Act, 1881, or this Act respecting open spaces, churchyards, cemeteries, and burial grounds transferred to them in pursuance of the said Act, or of this Act in respect of any open spaces, churchyards, cemeteries, and burial grounds of a similar nature which are or shall be vested in them in

pursuance of any other statute, or of which they are otherwise the owners." So that the same phraseology is preserved in these Acts throughout—churchyard, cemetery, or burial ground are spoken of as cognate but different things.

Now, I turn back to the Act of 1884, and what we have now is the definition of a burial ground contained in these Acts, and it comes to this—a burial ground is to include any ground, whether consecrated or not, which has been at any time set apart for the purpose of interment, and a disused burial ground shall mean any such burial ground—that is, any such burial ground as is no longer used for interments. Then let me add to that what was pointed out in the Court of Appeal in *Ponsford* v. *The Newport School Board*, 42 W. R. 358, [1894] 1 Ch. 454, that whether they ever have been used for interments or not, is entirely immaterial. It was suggested that the phrase, "no longer used," implied that it had at one time been used; but it was pointed out that that was not the meaning of the section, and the definition, therefore, contained in the Act is explained to mean, in addition to the express words of the Act, that which I have mentioned.

Then it it said that the building upon this site would be in express disobedience to the 3rd section of the Act of 1884. Now the first question is whether this land comes within that definition. Is it a piece of ground, whether consecrated or not, that has been at any time set apart for the purpose of interment? Can it be said that a piece of land devoted to the building of a church is set apart for the purpose of interment? In my opinion it cannot. It is not set apart for anything of the kind. It is set apart as a building for public worship, entirely irrespective of the question whether interments shall take place there or not. Interments have taken place sometimes in churches, and they have in this church; but, in my opinion, what is set apart for the building of a church cannot be said on any fair meaning of the words to be set apart for the purpose of interment. Then there is this to be borne in mind—that many pieces of land are set apart for building a church in which no interments ever take place, and nowadays, unless under very special circumstances indeed, when a piece of land is set apart for a church you cannot by law have any interments take place in it. It would be absurd to say that the land is not set apart for a church just as much as it ever was, although no doubt an incidental use to which it was sometimes applied in former days cannot now be applied.

Then we come to another consideration. Can it be said that by this phrase (section 3 of the Act of 1884) the express provisions of the Act of 1860 are repealed by implication? Expressly repealed they are not. That is quite clear. There is no reference to the provisions of that Act, and it is difficult to believe it could be intended by this Act of 1884 to defeat entirely the object of the Act of 1860, so far as relates to the union of the benefices under that Act, where the whole scheme—a very expensive scheme—is to be carried out by machinery, involving a reference to a great many persons, and considerable time and great expenditure, and ultimately culminating in an Order of Council; it is said that that is all done away with by implication, because this Act says that no building can be erected on the site of a church, and, therefore, the whole machinery of the Act is impliedly defeated and rendered null. I do not think that is the meaning of this Act. I do not think it is intended to apply to any such state of things as this. What is more, I think when one looks at this Act, section 5, there is quite enough to show that that was not intended to be the operation of it. I will read section 3, which provides:—"After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground," with certain exceptions which are not now material. Then section 5 is this:—"Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament." Just see how the matter stands as regards this particular site. When the conveyance has been completed and the purchase-money paid, the land will become vested in a purchaser, who shall proceed to build upon it. What is there to prevent him? Any person who says he will be prevented must prove it. According to the argument before me, reliance is placed upon the Act of 1884, the 3rd section of which says that this is the site of a disused burial ground, and no building is to be erected upon it. But section 5 says that nothing in the Act shall apply to a burial ground which, like this, has been sold or diposed of under the authority of any Act of Parliament. It must, then, be contended that that means, sold or disposed of before the passing of this Act. For that I see no foundation whatever. Where in the 3rd section something is intended to depend on the passing of the Act, those words are used. "After the passing of this Act it shall not be lawful" to do so and so. Then I look at section 4. It is a very important one as throwing light on the meaning of this Act: "Nothing in this Act shall prevent the erection of any building on a disused burial ground for which a faculty has been obtained before the passing of this Act." Therefore, in that case, if a burial ground has been disused and a faculty has been obtained for erecting a building upon it, that may be done notwithstanding the passing of the Act. And although the obtaining of a faculty, the lesser thing, before the passing of the Act is not to prevent the building on the site, yet it is now said that the greater thing, the obtaining an Act of Parliament before the passing of the Act, is to be nullified by this section, which says: "Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of"—before the passing of the Act, it is suggested—"under the authority of any Act of Parliament." Why is it to be confined in that way? Why, if a building can be erected upon land with respect to which a faculty has been given, should it not equally be erected on land in respect of which an Act of Parliament has been passed? I cannot imagine any reason for giving less power where the land has been dealt with under an Act of Parliament than where it has been dealt with under a faculty.

It seems to me, therefore, that there is no reason whatever by which I must limit this section of the Act of 1884 to a case in which the sale or disposition under an Act of Parliament has taken place before the passing of this Act, and it would be introducing something into the section, not only which is not found there, but which is expressed in the 3rd and 4th sections, where any such qualification is attempted to be imposed. It seems to me clear, therefore, that the 3rd section of the Act of 1884 does not apply to this case.

Then it was said that the contrary had been decided by Bacon, V.C., in the case of *The Trustees of St. Saviour's Rectory, Southwark, and Oyler*. Although there is a good deal of similarity between the two cases, yet, in my opinion, it does not bear on the point. There is no doubt, the point which is raised here might have been raised—namely, that the 5th section is confined to sales—before the passing of the Act. [The learned judge dealt with the facts and arguments of counsel in that case, and then continued:—] As far as the report goes, neither counsel nor

judge addressed themselves to the question as to whether it was confined to a sale before the Act or not. In my opinion, although that question might be implied, yet when I find it is not raised in the argument or referred to by the learned judge in his decision, there is no reason why I should hesitate to come to the clear opinion that I do, namely, that section 5 is not confined to a sale or disposition made before the passing of the Act; and if it is not, then under the present sale, when it has been completed and the purchase-money paid, the purchasers will have a clear right to build upon this land. Under those circumstances, the purchasers are wrong.

Summons dismissed.

Solicitors for the purchasers, *Western & Sons.*

Solicitors for the vendors, *White, Borrett, & Co.*

Chan. Div. North, J. — March 8.

In re COOK'S MORTGAGE. (*a.*)

Trustee—Vesting order—Will of surviving mortgagee disputed—Uncertainty as to personal representative—Trustee Act, 1893, *s.* 29 (e).

Where a surviving mortgagee has died leaving a will, whereby executors are appointed, but the validity of the will is disputed and litigation is pending in respect of it, then, within the meaning of section 29 (e) *of the Trustee Act*, 1893, *it is "uncertain who is the personal representative" of the mortgagee, and the mortgagor is entitled to a vesting order under that section.*

Petition by a mortgagor for a vesting order.

By a mortgage dated the 18th of February, 1882, E. R. Cook mortgaged certain freehold hereditaments to W. Thomson and W. R. Brooks to secure the repayment of a sum of £8,000 advanced by them out of moneys belonging to them on a joint account. Parts of the mortgaged property had been sold from time to time, and the proceeds of sale paid to the mortgagees.

W. Thomson died on the 25th of March, 1893.

By the 10th of May, 1894, the balance of the money remaining due on the mortgage had been paid off, but no reconveyance was executed.

W. R. Brooks, the surviving mortgagee, died on the 22nd of November, 1894, having previously made his will, whereby he appointed executors. The validity of the will was disputed, and proceedings to establish it had been commenced in the Probate Division, but the action would not be heard for some time.

The mortgagees had never entered into the possession or into the receipt of the rents and profits of the mortgaged land.

The mortgagor had contracted to sell the remaining land comprised in the mortgage deed, and the purchasers were pressing him to complete, which he was unable to do owing to the legal estate being outstanding.

This was a petition by the mortgagor praying that the hereditaments comprised in the mortgage deed and remaining unsold might vest in him for the whole estate therein, which would now be vested in W. R. Brooks if living, but freed and discharged from all moneys secured by and from all claims and demands under the mortgage deed. The petition had been served upon the executors named in the disputed will, but they did not appear.

J. Rolt, in support of the petition, submitted that the litigation pending in the Probate Division rendered it uncertain who was the personal representative of W. R. Brooks within the meaning of section 29 (*e*) of the Trustee Act, 1893,* and that the petitioner was entitled to a vesting order.

NORTH, J.—I am of opinion that in sub-section (*e*) of section 29 of the Trustee Act, 1893, the word "intestate" does not apply to the latter part of the sub-section so as to confine it to a mortgagee who died intestate; the sub-section therefore covers the present case, and I make the vesting order as prayed, omitting, however, the words "freed and discharged," &c., as being unnecessary, because the payment of the mortgage debt is by this very section a condition precedent to the making of a vesting order.

Solicitors, *Thomson, Brooks, & Danby.*

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-at-Law.

Chan. Div. Kekewich, J. — Dec. 20.

In re HAMILTON.
TRENCH *v.* HAMILTON. (*a.*)

Will—Construction—Absolute gift—Precatory trust—"I wish them to bequeath."

An absolute gift to a legatee is not to be reduced to a life interest, nor is a precatory trust to be created by the expression of a mere wish on the part of the testator as to the ultimate disposition of the gift by the legatee.

Adjourned summons.

Susanna Hamilton, who died on the 3rd of May, 1857, by her will, dated the 5th of January, 1856, made bequests as follows: "I give, bequeath, and appoint to my dear nieces Mrs. Gascoigne and Lady Ashtown the sum of £2,000 apiece, for their sole and separate use and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew Silver Oliver and my dear niece Mrs. Pakenham in such mode as they shall consider right."

The legacy of £2,000 was duly paid or accounted for to Lady Ashtown.

On the 23rd of February, 1893, Lady Ashtown died, having made a will which did not refer to this legacy. Her executors held ample assets for the payment of £2,000, if that sum was held not to belong to her estate, and took out an originating summons against the legal representatives of Susanna Hamilton and members of the families of Silver Oliver and Mrs. Pakenham to have it decided whether Lady Ashtown took the legacy of £2,000 absolutely, or whether that sum was, after her decease, subject to

* By section 29: "Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons, in such manner, and for such estate, as the court may direct, in any of the following cases, namely . . . (*e*) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee."

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

any, and what, trusts in favour of the families of Silver Oliver and Mrs. Pakenham, or otherwise.

The summons, being adjourned into court, came on for argument.

Cann, for the plaintiff, the surviving executor of Lady Ashtown.—The gift is absolute, and the words used by testatrix are not sufficient, in view of the later authorities, to constitute a precatory trust: *Lambe* v. *Eames*, 19 W. R. 659, L. R. 6 Ch. App. 597; *In re Adams and the Kensington Vestry*, 32 W. R. 120, 883, 27 Ch. D. 394; *In re Diggles, Gregory* v. *Edmonson*, 39 Ch. D. 253, 37 W. R. Dig. 205. [KEKEWICH, J., referred to *In re Hutchinson and Tenant*, 26 W. R. 904, 8 Ch. D. 540.]

J. T. Prior, for one of the defendants, the only child of Silver Oliver.—There is no absolute gift of the sum of £2,000. The words "their sole and separate use" point to a life interest only. The later cases nowhere overrule the old doctrine as to precatory trusts, though they may to some extent attack it. The words here are very strong. "Wish" is the next strongest word to "direct." *Malim* v. *Keighley*, 2 Ves. jun. 333, is almost on all fours with this case.

J. L. Bathurst, for another defendant in the same interest, cited *Cruwys* v. *Colman*, 9 Ves. jun. 319.

B. B. Rogers and *E. P. Hewitt*, for other parties.

KEKEWICH, J.—The question to be considered is whether a precatory trust is created by the words, "I give, bequeath, and appoint to my dear nieces Mrs. Gascoigne and Lady Ashtown the sum of £2,000 apiece for their sole and separate use and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew Silver Oliver and my dear niece Mrs. Pakenham in such mode as they shall consider right." I leave out of consideration the question whether (assuming there be any *cestuis que trust*) the *cestuis que trust* are sufficiently designated to cause no difficulty in giving effect to the trust if declared. Without doubt a bequest of substantially the same kind as this one has frequently been held to constitute a precatory trust. The case of *Malim* v. *Keighley* is in point. There the gift was "unto such surviving daughter, her executors and administrators," so there were definite words of absolute gift—*i.e.*, a proper limitation of personal estate when it is desired to give an absolute interest, and a precatory trust was raised on the words which followed, "hereby recommending it unto such surviving daughter to dispose of the same after her own death" among the children of one of the testator's daughters and his nephew. This is only one out of many examples, but these cases have been departed from. Without being expressly overruled, they have been departed from in such cases as *Lambe* v. *Eames* and in *In re Hutchinson and Tenant*, where Jessel, M.R., followed *Lambe* v. *Eames*, and reviewing the authorities observed that an absolute gift, followed by something which looks like a super-added power, has been held to be the gift of a life interest only. If a precatory trust is to be extracted out of a will like this, the absolute gift must be cut down to a life interest, in order that other persons may enjoy the property after his or her death. There is also another case, *In re Adams and the Kensington Vestry*, in which an expression of "full confidence" followed on a gift to the testator's wife, where the Court of Appeal held that the wife took absolutely. These are some of the more recent cases, and I think that, without expressly overruling, they ignore the older authorities.

In my opinion the court has taken a more common-sense and sound view, following more or less the lines laid down by James and Mellish, L.JJ., in *Lambe* v. *Eames*, and I am prepared to hold that a gift purporting to vest the subject of a testator's bounty absolutely in the legatee for his or her own benefit is not to be reduced to a life interest, nor is a precatory trust to be created merely by an expression of the testator's wish that the legatee shall, by will or otherwise, make a disposition in favour of others, which the legatee could equally effect through his own beneficial ownership.

The sole point in this case is, Do the words give a full beneficial ownership in the first instance? It is said the words "sole and separate use and to be independent of their husbands" point to a life interest only. With that I do not agree. *Corpus* as well as income may be limited to the separate use of a married woman, and having regard to the general rule of construction introduced by the Wills Act, I apprehend that this is an absolute gift to these ladies in the first instance. Consequently the rule which I have ventured to express applies, and the expression of a mere wish on the part of the testatrix as to ultimate disposal by the legatees becomes immaterial, and does not amount to a legal obligation.

I must declare, therefore, that Lady Ashtown took an absolute interest in the legacy of £2,000.

Solicitors, *Wilkinson & Son; Cope & Co.; Hopgoods & Dowson; Preston, Stow, & Preston*, for *Rooke & Coker*, Bath.

Chan. Div. } Oct. 25.
Kekewich, J. }

In re MOODY.
WOODROFFE *v.* MOODY. (*a.*)

Infant—Will—Legacy—Interest—Advancement clause—Provision for maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 43.

Where a testator had by his will, made in 1892, *given legacies to his eight children, two of whom were infants at the date of his decease, and had given the residue of his estate equally among all his children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry; and*

Where the will contained a power for the trustees to raise and apply for his or her advancement, preferment or benefit a portion of the expectant share of any child, but did not contain any express provision for maintenance,

Held, that, though section 43 *of the Conveyancing Act*, 1881, *must be taken to be incorporated in the will, neither the statutory power contained in that section nor the advancement clause in the will were such a provision for maintenance as to prevent a contingent legacy to an infant by a parent or person* in loco parentis *carrying interest from the date of the death, and that the infants were accordingly entitled to interest at four per cent. per annum from that date.*

Adjourned summons.

R. M. Moody by his will, dated the 4th February, 1892, appointed the plaintiffs his executors and trustees, and bequeathed to his son, W. H. Moody, the sum of £10,000, to be paid him on attaining the age of twenty-one years; and to each of his five married daughters, nominatim, £6,000, and Kate and Theodora, his unmarried daughters, £7 each, with a further legacy of £500 each in lieu of marriage portion if they should be unmarried at the time of his decease.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

His residuary estate the testator gave on trust for conversion and division equally among all his children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry.

The trustees were expressly empowered to raise any part or parts not exceeding one moiety of the expectant share of any child under the will, and to apply the same "for his or her advancement, preferment, or benefit, as the trustee should think fit."

There was no express provision for maintenance in the will.

The testator had eight children. Theodora attained the age of twenty-one years eight months after the testator's death, and was still unmarried; W. H. J. Moody was an infant of nineteen years; the other six children had attained the age of twenty-one before the date of the death. The estimated share of each child in the income of the residue was under £100 a year. The executors took out this summons against W. H. J. Moody and Theodora Moody and Mrs. Potter (a married daughter of the testator) to have the question determined whether or no the infants were entitled to interest on their legacies from the date of the death.

J. D. Davenport, for the executors.

Warmington, Q.C., and *R. H. Hodge*, for the infants.—There being in this will no express provision for maintenance out of any other fund, the infants' legacies carry interest from the date of the death of their parent—the testator: *Beckford* v. *Tobin*, 1 Ves. sen. 308; *Heath* v. *Perry*, 3 Atk. 101; *Donovan* v. *Needham*, 9 Beav. 164. Even if section 43 of the Conveyancing Act, 1881, must be taken to be incorporated in this will, it is not a provision for maintenance of such a nature as to prevent the legacies carrying interest. In the absence of authority we submit that no provision for maintenance can have this effect unless definite and adequate.

Jason Smith, for Mrs. Potter (representing the other married daughters).—A legacy given by a parent or by a person *in loco parentis* to a child is, it is true, an exception to the general rule that legacies carry interest from the time of payment only; but this, in turn, is subject to another exception, namely, that the rule giving interest to a child does not take effect where the testator has provided for the child's maintenance from another fund: *In re George* (*per* James, L.J.), 26 W. R. 65, 5 Ch. D. 837; *May* v. *Potter* (*per* Jessel, M.R.), 25 W. R. 507. Here provision for the infant's maintenance is made, first, by the clause for "the advancement, preferment, and benefit," and, second, in the statutory power of section 43 of the Conveyancing Act, 1881, which must be read into the will: *In re Holford*, 42 W. R. 563, [1894] 3 Ch. 30.

KEKEWICH, J.—The first point to be considered is whether, in construing this will, the words of the 43rd section of the Conveyancing Act of 1881 must be read into the will as if actually written in it. I think that the section must be considered to be incorporated in the will, and that it would be unfortunate if draftsmen were obliged to insert in such instruments their own provisions for maintenance because they could not rely on the provisions in the Act of Parliament.

Lord Cranworth's Act (23 & 24 Vict. c. 145) was expressly intituled "An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills," and contained a recital setting forth the convenience which would result from a general enactment of common forms; and the Conveyancing Act of 1881, which repealed it, must, I think, though not intituled in the same way, be taken to have repeated with variations, its provisions for the same purpose, that is to say, to prevent repetition and to dispense with the necessity of inserting clauses in wills and settlements. I therefore proceed to deal with this case on the footing that section 43 of the Conveyancing Act of 1881 must be taken to be incorporated in this will.

The law as to interest on legacies to infants by a parent or person *in loco parentis* is clear; its object, as laid down in the cases, is to provide for the maintenance of those infants whom the testator is under either a legal or moral obligation, as the case may be, to maintain, and the fact that, if income is required to maintain an infant child requiring maintenance, less is left for another child who does not require maintenance neither involves hardship nor can it alter the application of settled rules of law.

Here are two children—one entitled to a legacy of £10,000 on attaining twenty-one, and the other entitled to legacies of £7,000 and £500 absolutely, that is, without attaining twenty-one. The residue is given to all the children equally, and the trustees are empowered to raise and apply for the "advancement, perferment, or benefit" of any child a portion of that child's expectant share; beyond this there is no express provision for maintenance.

There are, of course, cases where, on the strength of such a power as this, the court has allowed capital to be applied for the benefit of an infant by somewhat straining a clause which was not intended to be a maintenance clause, but that does not enable me to call the power here inserted a provision for the maintenance of children.

Section 43 of the Conveyancing Act of 1881 does, however, confer on trustees a power to apply for an infant's maintenance the income of the infant's legacy. Counsel were unable to cite to me any case in which a direction to apply the income of a legacy to the maintenance of a child has been held to defeat the rule that a legacy given to an infant by a parent carries interest from the parent's death. I should have been surprised had such a case been found, for such a direction would seem to point to interest running from the death rather than otherwise.

As regards the cases cited, I find that *Wynch* v. *Wynch*, 1 Cox, 433, is, as far as is material, stated by Lord Langdale in *Donovan* v. *Needham*. In *In re George* James, L.J., lays down as a well-established rule of law that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis*, that exception being also subject to another exception—that the rule giving interest to the child does not apply when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose.

It has been argued, however, that these children take the residue, and that section 43 of the Conveyancing Act, 1881, being incorporated in the will, the will does provide for their maintenance out of another fund—*i.e.*, the income of the share of residue—and that consequently the testator must be deemed to have provided for their maintenance. I know of no case in which a share of a gift of residue, given to children as a class, has been held to bring into effect the exception mentioned by James, L.J. All the cases go to this, that the question must be regarded with reference to the money given to the child. Here the gift is a share of residue, and the amount is unascertained.

No doubt in *Wynch* v. *Wynch* and in *Donovan* v. *Needham* the provision was for payment out of the general estate, not, however, out of a share of residue, and I think that such a provision as I have here—*i.e.*, for maintenance of a child out of the income of his share of residue—does not bring the case

within the exception mentioned by James, L.J., in *In re George.*

I hold, therefore, that the legatees are entitled to interest at four per cent. per annum on their legacies from the testator's death until appropriated, and after appropriation to the income actually realized.

Solicitors, *Phelps, Sidgwick, & Biddle; T. Wilkinson; Jennings & Son.*

Q. B. Div.
(Charles and Wright, JJ.) May 3.

M'HARG v. UNIVERSAL STOCK EXCHANGE (LIMITED). (a.)

Practice—Appeal—"Matters of practice or procedure"—Jurisdiction of Divisional Court—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.

An appeal from the refusal of a judge in chambers to grant an interlocutory injunction is an appeal in a matter of "practice or procedure" within section 1, *sub-section* 4, *of the Judicature Act,* 1894, *and should be to the Court of Appeal.*

Appeal of the plaintiff from the refusal of the judge in chambers to grant an interlocutory injunction.

The plaintiff by his writ claimed that the defendants might be restrained from proceeding with an arbitration pursuant to a notice given by them to the plaintiff.

The plaintiff took out a summons for an injunction in the terms of the writ until the trial of the action.

Day, J., in chambers, made no order on the summons.

The plaintiff appealed to the Divisional Court.

Stutfield, for the plaintiff.—[CHARLES, J.—Is not this an appeal in a matter of practice and procedure, which, under section 1, sub-section 4, of the Judicature Act, 1894, should be to the Court of Appeal?] No; this is not a matter of practice or procedure. The sole object of the action is to obtain the injunction, and if this application succeeds the action is practically decided. [*Pollard,* for the defendants.—The defendants do not consent to treat this application as the trial of the action.] By section 1, sub-section 1 (ii.), there is a right of appeal without leave from a refusal to grant an injunction, and section 1, sub-section 5, provides that "in all cases where there is a right of appeal to the High Court from any court or person," the appeal shall be heard by a divisional court. This appeal is from a "person"—viz., the judge in chambers—and, there being the right of appeal, the case comes within section 1, sub-section 5, and the appeal is properly brought to this court.

Pollard, for the defendants, was not called upon to argue.

CHARLES, J.—I am of opinion that this is an appeal in a matter "of practice or procedure" within section 1, sub-section 4, of the Judicature Act, 1894. The action is for an injunction, and the order sought to be obtained by the plaintiff is an interlocutory order in the action. The order cannot be treated in any sense as a final order without the consent of all parties, and the defendants do not consent to treat it as such. Therefore it seems to me that the summons is merely a step in the cause, it is part of the machinery by which the action will be worked out to its final result. I do not say that all interlocutory applications are necessarily matters of practice or procedure, but I am clearly of opinion that this application is such a matter. As to the argument based on the language of sub-section 5, I am unable to agree with it. I doubt whether sub-section 5 applies at all to appeals from a judge of the High Court. It is true that the word "person" is used, but I cannot infer from the mere use of that word, which would apply to other individuals, such as arbitrators, that it was intended to mean a judge of the High Court, and so to limit the application of sub-section 4. I am, therefore, of opinion that this court has no jurisdiction to hear this appeal.

WRIGHT, J.—I am of the same opinion, for the same reasons.

Appeal dismissed.

Solicitor for the plaintiffs, *J. Banks Pittman.*

Solicitors for the defendants, *Last & Sons.*

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) April 23.

In re HEDLEY.
Ex parte BOARD OF TRADE. (a.)

Bankruptcy — Discharge — "Misdemeanour or felony connected with the bankruptcy"—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8 (2).

It is provided by section 8 (2) *of the Bankruptcy Act,* 1890, "*that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act,* 1869, *or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy unless for special reasons the court otherwise determines.*

Held, that a "misdemeanour or felony connected with the bankruptcy" means an offence ejusdem generis *with the offences included in the Debtors Act,* 1869, *and the Bankruptcy Act,* 1883, *and would be—first, one where there was a conviction on facts which brought about the bankruptcy; secondly, one wherein the facts upon which the conviction was based were misconduct as a bankrupt or in view of impending bankruptcy.*

Appeal from an order of his Honour the late Judge Digby Seymour, in the county court of Newcastle-on-Tyne, suspending the bankrupt's discharge for three years.

The bankrupt had been an estate agent, secretary to a building society, and also of a Wesleyan church society. A receiving order was made against him in October, 1891, at which time he was in prison under a sentence of six weeks' hard labour for embezzling moneys of the building society of which he had been secretary. This society proved in the bankruptcy for over £400, thirty-eight persons for whom the bankrupt had collected rents proved for an aggregate sum of over £1,200, and the Wesleyan church body proved for £98, all of which sums had been appropriated by the bankrupt to his own use, and employed in unsuccessful building speculations.

The estate paid a dividend of tenpence in the pound.

In October, 1894, the bankrupt applied for his discharge, when the official receiver reported offences against him under section 8 (3) and that which were insufficient books and fraud or fraud

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

breach of trust, and also that the bankrupt had committed a "felony connected with his bankruptcy" within the meaning of section 8 (2) of the same Act.

The county court judge accepted the official receiver's report as to the five offences under sub-section 3, but found that the bankrupt had not committed a "felony connected with his bankruptcy," and suspended his discharge for three years from the date of the application.

The Board of Trade appealed.

Muir Mackenzie, for the appellants.—I submit that the offence of which the bankrupt was found guilty was a felony connected with his bankruptcy. His bankruptcy was brought about by speculating with other persons' money, and he was convicted of embezzling the money of one of those persons. I suggest that "connected with his bankruptcy" means "connected with his dealings as a debtor" and that the bankrupt's offence was *ejusdem generis* with pledging property obtained on credit under section 11 (15) of the Debtors Act, 1869. Secondly, the suspension for three years was too short in consideration of the serious offences found to have been properly reported against the bankrupt; in particular, keeping of insufficient books and fraud: *Ex parte Castle Mail Steam Packet Co, In re Payne*, 35 W. R. 89, 18 Q. B. D. 154; *Ex parte Freeman, In re Freeman*, 7 Morr. 38, 38 W. R. Dig. 16; *Ex parte The Board of Trade, In re Stainton*, 35 W. R. 667, 19 Q. B. D. 182.

Strahan, for the respondent.—The definition which the Board of Trade seek to put upon "felony connected with the bankruptcy" is altogether too wide, and would cover any conviction which, however indirectly, could be said to have brought about the bankruptcy.

Muir Mackenzie replied.

VAUGHAN WILLIAMS, J.—In this case the bankrupt was convicted on his own confession of embezzling the moneys of a building society. It is said that this was a "felony connected with his bankruptcy," and that his discharge ought to have been refused. The county court judge was not of that opinion, and I am inclined to think he was right. It is not very easy to say what is meant by the words "or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy," but I think one may be guided in interpreting them by considering the nature of the misdemeanours included in the Debtors Act, 1869, and the Bankruptcy Act, 1883. I think that this section (section 8 (2) of the Bankruptcy Act, 1890) ought to be read as meaning to extend the Debtors Act, 1869, and the Bankruptcy Act, 1883, to misdemeanours *ejusdem generis* with those included in those two Acts.

Taking that view, I will try to define such an offence. I think, first, that certainly it would be one if there were a conviction on facts which brought about the bankruptcy; and secondly, if the facts on which the conviction was based were misconduct as a bankrupt or in view of impending bankruptcy. The Debtors Act, 1869, again and again recognizes that it may be a crime to defeat the policy of the law in contemplation of impending bankruptcy. Quite irrespective of bankruptcy, it was an offence for this man to embezzle, and on the evidence I do not think it was an offence committed in contemplation of bankruptcy.

I agree on the second point with Mr. Mackenzie that the suspension was short in view of the offences reported, but I do not think we sit here to correct the decision of the county court judge because it is wanting in severity. I therefore will not interfere with his discretion.

KENNEDY, J.—I concur on both points, and adopt the definition of Vaughan Williams, J., as the best that can be given, though necessarily somewhat general in its terms. I agree that the bankrupt was treated very leniently, and I suppose there might be circumstances under which this court would alter a term of suspension, but only in cases where the term is so plainly inadequate or excessive that the court would be bound to interfere.

Appeal dismissed.

Solicitors, *The Solicitor to the Board of Trade; Criddle.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — April 25, 26.

STEPHENS *v.* GREEN.
GREEN *v.* KNIGHT. (*a.*)

Trustee—Incumbrance—Priority—Assignments by beneficiary under derivative will—Stop order in suit administering original will — Notice to trustee of derivative will—Ward of court—Marriage without consent—Post-nuptial settlement—Consideration.

For the purpose of deciding the priority of incumbrances, a stop order obtained in an action for the administration of an estate has no greater effect than notice to the trustee of the estate would have had if there had been no action for administration.

Where there is a derivative settlement by a beneficiary under an original settlement, and successive assignments are made of the interest of a beneficiary under the derivative settlement, the assignees should give notice to the trustees of the derivative settlement, whose duty it is to pay over the fund to the assignor, and not to the trustees of the original settlement, though the latter may have the actual control of the fund.

Bridge *v.* Beadon, 15 *W. R.* 527, *L. R.* 3 *Eq.* 664, *distinguished*: dictum *of* Lord Romilly, M.R., *dissented from.*

Holt *v.* Dewell, 4 *Hare*, 446, *followed.*

In re Booth, 1 *W. R.* 444, *overruled.*

A ward of court who had married without the consent of the court executed a post-nuptial settlement, which contained (inter alia) *a covenant by the wife to settle after-acquired property and an assignment by the husband of a policy of assurance.*

Held, that the wife's covenant was not merely voluntary, but was founded upon valuable consideration, and might be enforced by the trustees.

Appeal from an order of Stirling, J., dated the 20th of December, 1894.

This was a petition by the trustees of a settlement dated the 22nd of June, 1878, for the payment out of court of a fund standing to the credit of an account in the suit of *Stephens* v. *Green*, which was instituted for the administration of the estate of the Rev. Henry Green.

The Rev. Henry Green, the testator in the suit, died in 1841, having by his will, dated the 13th of August, 1836, given to his trustees therein named the residue of his estate upon trust (in the events that happened) to raise and set apart a sum of £7,000 to be held in trust for each of his daughters during her life, and after her death in trust for her children, and

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

having thereby provided that in case either of his said daughters should die without leaving children who should attain the age of twenty-one years the share of each daughter so dying should go unto and equally between his son and his surviving daughter and her children.

The testator left three children—two daughters, Penelope Ann Green (afterwards Penelope Ann Helicar) and Alicia Green (afterwards Alicia Helicar), and one son, the Rev. Henry Armel Green.

By an order dated the 18th of December, 1849, and made in the suit of *Stephens* v. *Green*, certain funds representing the residuary personal estate of the said Henry Green were transferred into court to the credit of the cause: "The account of the legacies to the testator's daughters and their children."

Henry Armel Green, the son of the said Henry Green, died on the 25th of April, 1866. By his will, dated the 10th of October, 1862, he bequeathed all his residuary estate to J. W. Knight upon trust, subject to the payment of funeral and testamentary expenses, debts, and legacies, for all his children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry, in equal shares, and the testator appointed the said J. W. Knight executor of his will.

The suit of *Green* v. *Knight* was instituted for the administration of the estate of Henry Armel Green.

Henry Armel Green left two sons and a daughter, Alice Beatrice Joan Green, who, on the 13th of May, 1878, being an infant and a ward of court, married John O'Connor without having obtained the consent of the court.

No settlement was executed prior to the marriage of Mr. and Mrs. O'Connor, but on the 22nd of June, 1878, in order to prevent proceedings being taken against the husband, an indenture of post-nuptial settlement, made between the said John O'Connor and Alice Beatrice Joan, his wife, of the one part, and Uvedale Corbett and G. T. Woodroffe of the other part, was executed, whereby, after a recital of an agreement for a settlement made before marriage, certain trust funds, consisting of the residue of certain principal moneys therein mentioned and a cash balance and certain bank annuities, were transferred to the said Uvedale Corbett and G. T. Woodroffe upon certain trusts for the benefit of Mr. and Mrs. O'Connor, their issue, and the said John O'Connor and Alice Beatrice Joan, his wife (the latter so as to bind her separate estate), covenanted with the trustees that all real and personal property not thereinbefore settled to which Mrs. O'Connor was at the time of her marriage entitled, or to which she or the said John O'Connor in her right at any time during the coverture should become entitled, should be settled upon similar trusts. The settlement also contained an assignment by the husband of a policy of assurance on his life, which he covenanted to keep up.

By an indenture dated the 25th of October, 1883, Mr. and Mrs. O'Connor assigned to the Mutual Life Assurance Society, by way of mortgage to secure £400, all the share to which she or her husband in her right was then or might thereafter become entitled under the will of Henry Armel Green; and on the 5th of November, 1883, the society obtained in the suit of *Stephens* v. *Green* a stop order upon the funds standing to the credit of "the account of the legacies to the testator's daughters and their children." On the 14th of December, 1883, the trustees of Mrs. O'Connor's marriage settlement obtained in the same suit a stop order on the same fund.

On the 16th of January, 1884, the said trustees gave notice of the settlement to Selina Knight, who was the sole executrix of J. W. Knight (who died in 1878), and had thus become legal personal representative of Henry Armel Green. No stop order was obtained in the suit of *Green* v. *Knight*.

Penelope Ann Helicar died in 1888 leaving children, and subsequently—viz., by an order dated the 25th of August, 1890—the funds standing to the credit of the above account were divided, and a portion of such funds was carried to an account in the same suit entitled: "The account of the share of Henry Armel Green contingent on the death of Alicia Helicar without leaving children and subject to her life interest."

Alicia Helicar died on the 30th of July, 1894, without having had any children.

The petition prayed that it might be declared that the entire share and interest of Mrs. O'Connor, or Mr. O'Connor in her right, of and in the funds in court to the credit of the above-mentioned account, "of the share of Henry Armel Green contingent on the death of Alicia Helicar without leaving children, and subject to her life interest," ought to be transferred to the petitioners, Uvedale Corbett and G. T. Woodroffe, as trustees of the settlement of the 22nd of June, 1878. The petition was opposed by the Mutual Life Assurance Society, who claimed priority by virtue of the stop order obtained by them.

On the 20th of December, 1894, Stirling, J., made an order in the terms of the prayer.

The Mutual Life Assurance Society appealed.

Farwell, Q.C., and *Kirby*, for the appellants.—(1) Where there is a sub-settlement by beneficiaries under an original settlement, notice of assignments by beneficiaries under the sub-settlement should be given to the trustees of the original settlement: *In re Booth*, 1 W. R. 444; *Bridge* v. *Beadon*, 15 W. R. 527, L. R. 3 Eq. 664: see also *Addison* v. *Cox*, 21 W. R. 180, L. R. 8 Ch. App. 76. This is in accordance with the well-established practice, and has always been understood and acted upon. See Daniell's Chancery Practice, 5th ed., p. 185; Davidson's Conveyancing, 4th ed., sub. tit. Mortgage, pp. 228-30, and Lewin on Trusts, 9th ed., p. 800. [LINDLEY, L.J.—The authorities are not uniform. *In re Booth* differs from *Holt* v. *Dewell*, 4 Hare, 446.] *Holt* v. *Dewell* is not sustainable. Notice should be given to the persons having legal dominion over the fund. *The Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460, 34 W. R. Dig. 124, shows that a stop order, where the funds are in court, is equivalent to notice to the trustees where the funds are in the hands of the trustees. [LOPES, L.J., referred to *Pinnock* v. *Bailey*, 31 W. R. 912, 23 Ch. D. 497. KAY, L.J.—The stop order could not have prevented payment of the fund to the son's executor. LINDLEY, L.J.—It had this effect, that the son's executor could not have got the fund without notice of the stop order.] The question of notice as affecting the priority of assignments of equitable interests was considered by Lord Macnaghten in *Ward* v. *Duncombe*, 42 W. R. 59, at p. 62, [1893] A. C. 369, at p. 384. (2) The settlement of the 22nd of June, 1878, was voluntary, and the covenant therein contained to settle after-acquired property cannot be enforced. See the judgment of Lush, J., in *Currie* v. *Miss*, 23 W. R. 450, L. R. 10 Ex. 153; *Buckmaster* v. *Buckmaster*, 35 W. R. 438, 35 Ch. D. 21. [KAY, L.J.—Might not an action lie against the wife for breach of the covenant?] Possibly for damages, but that does not affect the argument that the covenant cannot be enforced. The recital in the settlement of an agreement to settle is not enough: *Warden* v. *Jones*, 6 W. R. 180, 2 De G. & J. 76, followed by *Trowell* v. *Shenton*, 26 W. R. 837, 8 Ch. D. 318; Lord St. Leonards on Powers, 8th ed., p. 650. [LINDLEY, L.J.—That point seems settled.] Even if there is in this case valuable consideration arising from the circumstances,

such consideration cannot enure for the benefit of children of the marriage: *Green* v. *Paterson*, 34 W. R. 724, 32 Ch. D. 95. Children are within the consideration of marriage, but are not within such consideration as is alleged here. [KAY, L.J.—Could not the trustees enforce the covenant?] Not in favour of children. [KAY, L.J., referred to *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451, 1 Ph. 698.] *Green* v. *Paterson* is a decision of the Court of Appeal, and is later than *Davenport* v. *Bishopp*.

Grosvenor Woods, Q.C., and *Cordery*, for the trustees of the settlement.—(1) The person to whom notice of the assignment of a *chose in action* should be given is the person whose duty it is to pay the assignor. See the judgment of Lord Herschell, L.C., in *Ward* v. *Duncombe*. If the appellants' contention is right, a very onerous duty would be thrown upon trustees, and numerous administrations might become necessary. It would also throw upon assignees the duty of finding out who are the actual custodians of the fund assigned. It cannot have been the intention of the judges in *Mutual Life Assurance Society* v. *Langley* to lay down such a rule. *In re Booth* is wrongly decided. It is inconsistent with the *dictum* of Lord Romilly in *Board of Works* v. *Harby*, 5 W. R. 400, and is in direct conflict with *Holt* v. *Dewell*, which is a clear authority in favour of the trustees. *In re Booth* is never cited, and is not found in the text-books where it might be expected to appear. It is not referred to in the 5th edition of Lewin on Trusts, which is the last edition by Mr. Lewin himself. [LINDLEY, L.J.—It is referred to in Fisher on Mortgages and Coote on Mortgages.] The law is not settled, and it is open to the court to decide the question on principle. The funds divisible in the two suits are not identical. The beneficiaries under the second will had no right to sue the trustees of the first will unless their own executor refused to take proceedings. (2) There was ample consideration for the settlement, and a Court of Equity would certainly enforce specific performance of the covenant. On this point they referred to *Watts* v. *Watts*, 24 W. R. 489; *Montefiore* v. *Behrens*, L. R. 1 Eq. 171, 14 W. R. Ch. Dig. 44; *Mackintosh* v. *Pogose*, 43 W. R. 247, [1895] 1 Ch. 505.

Farwell, Q.C., in reply.—*In re Booth* is cited as an authority in Lewin on Trusts, and should be upheld unless flagrantly wrong. Many assurance societies must have lent money on that view of the law.

LINDLEY, L.J., after stating the facts, said: Stirling, J., has decided that the trustees of the settlement are entitled to priority over the mortgagees, partly because the settlement was prior in point of date to the mortgage, but more especially because the trustees of the settlement gave notice of their settlement to the son's legal personal representative, whereas the mortgagees gave no notice at all, except by the stop order. Now, the question is, whether that decision is correct.

The authorities upon the point are by no means altogether in harmony, and before I turn to them I will consider the matter a little in reference to the principle which, as far as I understand, underlies all of them. That principle is to be found by turning to the leading case of *Loveridge* v. *Cooper*, 3 Russ. 30. That case settled, for the first time, what the principle was. There, as I understand, there were various dealings with a beneficial interest, and the priority was held to be in the assignee who first gave notice to the trustee. That was a comparatively simple case. There was one estate, and it was the duty of the trustee to distribute the estate among the *cestuis que trustent*; and the question in *Loveridge* v. *Cooper* was, whether by giving notice to the trustee the assignee converted the trustee into a trustee for him. That was the theory, and it was so held.

Now, let us look and see whether that principle does not show that Stirling, J., was right here. Who was the trustee for Mrs. O'Connor? Who was the person whose business—whose duty—it was to pay her her share of her grandfather's estate, her father's estate first, and ultimately her grandfather's estate? Who was her trustee? I should say, unquestionably, the answer to that question is that it was her father's legal personal representative. She had no interest in this estate, except subject to the payment of the debts and funeral and testamentary expenses of her own father, and, unless there were some very extraordinary circumstances on the part of the trustees of her grandfather, she had no right to call upon them at all. They were not her trustees in any proper sense of the expression, and the father's legal personal representative was a trustee of the son's share for the son's legal personal representative. If that be so, in order that the person claiming under the son's will should convert anybody into a trustee for him by notice, it must be notice to the son's legal personal representative, whose duty it was first to get in the assets, and then to distribute them amongst the beneficiaries claiming under the son's will.

Now I pass on to another thing which bears upon the same point. In practice, when *cestuis qui trustent* are going to sell an interest or to borrow money on their shares, in what quarter do business men make inquiries in order to ascertain whether these shares have been previously incumbered? They do not go back, nobody knows how far, to make inquiries of the trustees of the original settlement. They go to the trustee for the *cestui que trust* of that particular settlement, the person whose business it is to hand over the money to that *cestui que trust*. They make inquiries of that person, and I dare say these mortgagees went to the legal personal representative of the son and asked, "Have you any notice of incumbrance? They want to borrow money of us: have you received any notice?" They would not go far away in order to make inquiries in quarters in which business men do not usually make them. It appears to me, then, that the doctrine and principle laid down in *Loveridge* v. *Cooper* with regard to notice and priority would apply in this case to the legal personal representative of the son; and inasmuch as the trustees of the settlement gave notice to the legal personal representative of the son, before the mortgagees gave notice, they would have priority according to the principle of that case. That is as I understand it.

But then it is said there are authorities, such as the case of *Mutual Life Assurance Society* v. *Langley* and *Ward* v. *Duncombe*, in the House of Lords, to the effect that notice should be given to the holder of the fund. Well, so it ought, if the holder of the fund is converted by the notice into a trustee for him; and when you look into the case of *Mutual Life Assurance Society* v. *Langley* for the explanation, the explanation is obvious enough. There was a fund of which the person was trustee, and that fund had come into court. The question was, whether an incumbrancer ought to give notice to the trustee, or ought to get a stop order? and the court said, You ought to get a stop order; you ought to give notice to the person whose duty it is to distribute the fund to you. That appears to me to be perfectly consistent with the observations which I am now making.

As to the authorities of *Holt* v. *Dewell* and *Bridge* v. *Beadon*, they are, I think, quite in accordance with the view I am expressing; but on the other hand, there is the decision of *In re Booth*, which was decided in 1852 by Page Wood, V.C., and which is an

authority in Mr. Farwell's favour. In that case there was a primary settlement and a secondary settlement, and the Vice-Chancellor held that notice ought to have been given to the trustees of the original settlement. When that case was argued before him it does not appear that the case of *Holt* v. *Dewell* was brought to his attention; and I confess that I do not myself see any difference in principle between *Holt* v. *Dewell* and *In re Booth*. There is a difference in details, exactly as we have here. There was a trustee of the secondary interest whose duty it was to get in the estate for administration, but I do not think that it is of any real importance.

Then, again, in Mr. Farwell's favour there is a *dictum* in the case of *Bridge* v. *Beadon*, to which I will now refer. I have not the slightest doubt, upon looking at it, that that decision was perfectly correct. It was a case in which there was a settlement, and there were trustees of that settlement, and then there was a will made by a *cestui que trust* under that settlement, appointing trustees for children, and the trust under the will ceased when those children attained wenty-one. Therefore, when they attained twenty -one, the trustees of the will were really not their trustees at all, but their trustees were the trustees of the original settlement; and Lord Romilly points that out in the following passage. He says: "I am of opinion that the trusts reposed in Bridge and Yates were intended to be confined to the period of the infancy of the respective legatees, and that each legatee, upon attaining twenty-one, would be entitled to receive his legacy directly from the trustees of the settlement." Of course, if that is so, notice to the trustees of that settlement is quite right, and they would have priority. Then he goes on to use this language in a passage which, I must say, I think is unfortunate. "But even if the testatrix had appointed the legacies to the trustees in trust for her nephews, I am of opinion that so long as the trusts of the settlement had not been fully executed, and the trust funds remained under the control of the trustee of the settlement, that trustee was the person to whom an assignee of the legacies was bound to give notice. If, at the death of William Rowcliffe, these legacies had been paid over to the trustees under the will, notice to the trustee of the settlement would from that time have ceased to be necessary, but until the funds left his hands he continued to be the trustee for the purposes of notice."

Well, that has got into the text-books, and particularly into Mr. Lewin's book, which is extremely valuable. [His lordship referred to the following passage, which appears at p. 800 of the 9th edition: "Where there are two settlements, one original and the other derivative, notice should be given to the trustees of the original settlement who hold the property."] Well, when one comes to consider the principle, I must say I think that statement is not sound, and it would have for its consequence the imposition of duties upon trustees of an extremely onerous nature. Supposing I am a trustee of a settlement, am I to be supposed to have taken note of all the dealings of everybody who may have taken an interest in the fund of which I am trustee? It would make my position perfectly intolerable. It is quite enough to carry out, under the trusts of some other settlement, certain duties for *cestuis que trustent* under a settlement of my own. But to follow claims which are being made under some settlement, nobody knows how remote, would entail consequences which would be perfectly intolerable. It appears to me, therefore, that that statement is wrong in principle, and that the true principle is that which I have suggested.

Now let us look and see what the effect of the stop order is, because the mortgagees obtained the stop order. I am not quite sure that that stop order was not got a little inadvertently. However, there it is, and we know how easy it is to get a stop order. The effect of that stop order was not to convert the trustees of the father's will into trustees of the person getting the stop order. It had no effect of the kind. But it had an effect, and a useful, good, and practical effect, in that it prevented the legal personal representative who was entitled to the fund from getting it without giving notice to the person who got the stop order. That is a very valuable protection, because, after that, no one person is enabled to get the money out of court. It is necessary that those to whom he is accountable should know what he is about. It is true that when he went to obtain the money he would have notice of that stop order, and if he had had no prior notice from the trustees of the settlement the notice so acquired by that stop order would be sufficient to protect Mr. Farwell's client. However, unfortunately, the legal personal representative of the son had notice of this settlement. It appears to me, therefore, that the decision of Stirling, J., is correct; and when we have, as we must, to choose between the conflicting authorities, I am of opinion that the case of *Holt* v. *Dewell* is more sound, on the authorities, than *Bridge* v. *Beadon* or *In re Booth*.

Then the other point that was made by Mr. Farwell is this. He says the settlement is void as against him because the trusts are such as the court would not enforce. I cannot agree with that. Here is a lady who was a ward of court, and who was married without the consent of the court. Her husband afterwards made a settlement with her. That settlement contains covenants by both the husband and the wife, and it settles a policy of assurance. It appears to me impossible to say that that is a settlement which the court would not take into consideration and enforce. The consideration required is to be found in the covenants on the part of the husband. In dealing with contracts made without consideration what we have to consider is this: Under ordinary circumstances the court of equity, of course, will not decree specific performance of a contract which is not made for some consideration. That is common knowledge; but, at the same time, it would take a good deal to make me refrain from enforcing a contract entered into by a ward of court in order to keep her husband out of gaol. I do not doubt for a moment that the court would enforce a covenant of that kind in a settlement so executed; but the real answer, I think, to Mr. Farwell's contention is, that there is ample consideration here.

I think, therefore, that the appeal should be dismissed.

LOPES, L.J.—This matter of priority of notice is a matter with which I am not familiar, but I have had the opportunity of considering the cases and the arguments which have been addressed to the court, and I agree with the judgment which Lindley, L.J., has delivered. I will only shortly state the ground for the conclusion at which I have arrived. It is this: that the only proper person to whom to give notice is the person who is the trustee for the assignor, and that the effect of such notice is to convert him into a trustee for the assignee. If that is so, we have, in the present case, the personal representative of the second testator—namely, the son—who was a trustee of the assignor. Therefore, according to the view which has been already stated and according to my view, he is the proper person to whom the necessary notice should have been given. Under those circumstances the trustees of the settlement are entitled to priority.

With regard to the other point, it was contended by Mr. Farwell that this was a voluntary settlement, and for some time I had a doubt about that matter. But when the circumstances of this settlement were looked into it became quite clear that there was ample consideration. There were mutual covenants, and there was also the provision with regard to the policy of assurance to be effected by the husband. I cannot doubt for a moment that specific performance of the covenants would have been granted by the Court of Equity. Under those circumstances I am of opinion that the decision of the learned judge was right.

KAY, L.J.—I have come to the same conclusion. The stop order obtained in this case was on the fund which was in court in the administration of the estate, and it had no greater effect, for the purpose of the question we have to consider here, than notice given to the executor of that will would have had if the fund, instead of being in court, had been in his hands. That was admitted in argument, and it cannot be doubted that that is the true effect of the stop order.

Well, then, the question is whether a prior notice of a subsequent incumbrance given to the executors of the father would entitle that subsequent incumbrancer to priority over the incumbrancer who was prior in date and who gave the first notice to the executor of the son. In truth, it comes to this: Suppose there had been a settlement, and then a second derivative settlement of the interest of the *cestui que trust*, the son, under the first settlement, and then that the *cestui que trust* who made the second settlement had improperly made an assignment of the property comprised in that second settlement. If the doctrine here contended for be right, if there had been two assignments made, say, first, one to A., and then another, improperly, to B., and A. had given notice to the trustee of the second settlement, B., if he had received no notice of the first assignment, might obtain priority over A. by giving notice to the trustee of the first settlement. I was certainly very much startled to hear that there was any decision which could produce that result. The principle to be followed, which was distinctly stated by the Lord Chancellor in the case of *Loveridge* v. *Cooper*, is this: "The act of giving the trustee notice is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

Now, applying that rule and that principle to this case, how is it possible to say here that the executor of the father, if notice had been given to him of the mortgage by the Mutual Society, could have become a trustee for the Mutual? The executor of the father would say, "I have nothing to do with an assignment executed by the son. I must carry out the trust, and no notice that you can give me can possibly interfere with my right to do that; no notice that you can give me will affect that at all"; and no stop order would have had any other effect. The effect of obtaining a stop order would have been no greater than the giving of such a notice would have been. I am clear, according to principle, that the person to whom notice ought to have been given in this case by the Mutual Society, who had obtained the mortgage, was the executor of the son, who was the immediate trustee for the assignor of the debt, and that the Mutual Society need not go further and find out in whose hands the fund was, and give him notice. If that were not the law, I can see no escape from this result, that if a settlement included a debt due from A., which is the common case—if it included a bond, for instance, given by the father of the wife to the trustee—the person to whom notice should be given would be the obligor under that bond, and not the trustee. It is, I think, impossible to say that, and therefore I agree with what has already been said by the Lord Justice, that the case of *In re Booth* is not an authority which we ought to follow or recognize as binding upon this court, and if that case decided, as it seems to have decided, that the notice given to the trustee of the original settlement was a notice which gave priority to a subsequent assignee, I, speaking for myself, am not at all prepared to follow that case. So much for the first point.

Upon the second point it was argued that the settlement was voluntary, and, seeing that this property was only included in it by reason of there being a covenant to settle after-acquired property, that, the covenant being in a voluntary settlement, the Court of Equity would not decree specific performance of it; consequently that it did not bind this property in any way; and that the Mutual Society had a better claim than the trustees of the settlement. But when we look at this settlement we find that, although it was post-nuptial, it contained not merely a settlement of the property of the wife which then existed, but also a settlement of a policy of assurance effected by the husband on his own life, which was assigned to trustees, and which the husband covenanted to keep up, so that between the husband and wife, as in many of the decided cases, there was quite sufficient consideration, although the settlement was not made before but after the marriage. Obviously, as Lindley, L.J., said, it was a settlement made in order to prevent an application being made to the court for the committal of the husband for contempt for marrying a ward of court.

In such a case the court would have acted without the leave of the husband, and I cannot conceive, if such a settlement had been made under the order of the court, that the Court of Chancery would have had any difficulty whatever in supporting it, and in decreeing specific performance of its covenants.

Therefore, I think, on both points the appeal from Stirling, J.'s order fails, and that the settlement ought to be upheld as having priority over the mortgage. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Burchell & Co.; Woodroffe & Burgess.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — March 19, 20; April 5.

MARSHALL v. SOUTH STAFFORDSHIRE TRAMWAYS CO. (*a*.)

Tramway company—Debenture-holder—Receiver and manager—Sale of undertaking—Winding up—Tramways Act, 1870 (34 & 35 *Vict. c.* 78), *s.* 44—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.

The right, which the owners of an equitable charge or lien on property as a security for money, have to a judicial sale of such property, in order to satisfy the charge or lien, does not extend to an undertaking which has been acquired under statutory powers for public purposes, if those purposes will be defeated or seriously affected by a judicial sale.

The term "promoters" as used in the Tramways Act, 1870, *does not include debenture-holders.*

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Held, therefore, that the debenture-holders have no right to exercise the statutory powers conferred by the Tramways Act, 1870 *or by provisional orders, on the promoters.*

As regards the securities which tramway companies can give, and the remedies of their mortgagees and debenture-holders, such companies are within the principles expounded by Lord Cairns *in* Gardner *v.* London, Chatham, and Dover Railway Co., 15 *W. R.* 325, *L. R.* 2 *Ch. App.* 201, *and by* Kay, L.J., *in* Blaker *v.* Herts and Essex Waterworks Co., 37 *W. R.* 601, 41 *Ch. D.* 399.

The power of sale conferred by section 44 *of the Tramways Act,* 1870, *does not enable a tramway company to give its debenture-holders a right to sell the company's tramways and undertaking, nor a right to a judicial sale under the order of the court in an action brought to enforce the security. The court ought not to appoint receivers and managers of such an undertaking, but only a receiver of the earnings thereof.*

Appeal from a decision of Kekewich, J.

This was an action brought by the plaintiffs on behalf of themselves and all other the holders of the mortgage debentures issued by the South Staffordshire and Birmingham District Steam Tramways Co. (Limited), now dissolved, against the South Staffordshire Tramways Co., which was the statutory successor to the dissolved limited company.

The object of the action was to have the property of the company, comprised in the debentures held by the plaintiffs and others, realized under the direction of the court and applied in payment of the debentures.

On the 5th of May, 1893, an order was made appointing receivers and managers; but on the trial of the action Kekewich, J., by his judgment, declared that the plaintiffs were not entitled to the appointment of a manager nor to any order for sale, and he discharged the receivers and managers, and appointed a receiver only of the company's undertaking and of the net earnings thereof.

From this decision the plaintiffs appealed, and contended that they were entitled to an order for a sale of the company's undertaking and tramways, and the appointment of a receiver and manager until sale.

The debentures held by the plaintiffs, and by those on whose behalf they sued, were issued by a limited company, formed and registered in 1883 under the Companies Act, 1862, for the purpose of making and working certain tramways. Power to make and work them was obtained by the company from the Board of Trade under the provisions of the Tramways Act, 1870. The debentures were for £100 each, repayable on the 1st of August, 1897, and were constituted a charge on the undertaking and all the property of the company present and future, including uncalled capital.

The conditions upon which the debentures were issued were as follows:—"(1) The mortgage debenture is one of a series of mortgage debentures issued, or about to be issued, by the company for securing an aggregate sum of £50,000, with interest at the rate of £5 per cent. per annum. (2) The debentures of the said series shall rank *pari passu* as a first charge upon the property of the company, without any preference or priority one over another. (3) Notwithstanding the charge hereby created, the company shall be at liberty in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the said property, or call up its uncalled capital, unless default shall be made in payment of any principal moneys or interest hereby secured for the space of three calendar months after the same respectively shall have become due according to the tenure of this debenture, or the company shall go into liquidation either voluntarily or by the order of a competent court. (4) In the event of such default or such going into liquidation, whichever shall first happen, the liberty and authority to the company hereinbefore given shall cease, and the charge by the indenture created shall and may be immediately enforceable. (5) Nothing herein contained shall be taken to authorize the creation of any mortgage or charge of or upon the said property or any part thereof having priority over the said charge."

In 1889 a special Act (52 & 53 Vict. c. cxci.) was passed dissolving the limited company and creating a new company, which was the defendant company. All the rights and obligations of the limited company were vested by this statute in the defendant company; and whatever rights the debenture-holders of the limited company had over its tramways and undertaking were preserved and made applicable to the larger undertaking of the new company, subject only to this qualification—viz., that the debentures issued by the limited company and those to be issued by the new company were all to rank *pari passu* so as to exclude any question of priority *inter se.*

Warmington, Q.C., and *Willis Bund,* for the appellants.

Sir R. E. Webster, Q.C., Bramwell Davis, Q.C., and *C. E. E. Jenkins,* for the respondents.

The following cases were referred to in the course of the argument:—*Attorney-General* v. *Great Eastern Railway Co.,* 28 W. R. 769, 5 App. Cas. 473; *Baroness Wenlock* v. *River Dee Co.,* 10 App. Cas. 354, 33 W. R. Dig. 228; *Potts* v. *Warwick and Birmingham Canal Co.,* Kay, 142, 2 W. R. Dig. 18; *Barton-upon-Humber and District Water Co.,* 38 W. R. 8, 42 Ch. D. 585; *Borough of Portsmouth Tramways Co.,* 40 W. R. 553, [1892] 2 Ch. 362; *Bartlett* v. *West Metropolitan Tramways Co.,* 42 W. R. 500, [1893] 3 Ch. 437, [1894] 2 Ch. 286; *Edinburgh Street Tramways Co.* v. *Lord Provost, &c., of Edinburgh,* [1894] A. C. 456; and *Burt, Bolton, & Hayward* v. *Bull, ante,* p. 180, [1895] 1 Q. B. 276.

Cur. adv. vult.

April 5.—The judgment of the COURT was delivered by

LINDLEY, L.J., who stated the facts, and continued:—The question raised by this appeal is whether the holders of the debentures had any right to enforce their securities by a sale of the tramways and the undertaking of the limited company. The debenture contains no power of sale; but it unquestionably creates an equitable lien or charge on the property of the limited company; and if this property were ordinary property in which the public had no particular interest, the security would confer upon the holder the right to have such property sold by the court and applied in payment of his debt if the principal and interest were due and unpaid. Speaking generally, the owner of an equitable charge or lien on property as a security for money which is due and payable has a right to a judicial sale of such property in order to satisfy the charge or lien: see *Neate* v. *Duke of Marlborough,* 3 Myl. & Cr. 417. But this right does not extend to property—or what is called an undertaking—which has been acquired under statutory powers for public purposes if those purposes will be defeated, or at all events seriously affected, by a judicial sale. This exception to the general rule is as well settled as the rule itself: see

Gardner v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. 202. It becomes necessary, therefore, to consider what a tramway company is and what its undertaking is, and to determine whether an equitable lien or charge upon its tramways and undertaking falls within the general rule or within the exception to it.

Tramways and tramway companies, however formed, are all governed by the Tramways Act, 1870, to which it is necessary to refer. By this statute provision is made for obtaining from the Board of Trade provisional orders authorizing the construction of tramways (sections 4 and 8). Provisional orders so obtained have to be submitted to Parliament for confirmation, and the Act confirming a provisional order is to be deemed to be a public general Act. The persons authorized to construct a tramway, either by a provisional order or by any special Act, are referred to as "the promoters" (sections 4 and 24), and they may be the local authority of the district in which the tramway is to be made, or any person, persons, corporation, or company (section 4). But persons to whom tramways have been sold under those sections which authorize their sale are also deemed to be promoters (see sections 43 and 44). So that the expression "promoters" really means, not only the persons originally authorized to construct a tramway, but also their permitted assigns. It is, however, plain that neither lessees (section 19) nor licensees (section 35) are promoters. Moreover, the term "promoters" does not include debenture-holders. Debenture-holders have no right to exercise the statutory powers conferred by the Act or provisional orders on the promoters; nor are debenture-holders liable to perform the statutory duties imposed upon the promoters by the Act or by provisional orders made under its authority. It is important to bear this in mind in considering the right to sell the tramways. The Tramways Act, 1870, is silent on the subject of borrowing money by the promoters; but provisional orders sometimes contain regulations on the subject. The power of the limited company to borrow money on the security of their property was not questioned in this case. Nor, indeed, can the validity of the debentures issued by the limited company be disputed after their express recognition in the defendant company's special Act.

The Tramways Act, 1870, does not in terms require the promoters either to make or maintain the tramways which they are authorized to construct. But the Act, nevertheless, enables the Board of Trade to grant licences to other persons to use tramways if the public are deprived of their full benefit (section 35), and authorizes the Board of Trade to put an end to the powers of the promoters over disused tramways, which may then be removed at the expense of the promoters (section 41). Similar authority is given to the Board of Trade if the promoters are insolvent so that they are unable to maintain the tramway or work the same to the advantage of the public (section 42). But although the Act itself assumes rather than imposes duties in favour of the public, the provisional orders made under the Act frequently impose such duties in express terms. For example, one of the provisional orders in this case requires the promoters to maintain their tramways to the satisfaction of the road authorities, and to run carriages twelve times a day, and to run two carriages each way at low fares (see the Walsall and District Tramways Provisional Order of 1882, ss. 10, 33, 36). The interest of the public in the working of the undertaking of a tramway company is apparent throughout the whole legislation, and this circumstance goes far to bring tramway companies into the same category as railway and other companies formed for public purposes, and to distinguish them from ordinary trading companies in whose property and undertakings the public have no interest.

In two important respects, however, railway companies differ from tramway companies. First, railway companies (unless the Railway Abandonment Acts apply to them) cannot be wound up under the Companies Act, 1862, and tramway companies can (see Companies Act, 1862, s. 199); secondly, railways cannot be sold by the companies to which they belong, whilst tramways can be sold by the promoters, with the sanction of the Board of Trade (see sections 43 and 44 of the Tramways Act, 1870). But when the jurisdiction to wind up is not invoked, the first of those differences is unimportant, and as the debenture-holders are not promoters, and cannot either sell under the statutory powers conferred on the promoters or require the promoters to sell under those powers, the second difference does not assist them. Notwithstanding those differences, it may therefore be truly said that, as regards the securities which tramway companies can give and the remedies of their mortgagees and debenture-holders, such companies are within the principles expounded by Lord Cairns in the case of *Gardner* v. *London, Chatham, and Dover Railway Co.*, and by the present Kay, L.J., in *Blaker* v. *Herts and Essex Waterworks Co.*, 37 W. R. 601, 41 Ch. D. 399. In *Blaker* v. *Herts and Essex Waterworks Co.* Kay, L.J., decided two points which are important on the present occasion. First, he held that section 19 of the Conveyancing Act, 1881, conferring powers of sale on mortgagees, did not apply to debentures in the ordinary form; and, secondly, he held that the principle of *Gardner* v. *London, Chatham, and Dover Railway* applied as much to waterworks companies as to railway companies. The fact that waterworks companies can be wound up under the Companies Act, 1862 (see section 199), and that in the winding up the company's property can be sold by the liquidator, does not appear to have been noticed either by counsel or by the court. But, whatever the jurisdiction of the court may be under the Companies Act, 1862, that jurisdiction is not invoked and cannot be exercised in an ordinary action by a debenture-holder; and the learned judge therefore held, and held quite rightly, that no sale could be ordered in such an action of the undertaking and works of a waterworks company. It consequently followed that no manager ought to be appointed. It is noteworthy that in *Blaker* v. *Herts and Essex Waterworks Co.* a receiver and manager had been appointed until the trial of the action. But when the case was more fully argued and considered the judgment was that no manager ought to be appointed.

Cases, however, were referred to in which receivers and managers of tramways had been appointed in actions brought by the holders of debentures against tramway companies, and in one of them a sale was directed, subject to the consent of the Board of Trade. These cases require notice. The first was *Hope* v. *Croydon and Norwood Tramways Co.*, 35 W. R. 594, 34 Ch. D. 730, in which North, J., appointed a receiver and manager by an order dated the 4th of February, 1887, and on the 24th of June, 1889, the undertaking and tramways and real and personal property of the company were ordered to be sold as a going concern (see the order in Seton, vol. 1, p. 686). This was apparently followed in 1892 by Chitty, J., in *City of London Contract Corporation* v. *Coventry and District Tramways Co.* (unreported), where a conditional agreement for a sale of the undertaking and property of the company was sanctioned. The next case is *Bartlett* v. *West Metropolitan Tramways Co.*, where North, J., first appointed a receiver and manager, and afterwards directed a sale with the

consent of the Board of Trade. These cases were all passed over very lightly; in none of them was there any real opposition by the company; and they can hardly be regarded as deliberate judgments. Stirling, J., in *Borough of Portsmouth Tramways Co.*, ordered a tramway company to be wound up at the instance of a debenture-holder, but the learned judge evidently thought that the principle of *Gardner* v. *London, Chatham, and Dover Railway Co.* was applicable to the debentures of tramway companies, a view which is inconsistent with any right to a receiver and manager and a sale as incidental to the security constituted by the debentures. The power of sale conferred by section 44 of the Tramways Act, 1870, does not enable a tramway company to give its debenture-holders a right to sell the company's tramways and undertaking, nor a right to a judicial sale under the order of the court in an action brought to enforce the security. In the event of a sale under that section the proceeds of sale would form part of the debenture-holders' security, but it does not follow that the power of sale conferred upon the promoters by that section can be exercised by the plaintiffs or by the court. But, unless it can be so exercised, the case cannot be distinguished from *Gardner's case*. The conclusions thus arrived at really dispose of this appeal. The principle of *Gardner's case* applies to all tramway companies governed by the Tramways Act of 1870, whether the promoters are local authorities or private individuals, or companies formed under the Companies Act, 1862, or companies created by special Act of Parliament.

In this particular case, if the old limited company were still subsisting, the holders of its debentures would not be entitled to a receiver and manager and a sale of the tramways and undertaking; and it is unnecessary to go through the special Act to show that it contains nothing to confer such rights upon them. Nobody contended that it did. The argument for the appellants assumed that the debenture-holders had such rights against the limited company, and it was contended that they had not been deprived of those rights by the special Act. This argument falls to the ground if the assumption on which it is based is unsound, as we hold it to be. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellants, *Spencer Whitehead*, for *Milwards*, Birmingham.

Solicitors for the respondents, *Munns & Longden*.

High Court of Justice.

Chan. Div. North, J. — Jan. 17, 18.

In re BOARDS.
KNIGHT *v.* KNIGHT. (*a.*)

Will—Construction—Blended fund—Realty and personalty—Legacies—Rateable payment.

When there is a bequest of legacies followed by a bequest of the proceeds of the real and personal estate, the legacies are primarily payable out of the personalty; the real estate is only charged in aid of the personalty. If they are directed to be paid out of a blended fund, then they are payable rateably out of the realty and personalty.

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Elliot *v.* Dearsley, 29 *W. R.* 494, 16 *Ch. D.* 322, *followed.*

Gainsford *v.* Dunn, 22 *W. R.* 499, *L. R.* 17 *Eq.* 405 (dicta *of* Jessel, M.R.), *discussed.*

Originating summons.

By his will, dated the 9th of January, 1878, the testator, Edward Boards, appointed H. A. Knight, Thomas Chapman, and Alfred Richardson executors and trustees of his will, and gave certain specific legacies, and bequeathed to his wife a legacy of £2,000 and a life annuity of £400. He directed that the annuity to his wife should be paid quarterly, and that his trustees should purchase, appropriate, and set apart, as soon as convenient after his decease, a sufficient fund or funds to answer the said annuity, and that such funds might consist partly of any of the stocks, shares, or securities forming part of his personal estate at the time of his decease. He devised and bequeathed to his trustees all his freehold and leasehold lands and hereditaments, and directed his executors and trustees to sell the same as soon as convenient after his decease. Then he gave directions to convert all his residuary personal effects into money so soon as convenient after his decease. And he directed his executors and trustees to stand possessed of the net proceeds arising from the sale and conversion of his real and personal estate and effects (after and subject to the payment of his debts and funeral and testamentary expenses and legacies, and after making due provision for the said annuity) upon trust for E. B. Knight, one of the defendants, and as to the funds and personal effects set apart to answer the annuity thereinbefore bequeathed, he directed that the same, after the death of his wife or the cesser of the said annuity, should fall into and form part of his residuary estate, and be held accordingly upon trust for the Royal Agricultural Benevolent Institution of Great Britain.

The testator died on the 11th of November, 1878.

The testator's widow died on the 5th of April, 1894.

The summons was taken out by the surviving trustees and executors to know who was entitled to the funds set apart to meet the annuity, such funds being partly the proceeds of the sale of real estate and partly of pure and impure personalty.

Stewart-Smith, for the plaintiffs, stated the facts.

Swinfen Eady, Q.C., and *Upjohn*, for residuary legatee.—The legacies are payable rateably out of the proceeds of the realty and the personalty, the testator having made a blended fund; and in any case, if in fact it was necessary to resort to the realty, then to that extent the gift to the charity fails: *Roberts* v. *Walker*, 1 Russ. & My. 752; *Allan* v. *Gott*, 20 W. R. 427, L. R. 7 Ch. App. 439. In *Gainsford* v. *Dunn*, 22 W. R. 501, L. R. 17 Eq. 408, Jessel, M.R., said: "The result of the cases is this, that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to distribute the legacy proportionably and rateably, as taken out of the mixed fund."

Cozens-Hardy, Q.C., and *Rowden*, for the charity.—We admit that the legacy must abate in the proportion which the impure personalty bears to the pure personalty. The realty is only charged in aid of the personalty. There is no direction to pay out of a blended fund, and the personalty is primarily liable. In *Elliott* v. *Dearsley*, 29 W. R. 494, 16 Ch. D. 322, James L.J., said (p. 329): "The rule of rateable payment does not extend beyond the things which the testator

has expressly directed to be paid out of the fund. Here the legacies are no doubt charged on the real estate by force of the word residue, but there is no direction to pay them out of the mixed fund. There is nothing therefore to disturb the ordinary rule that they are primarily payable out of the personal estate." That case governs this, and overrules the *dicta* of Jessel, M.R., in *Gainsford* v. *Dunn*.

Upjohn replied.

Micklem, for devisees in trust and personal representatives of the testator's heir-at-law.

NORTH, J.—In my opinion, under the terms of the will, the personal estate is primarily liable to the payment of the annuity fund. [The learned judge read and commented on the will, and continued:—] Having regard to a long series of cases, of which *Greville* v. *Browne*, 7 W. R. 673, 7 H. L. Cas. 689, is an example, it cannot be disputed that the direction to the trustees to hold the proceeds of the sale and conversion of the testator's real and personal estate after and subject to the payment of his debts and funeral and testamentary expenses and the legacies, and after making due provision for the annuity, upon trust for E. B. Knight, has the effect of throwing the legacies and the annuity upon the real estate; but whether they are to be thrown upon the real estate *pari passu* with the personalty, or only in aid of the personalty, if the personalty is insufficient, is not indicated by the words here used. What is the meaning of them? By the will down to this point the annuity is made payable out of the personalty only. Then comes this gift. Construing the words strictly, the gift is only of the net proceeds of the sale and conversion after something has been taken out of them; it is not a gift of the whole fund subject to certain deductions being made, but it is a gift of the "net proceeds" after certain deductions have been made. There is nothing to show when those deductions are to be made; that is provided for in another part of the will. I cannot see any direction that these sums are to be paid out of the entire fund.

It has been settled by authority that, where the personalty is insufficient, the real estate may be either charged in aid of the personal estate, or there may be a direction to make the payments out of realty and personalty *pari passu*; but I do not see that this gift of what is described as the "net proceeds" can mean the entire proceeds, or anything but what is left after all the other payments have been made. I think those words "net proceeds" are used here in precisely the same sense as that in which James, L.J., used them in *Elliott* v. *Dearsley*. I refer to what he said, not as deciding a point of law, but as illustrating the use of language. He said (16 Ch. D.), at the foot of p. 329: "The reasonable view of his intention is, that he considered that the mortgages on the estates which were to be immediately sold would be paid out of the proceeds of the sale of those estates, and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated." He there used the words "net proceeds" as indicating what was left after particular payments which had to be provided for had been taken from the gross proceeds; exactly as the same phrase is used in the present case. It seems to me that there is not in these words any direction for the payment of legacies or of the annuity fund out of the net proceeds of the whole; and, that being so, *Elliott* v. *Dearsley* is, I think, precisely in point. The annuity is not directed to be paid out of a mixed fund arising from the conversion of the real and personal estates, but out of a sum for which provision has to be made out of the personal estate. There is nothing, in my opinion, in the clause now under consideration to show more than that, if necessary, the real estate is to be resorted to in aid of the personalty. I cannot find any words which indicate that payment is to be made out of the real estate and the personal estate *pari passu*. Under these circumstances *Elliott* v. *Dearsley* is directly in point; and so far as the observations of Jessel, M.R., in *Gainsford* v. *Dunn* are, as they seem to me to be, inconsistent with *Elliott* v. *Dearsley*, I must follow the later decision of the Court of Appeal. I hold that the annuity fund is primarily payable out of the personal estate, and is charged on the real estate only in aid of the personal estate.

Order accordingly.

Solicitors, *Rooks, Spiers, & Wales; Morley, Shirreff, & Co.; G. O. Humphreys, Son, & Kershaw.*

Chan. Div. Kekewich, J. March 30.

In re FREME'S CONTRACT.
FREME *v.* HALL. (*a.*)

Vendor and purchaser—Land sold subject to incumbrance—Future interests in incumbrance—Jurisdiction of court to discharge incumbrance—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.

Where land has been sold subject to an incumbrance, the court has jurisdiction, under section 5 of the Conveyancing and Law of Property Act, 1881, *to discharge such incumbrance, even though, in doing so, it may be deciding as to future interests therein.*

William Purser Freme by his will, dated the 27th of February, 1877, appointed executors and trustees, and after making certain specific bequests to his son James Freme, gave and devised to his granddaughter Anna Helena Hall, the wife of Samuel Anton Hall, "an annuity of three hundred pounds a year, to be paid to her half-yearly, for her sole and separate use, and to be a charge upon my property in John-street, Liverpool; and after the death of my said granddaughter . . . . I direct that the said sum of three hundred pounds shall be raised and paid unto and amongst all her children as she shall by deed or will appoint, and in default of such appointment amongst all the children of my said granddaughter . . . in equal shares during their respective lives," and testator gave and devised to his granddaughter Ellen Elizabeth Graham Lloyd, the wife of Henry Graham Lloyd, "a like annuity of three hundred pounds to be a charge upon the said property in John-street aforesaid, and to be paid to her and her children in the same manner in all respects" as the annuity thereinbefore given to his granddaughter Anna Helena Hall. The testator also gave and devised an annuity of £150 per annum to his grandson Sidney Clement and his assigns for his natural life, to be paid half-yearly, such annuity to be charged upon such part of his Liverpool property as was not thereinbefore specifically devised to the testator's son James. And after making divers specific and pecuniary bequests, the testator devised to his executors all estates vested in him on trust or by way of mortgage, subject to the trusts and equities affecting the same respectively, and gave, devised, and bequeathed all his real and personal estate of whatever kind and wheresoever situate, not thereinbefore disposed of, unto his said son James absolutely.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

By a codicil dated the 22nd of March, 1877, the testator, after reciting that he had by his said will given and devised to each of his granddaughters, Anna Helena Hall and Ellen Elizabeth Graham Lloyd, an annuity of £300 per annum, and had also by his said will given to his grandson Sidney Clement an annuity of £150 per annum, the said three several annuities being payable and charged in the manner and on the hereditaments in his said will particularly mentioned, thereby revoked the devises of the said several annuities, and instead thereof gave and devised as follows—namely: "To each of my said granddaughters . . . an annuity of £150 per annum, to be payable and charged in the same manner and on the same hereditaments as the said several annuities of £300 each were in and by my said will respectively made payable and charged," and to his said grandson an annuity of £100 per annum, to be payable and charged in the same manner and on the same hereditaments as the annuity of £150 was in and by his said will made payable and charged.

The testator died on the 10th of September, 1878. The testator's property in John-street (the name of which was afterwards changed to North John-street), Liverpool, passed by virtue of the residuary devise in his will to his son James Freme.

The testator's granddaughter, Anna Helena Hall, had five children by her marriage, the youngest of whom was born on the 26th of July, 1883, and four of whom were surviving.

His granddaughter Ellen Elizabeth Graham Lloyd had four children by her marriage, the youngest of whom was born on the 1st of February, 1870, and three of whom were surviving.

The annuitant Sidney Clement sold and assigned his annuity of £100 per annum to John Rowden Freme.

The testator's son James Freme died on the 21st of April, 1888, intestate, the said John Rowden Freme being his eldest son and heir-at-law.

By a contract in writing, dated the 18th of January, 1895, and made between the said John Rowden Freme of the one part and the Royal Insurance Co. of the other part, the said John Rowden Freme agreed to sell to the said company, who agreed to purchase for £30,200, the said property in North John-street, Liverpool, subject to certain conditions of sale, one of which was that the vendor would immediately after the sale apply to the Chancery Division of the High Court of Justice under section 5 of the Conveyancing Act, 1881, and endeavour to obtain an order discharging the property from the annuities; but if the court should refuse to make such an order, or should, as a term thereof, require payment into court of a sum exceeding the purchase-money, the vendor was to be entitled to rescind the contract in the same manner and upon the same terms as if the purchasers had made and insisted on a requisition which the vendor was unable to comply with.

Neither of the testator's said granddaughters had ever executed any deed purporting to exercise the power of appointment contained in the said will.

This was an originating summons intituled "in the matter of the contract and of the Conveyancing Act, 1881," by John Rowden Freme against Anna Helena Hall and her surviving children, Ellen Elizabeth Graham Lloyd and her surviving children, and the Royal Insurance Co., for an order that he might be at liberty to transfer into court to the credit of the matter the sum of £12,000 £2 10s. per Cent. Consols, or such other sum of like Consols as the court should direct, and that the costs of the respondents, other than the Royal Insurance Co., might be taxed, and that upon such transfer into court and payment of the said costs and expenses the applicant might be at liberty to apply that the hereditaments comprised in the above-mentioned contract might be declared free from the annuities charged thereupon by the above-mentioned will and codicil other than the annuity by the said codicil given to the testator's grandson Sidney Clement, and that directions might be given for the payment, out of the dividends on the said Consols so transferred, of the said annuities to the persons entitled thereto, and for payment of the balance of such dividends to the applicant.

When the summons came on for hearing the plaintiff obtained leave to amend it by intituling it "In the matter of the estate of William Purser Freme, deceased," so as to enable him to submit questions arising on the construction of the will and codicil as to the existence and amount of the incumbrances charged upon the land sold. These questions were argued and decided, but it is sufficient to say, as regards them, that his lordship was of opinion that the land sold was charged with an annuity of £150 per annum in favour of each of the testator's said granddaughters for life, and after her death for her children.

Warrington, Q.C., and *Arkle*, for the applicant.

Marten, Q.C., and *Ingle Joyce*, for Anna Hall and her children.

Renshaw, Q.C., and *E. S. Ford*, for Ellen Lloyd and her children, submitted the question whether the court had jurisdiction to discharge the annuities, seeing that other persons might possibly be interested in them in future, and referred to *Curtis* v. *Sheffield*, 30 W. R. 581, 21 Ch. D. 1.

KEKEWICH, J.—It is somewhat strange that applications under this section of the Conveyancing Act, 1881, are so seldom made to the court. I speak, of course, only from my own experience. Though I have, no doubt, had several of these applications before me, I remember at present only one case which came on in chambers. That only goes to show that the section is not so useful as the Legislature contemplated. It is a remedial enactment for facilitating the sale of land. Until the Act was passed a purchaser might object to complete the sale if there happened to be any incumbrance such as a small annuity charged upon the land sold, and in that way got off his bargain until an indemnity was offered him. It is possible that purchasers do not make the difficulty often because they know that it can be remitted to the court and cleared away, and that is, perhaps, why applications of this kind are not more frequent.

I am bound to regard it as a remedial Act, to which I should give such elasticity as the words permit. The section contemplates the existence of a "charge," —in the earlier part of the section it is called an "incumbrance." It presupposes the existence of an incumbrance. Whether there is an incumbrance or not cannot be determined under this section. Mr. Warrington anticipated that objection, and asked for an amendment of the summons in order to ascertain first from the construction of the will whether there is an incumbrance. That is quite right, and I do not see why I should not construe it, and when construed then use the Act for its remedial purpose.

The objection, however, is taken that I would now be deciding as to future interests. But however that may be, and notwithstanding the distinction in Curtis v. *Sheffield*, the court has of late years been disposed to be far less strict than formerly with regard to such interests, and has recognized the advantage of deciding the question at once and enabling the estate to be

divided. I have done it often myself, and other judges have also done it (sometimes on the fiction that it is intended to sell at once). The court has been of late years very much more ready to decide questions *in futuro* than it formerly was. Of course this should not be done except where it is necessary; but where is it more necessary than where a vendor wants to sell land and a title cannot be cleared up without the sanction of the court?

The section itself seems to support that view, for it speaks of land subject to a charge "whether payable or not." That is, it contemplates a charge payable *in futuro*. It provides that you are to make provision for a charge that is not immediately payable. Thus the section seems to come in aid of the greater elasticity of view of modern times. Therefore I think that I am obliged to go into the matter, it being a great convenience to enable this property to be sold, and on the other hand to enable the vendors to get the purchase-money. There will be a declaration that the plaintiff is at liberty to transfer into court £6,250 2½ per cent. Consols to the account of each of the annuities to the testator's granddaughters and their respective children; that the costs of these ladies and their children be taxed as between solicitor and client and paid by the applicant; and that on such transfer into court and payment of costs liberty be given to apply for release of the land from the annuities.

Solicitors for the applicant, *Gibbons & Arkle*, Liverpool.

Solicitors for the Halls, *Rowcliffes, Rawle, & Co.*, for *Holland & Rigby*, Ashbourne.

Solicitors for the Lloyds, *Paterson, Snow, Bloxam, & Kinder*, for *Peele & Peele*, Shrewsbury.

Chan. Div.
Kekewich, J. } March 1.

GROOM v. CHEESEWRIGHT. (a.)

Solicitor and client—Security for costs—Charging order—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

The court will not make a charging order for costs under section 28 *of the Solicitors Act*, 1860, *where the solicitor has already accepted security for the costs.*

Motion.

This was an application by the plaintiff's solicitor for a charge upon certain shares and other property recovered in this action in respect of his costs in this action as the plaintiff's solicitor.

The action had been commenced to recover from the defendants, Cheesewright and Paterson, certain shares and sums of money.

During the continuance of the action the plaintiff had executed a mortgage to one Maccall, whereby he assigned to Maccall (*inter alia*) the cash and shares coming from the defendants upon trust in the first place to secure to the applicant the payment of his costs, charges, and expenses due or to become due in the said action, and afterwards for securing payment of certain scheduled debts.

The action was continuing as against the defendant Paterson, but had been settled so far as regards Cheesewright by the delivery of a certain number of the shares in question to the applicant on behalf of the plaintiff.

Renshaw, Q.C., and *Macpherson*, for the applicant.—We are entitled to a charge under section 28 of the Solicitors Act, 1860.

C. E. E. Jenkins, for the plaintiff.

Renshaw, Q.C., replied.

KEKEWICH, J.—In this case I have before me a point not covered by authority. The plaintiff gave his solicitor, during the progress of the action, a charge for his costs on the property to be recovered in the action, and by the deed he assigned to a trustee not only the property which might be recovered in the action, but also other property upon trust in the first place to secure to the solicitor his costs, charges, and expenses in connection with the action. Subject to the trustee's costs, charges, and expenses, the solicitor has accepted a first charge upon this property and he is now asking for a charging order upon the same property.

The intention of the Legislature under this Act is to give the solicitor an ancillary right, and not to displace the liability of the client to pay the solicitor out of his own pocket, and it has been doubted whether a charging order ought to be made at all where the client is a responsible person well able to pay. It was not intended that the right of the solicitor to a charging order should be absolute, but that it should be a right ancillary to his right to be paid on his retainer. On the general principle that for a solicitor to accept security for his costs is inconsistent with his right to payment otherwise, it seems to me that the applicant has put it out of his power to get the order he now asks.

Application refused, without costs.

Solicitors, *E. Kimber; H. W. Christmas.*

Chan. Div.
Romer, J. (for Chitty, J.) } April 5.

In re WYLIE.
WYLIE v. MOFFAT. (a.)

Married woman—Will—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 3.

Section 3 *of the Married Women's Property Act*, 1893, *applies to every will of a married woman who dies after the coming into operation of the Act.*

Held, therefore, that the will of a married woman dying after the Married Women's Property Act, 1893, *made during coverture and before the Act, and not re-executed or republished after the death of her husband, passed all the estate, whether separate or other, of the testatrix.*

Summons.

The testatrix was married to Mr. Wylie in 1834. By her will, made in 1862, and a codicil made in 1884, she, in the event of her surviving her husband, in effect gave all her property upon trust for the defendant, her nephew, for life, and after his death for his eldest son absolutely. Mr. Wylie died in 1887. The testatrix died in May, 1894. She was at the date of her death entitled to some £30,000, including savings out of her income, which were not her separate property at the dates of the will and codicil.

The question arose whether the will and codicil of the testatrix operated to pass all the personal estate of which the testatrix was possessed at her death, or only so much, if any, as was her separate estate at the time of her making the will and codicil.

By section 24 of the Wills Act, 1837, it was enacted that every will, with respect to the property com-

(a.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

prised in it, shall speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. By section 3 of the Married Women's Property Act, 1893, it is provided that section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it; and such will shall not require to be re-executed or republished after the death of the husband.

Davenport, for the plaintiff, the executor and trustee of the will.

Farwell, Q.C., and *F. L. Wright*, for the beneficiary.—Section 3 of the Act of 1893 amends the Wills Act, and the testatrix having died after the amending enactment, that enactment applies, and all the testatrix's property passes to her legatees. There are no words in section 3 like "hereafter" in section 1, and "now or hereafter" in section 2.

They referred to the Married Women's Property Act, 1882, ss. 1, 5, and the cases of *Willock* v. *Noble*, 23 W. R. 809, L. R. 7 H. L. 580; *In re Cuno, Mansfield* v. *Mansfield*, 43 Ch. D. 12, 38 W. R. Dig. 125; *In re Bowen, James* v. *James*, [1892] 2 Ch. 291, 40 W. R. Dig. 142; and *In re Bridger, Brompton Hospital* v. *Lewis*, 42 W. R. 179, [1894] 1 Ch. 297.

Byrne, Q.C., and *Clauson*, for the next of kin.—The Act of 1893 cannot, in the absence of express words showing such an intention, affect an instrument made before it came into operation. It only applies to wills executed after the Act. Moreover, the cases show that the section should be construed as confined in its operation to the separate property of the wife.

ROMER, J.—In my opinion section 3 of the Act of 1893 applies to every will of a married women who dies after the coming into operation of the Act. This is a beneficial enactment, and its operation ought not to be cut down without cogent reason. Having heard all that can be urged to the contrary, I can see no good or cogent reason for cutting down the section. I am asked to construe the section as if the words "made after the passing of this Act" were inserted after the word "will." I do not think that construction right. There is nothing which justifies the insertion of any words. I therefore make a declaration that the will and codicil passed all the property, whether separate or other, of the testatrix.

Solicitors, *Edward F. Turner; Stileman, Neate, & Toynbee*, for *Toynbee, Larken, & Toynbee*, Lincoln.

Chan. Div. } Feb. 27;
Vaughan Williams, J. } March, 13, 20, 21.

In re LONDON METALLURGICAL CO. (*a.*)

Company—Winding up—Successful litigant—Costs of—Priority—Immediate payment—Companies (Winding-up) Rules, 1890, *r.* 31.

A. obtained an order that his name should be removed from the list of contributories of a company which was being wound up, and that the liquidator should, "out of the assets of the company," pay the applicant his taxed costs of the application. The liquidator having refused to pay, except in due course of administration in the winding up, A. took out a summons asking that the liquidator might be ordered to make immediate payment. The liquidator had a sum of money in hand, but the costs of realization in the winding up had not been paid, and a similar order to the applicant's, and prior in date, had been obtained by another person. There were also some claims put forward by the liquidator, in respect of which he had to give security for costs.

Held, that the matter ought to be referred back to chambers, with liberty to the liquidator to bring to the attention of the registrar any present claims or rights to immediate payment, and that, if there was a sufficient sum to warrant payment to the applicant of his costs, he was to have them; if there was not such a sum, there could be no order for immediate payment; but, even in the latter case, the right of payment ought not to be postponed indefinitely.

In re Home Investment Society, 28 *W. R.* 576, 14 *Ch. D.* 167, *and* In re Dominion of Canada Plumbago Co., 32 *W. R.* 425, 27 *Ch. D.* 33, *followed.*

Ex parte Percival, *L. R.* 6 *Eq.* 519, 17 W. R. Ch. Dig. 76; *and* In re Dronfield Silkstone Coal Co., 31 *W. R.* 671, 23 *Ch. D.* 511, *not followed.*

This was a summons taken out in the winding up of the above-named company by George Marcus Parker, asking for an order that the liquidator might be ordered forthwith to pay to the applicant out of the assets of the company the sum of £13 2s. 2d., the amount of the applicant's taxed costs under an order dated the 11th of April, 1894, and also to pay to the applicant the costs of this application personally. The order to wind up the company was made on the 18th of May, 1893. The applicant, on the 23rd of February, 1894, took out a summons to have his name removed from the list of contributories of the company.

On the 11th of April, 1894, an order was made acceding to his application, and it was ordered that the liquidator should, out of the assets of the company, pay to the applicant his taxed costs of the application; and the liquidator's costs of the application, including what he should so pay to the applicant in pursuance of that order, were to be his costs in the winding up of the company.

The liquidator had a sum of £974 13s. in hand, but the costs of realization in the winding up had not been paid, and a similar order to the applicant's and prior in date had been obtained. The liquidator had commenced three actions, in each of which he had been required to pay into court money as security for costs.

Younger, for the summons, referred to *In re Home Investment Society*, 28 W. R. 576, 14 Ch. D. 167, 17 *In re Dronfield Silkstone Coal Co.*, 31 W. R. 671, Ch. D. 511; *In re Dominion of Canada Plumbago Co.* 32 W. R. 425, 27 Ch. D. 33; *In re Staffordshire Gas and Coke Co.*, [1893] 3 Ch. 523; Companies Act 1862, s. 110.

Ashton Cross, for the liquidator.—When an order made to pay out of the assets, all persons holding such orders are entitled to be paid rateably out of the assets as soon as they are ascertained, but not "forthwith." The assets are a fund the court has to administer, and ought to be distributed rateably with regard to the statutory priorities. If this were not so there would be a scramble to get orders, and sections 35 and 87 of the Companies Act, 1862, were enacted to prevent such a scramble. Orders to pay out of the assets give no priority. In *Ex parte Perceval*, L. R. 6 Eq. 519, 17 W. R. Ch. Dig. the facts were similar to those in the present case. The right is only a right to be paid in due course of administration: *Cape Breton Co.* v. *Fenn*, W. R. 386, 17 Ch. D. 198, 205. It can never have been meant that each successive applicant should

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

help himself out of the assets. The liquidator must wait to see if the assets are sufficient for all the holders of such orders, as in the present case, for if they are not sufficient they will have to be reduced rateably. The decision of Chitty, J., in *In re Dronfield Silkstone Coal Co.* is a composite decision. One part of the decision has been questioned, but the main part of the decision stands, that all costs to be paid out of assets must be paid *pari passu*, without regard to the dates of the orders. [VAUGHAN WILLIAMS, J.—Supposing the winding up extends over ten years, what happens then?] Special circumstances must be dealt with on special applications. Here the question is as to the common practice. If the first comer is allowed to seize on the assets it would be impossible to do equity between the successive comers. *In re Dronfield Silkstone Co.* applies to costs incurred in the winding up that can be dealt with without bringing actions outside the winding up. The case of *In re Dominion of Canada Plumbago Co.*, relied on by the other side, is based on two misunderstandings, and is not consistent with later decisions of Pearson, J. The first misunderstanding is that of the decision of Lord Cairns in *Smith's case*, 16 W. R. 170, L. R. 3 Ch. App. 25. That is a decision in external litigation where the company itself is litigant. Secondly, Pearson, J., treats an order on the liquidator to pay and recoup himself as if it were the same thing as an order to pay out of the assets. The Court of Appeal disapproved of the learned judge's grounds for his decision. Pearson, J., in *Batten* v. *Wedgwood Coal Co.*, 33 W. R. 303, 28 Ch. D., at p. 325, directs costs of realization to be paid first, as being a necessary preliminary to constitute the fund to be distributed. This is inconsistent with the former decision of Pearson, J., but is correct. See also *Smallpage and Brandon's case*, 30 Ch. D., at p. 604, 34 W. R. Dig. [VAUGHAN WILLIAMS, J.—The different kinds of orders were never intended to give different priorities.] Ordering payment at once, without regard to subsequent comers, is to give priority, and to order a liquidator to pay personally is an order for immediate payment, which would give priority. [VAUGHAN WILLIAMS, J.—referred to section 1, sub-sections 2 and 3, of the Preferential Payments in Bankruptcy Act, 1888.] *Salisbury-Jones & Dale's case*, [1895] 1 Ch. 333, shows that the Court of Appeal recognizes a broad distinction between an order to pay out of the assets and an order that the liquidators pay personally. The case for the applicant is based on a confusion of these two orders. Perhaps all the cases are now superseded by r. 31 of the Companies (Winding-up) Rules, 1890. In order to ascertain what the assets are you must have recourse to the statutory definition contained in r. 31. The liquidator must provide for the Board of Trade fees before he pays anyone, except there is a special order of the court. [VAUGHAN WILLIAMS, J.—The *onus* of showing special circumstances is on the liquidator.] It would be most inconvenient to disclose the state of the liquidation. The time of payment under an order to pay out of the assets is only when it can be ascertained what the prior charges are, and that there are assets to meet them. These orders are treated as orders for immediate payment winding up will become impossible.

Langer, in reply.—*Ex parte Percival* is no longer authority. Rule 31 of the Rules of 1890 contains the words "subject to any order of the court." Before the old practice remains.

I also referred to *In re South Kensington Co-operative Stores*, 29 W. R. 662, 17 Ch. D. 161.

VAUGHAN WILLIAMS, J.—Before dealing with the application I will endeavour to state the principles on which the court proceeds in these matters, because cases in which the court has to deal with the costs of litigants, who are successful as against the liquidator, are of frequent occurrence. If what I state is in accordance with what has been laid down in the Court of Chancery and the Chancery Division it will be a guide in the future, and if not, the liquidator can obtain a review of my decision elsewhere. It was at one time contended that the terms of the Companies Act, 1862, were such that a successful litigant in proceedings with the liquidator, or with the company through its liquidator, or with the company after liquidation had begun, had to come in and prove in respect of his claim with the creditors of the company who were such at the date of the order for winding up. But that contention was disposed of by Malins, V.C., in *In re Home Investment Society*.

I start, therefore, with the proposition that successful litigants and other persons who become creditors after the winding-up order are *primâ facie* entitled to be paid in full, and I do not understand that this is disputed by Mr. Ashton Cross. Thus two steps have been taken in the line of reasoning—(1) that the successful litigant is not in competition with the creditors, and (2) that *primâ facie* he is to be paid in full. Questions of priority may arise, but they can only do so when there is a deficiency in the estate, and not where everybody can be paid in full. Then out of what are the successful litigants to be paid? They are to be paid out of the assets of the company, though of course an order may be made going beyond that, and directing the liquidator to pay them personally. The assets of the company are being administered by the court; and thus one arrives at a fund to be applied, having regard to the rules by which the administration is to be governed. In this way questions of priority have arisen. *Ex parte Smith*, L. R. 3 Ch. App. 125, decides at least this — that a successful litigant in proceedings commenced after a winding-up order has been made, has priority over the general costs of liquidation. To my mind that is laid down in the very plainest manner by Lord Cairns, and subsequent cases recognize that he did so. That proposition was affirmed in *In re Home Investment Society* and also in *In re Dominion of Canada Plumbago Co.*, certainly by Pearson, J., and, as I read it, by the Court of Appeal also. I am only concerned here to show that by a long and uninterrupted stream of authority a successful litigant has been held entitled to be paid his costs in priority to the general costs of liquidation, and, that being so, I will not at present consider what particular costs come before or rank *pari passu* with his costs. If there are any such other costs, what is the right of the successful litigant, and has he a right to immediate payment? *Primâ facie* he has. If the estate is solvent, in practice he obtains immediate payment, although that does not show that he has a right to it. I cannot understand why he should not be paid at once. If the estate is insolvent there must necessarily be an abatement; but even then, until insolvency is shown, the right of the successful litigant is to be paid in full; although I recognize that the fact of the fund being in court makes a difference, because the litigant has not to stretch his hand to seize the property of the company, and the court must be satisfied as to his right before it allows him to be paid. That being his *primâ facie* right, the *onus* is on the liquidator to show that the condition of the assets is such that the successful litigant is not entitled to what would *primâ facie* be his right. It may be that the costs of the winding-up petition have not been paid, in which case the court will postpone payment of his costs till those costs have been

paid. But the *onus* is on the liquidator to show that the convenient course of immediate payment should not be followed. If the liquidator shows that there are persons who have a prior right to, or who are entitled *pari passu* with, the successful litigant, the court will not make any order in his favour without providing for their claims.

In the present case I am told that there is some gentleman who has obtained an order for payment of costs which is prior in date to the order obtained by the applicant. I quite agree that priority in the date of the order makes no difference. When once a person is in a position to say, "I am entitled to rank on this fund" he and all other persons in the same position must be dealt with on a footing of equality irrespective of the dates of their judgments. The obtaining of the order for costs creates no sort of a charge on the assets, but I cannot see that *Cape Breton Co.* v. *Fenn* decides more than that. Jessel, M.R., said in that case: "Upon that application an order was made that Mr. Rooney's costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge on the assets; it limits the right of the person in whose favour it is made to payment out of the assets, but it does not create a charge on them. If it did, the persons in whose favour such orders were made would have priority according to the dates of their orders, but that is not so. In many cases the liquidator has priority over all these orders, even for subsequent costs. The order does not create a charge on the assets, but gives a right to get paid out of the assets in due course of administration." The remarks of Jessel, M.R., in that case only show that when there is an insolvent fund, and various claimants are entitled to rank on that fund, the date of the order gives no priority. The liquidator seeks to treat that case as a decision that a successful litigant who gets an order for costs is not entitled to payment until provision has been made for the whole costs of the liquidation, including contingent debts, and fresh debts incurred and to which priority is given under rule 31 of the Rules of 1890, or the general practice of the Chancery Division. I do not understand the case to decide anything of the kind, and I am not going to hold that the right to payment is postponed until all the claims in the winding up have come in. I hold that the order gives the right to immediate payment in full, *primâ facie*, or that if there are other persons who have existing claims prior in right or equal to his own, then he can only get payment subject to their priority or on an equality with them. It is said that Lord Romilly decided in *Ex parte Percival*, that the litigant was not entitled to immediate payment, and that no order for payment to him could be made while the liquidator's remuneration remained unpaid; and it seems to me that he did so decide. But I cannot agree that that decision was recognized as correct by the Court of Appeal in *In re Dominion of Canada Plumbago Co.* When that case was before Pearson, J., he said in terms that the litigant was entitled to be paid forthwith, and that means, of course, in conjunction with others in the same position and subject to abatement in case of deficiency.

But it is said that the Lords Justices went on a different principle, and followed *Ex parte Percival*. It seems to me that they did nothing of the kind. [His lordship discussed the facts of *In re Dominion of Canada Co.*, and continued:—] *Smallpage and Brandon's cases*, were then relied on, but have nothing whatever to do with the present case. If a trustee in bankruptcy is a litigant and is unsuccessful, he is made personally liable for costs, but it is not so with liquidators. The person who has dealt with the syndicate or estate is left to come upon the estate; but, even in bankruptcy, cases sometimes arise of trustees declining to embark in litigation, because they may be made personally responsible for costs, in which case the creditors often come forward and indemnify them. It is said that if liquidators were bound at once to pay the costs of successful litigants, windings up would soon come to an end. But that is not so. If necessary creditors in liquidations, as in bankruptcy, must provide an indemnity fund. If the result of the rule of practice I am laying down is that where liquidators start proceedings knowing there is no estate on which the adverse litigant can come, creditors should find that liquidators will not go on without an indemnity fund, so much the better. I am not to be deterred by being told that liquidators of insolvent estates will be deterred from bringing actions which may swallow up the assets.

Having laid down the rule which I think ought to prevail, I now propose to say a word or two about the practice as now existing under rule 31 of the Companies (Winding-up) Rules of 1890. What I have said before relates to the practice before that time. As I understand the decisions to which I have referred, the result was that, prior to 1890, if costs were ordered to be paid out of the assets to a successful litigant, such litigant was entitled to payment in full, and if the estate was insolvent or insufficient, then his right was to be paid in priority to the general costs of the liquidation, and also in priority to the remuneration of the liquidator. Practically, therefore, such costs came first after the costs of the petition to wind up the company. When those were once paid there was nothing else before those costs. A question sometimes arises with regard to the costs of the realization. Of course no one would suppose that he could go against the gross assets; the net assets are all that he could go against, and the costs of a successful litigant would thus, if the costs of the realization be taken into account, come in the third place, not in the second. Subject to those costs, it seems to me that the position of a successful litigant was, as regards priority, before the rules of 1890, in the second place. Then was there any limitation to his right of immediate execution? The answer to that question is that if there were other claimants with an equal or a prior right to him he could not have had execution without providing for the claims. Then came rule 31 of 1890. It is to be observed that the costs of a successful litigant are not mentioned there at all, nor, in my opinion, were they intended to be mentioned. They were provided for by the words "subject to any order of the court." The question is what a litigant gets when his costs are ordered to be paid out of the assets of the company, and the whole of the rule as to priority is subject to that. So the costs of a successful litigant come in the same place as before the rules were made.

Then, as regards the present case, it has been brought to my attention that there are certain persons who have got orders which will rank in equality with those of the present claimant. It has also come to my notice that there are outstanding claims; there are said to be three, put forward by the liquidator, in respect of which he had to give security for costs. I suppose he did that out of the estate. I do not know how that is, and I decide nothing as to his right to do so. I am also told that there are other matters which may have to be gone into. There is in hand a sum of a little more than £1,000, which would be *primâ facie* sufficient to pay the costs, but I do not dispose of that matter now. What I propose to do is to order that this matter be referred back to chambers, with liberty to

liquidator to bring to the attention of the registrar any present claims, or present orders, or rights to immediate payment; and if it appears, after taking all that into consideration, that there is a sufficient sum to warrant the payment to this applicant of his costs, then he may have them. If it appears that there is not a sufficient sum, then I cannot make any order for immediate payment. At the same time I do not think that, even in such case, the present applicant, who has got an order for payment, is to have his right of payment postponed, while the whole of the assets may be wasting away in the sunshine of liquidation. I think that the applicant and those who are in the same position as he is, ought to have an opportunity of having some time fixed when the fund available should be distributed, so I order that, in case the registrar comes to the conclusion that there is not a sufficient sum to allow payment of these costs, he should send the matter back to me with a certificate of what the sum is and what claims on it there are, and I will then see what can be done. The costs of both applicant and liquidator must be paid out of the assets.

His lordship added that if there were Board of Trade fees immediately payable the registrar was to take them into account, but he was not to regard future Board of Trade fees.

Solicitors, *Wynne, Holme, & Wynne; G. R. Grant & Co.*

Q. B. Div.
(Day and Wright, JJ.) April 26.

MORGAN *v.* JACKSON. (*a.*)

Landlord and tenant — Game — Agreement by tenant occupier to let the "sole right of killing all winged game, hares, and rabbits" on farm land to a person other than his landlord — Ground Game Act, 1880 (43 *&* 44 *Vict. c.* 47), *ss.* 1-3.

Section 3 *of the Ground Game Act,* 1880, *applies only to an agreement made as between a tenant and his landlord whereby the tenant agrees to divest himself of his right to take the ground game, and does not prevent a tenant occupier from assigning any sporting rights he may have to a third party for money value.*

Appeal from a decision of his Honour Judge Owen, sitting at the Monmouth County Court, who had nonsuited the plaintiff in an action in which he sought to recover from the defendant £40, being the balance due for rent under a lease of the sporting rights over a farm of which the plaintiff was the tenant.

The facts, which were not in dispute, were as follows:—Llantellan Farm, in Monmouthshire, was the property of a Mrs. Beavan, and some years ago the plaintiff Morgan became her tenant from year to year, having the right of shooting over the farm independently of the Ground Game Act, 1880. In 1889 Morgan agreed with Jackson, a neighbouring farmer, to lease him his sporting rights, and an agreement was made by the parties themselves which contained agreements to the effect that the defendant Jackson should have the "sole right of killing all winged game, hares, and rabbits" on Llantellan Farm; that the lessor should preserve the game; that the defendant should pay him for the shooting £15 at the end of each season. Each party had the right to terminate the agreement by giving two years' notice in writing. Such a notice was duly given by the plaintiff in February, 1892. Jackson had shot over the farm for five years, and paid as rent at different times £35. It was admitted by the defendant at the trial that if the lease was not void under section 3 of the Ground Game Act, 1880, the amount claimed was due. That section provides that "every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier, as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void."

A. Gwynne James, for the appellant.—The county court judge was wrong in deciding that the agreement was made for an illegal consideration and was void under the provisions of the Ground Game Act, 1880. Section 3 of that Act does not apply to the present case at all. It is applicable only to a case in which a tenant and his landlord combine to defeat the rights of the former. Here the agreement to kill game was made between a tenant occupier, who had an unrestricted right to kill the game on the farm, and a third party. The agreement, therefore, is not affected by the statute at all, and the rent can be recovered.

J. Corner, for the respondent.—Under the Act the agreement is void, at any rate so far as it purports to assign to Jackson the sole right to kill the ground game on the farm. Section 2 must be read with section 3. Section 2 enacts "that where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game he shall nevertheless retain, and have, as incident to and inseparable from such occupation the same right to kill and take ground game as is declared by section 1 of this Act." The contract to permit Jackson to kill the winged game, hares, and rabbits on the farm must be read as one entire contract. That part of it which refers to the ground game is clearly made illegal by the statute, and therefore the whole contract is bad, and money agreed to be paid under it cannot be recovered.

A. Gywnne James replied.

DAY, J.—I think the decision of the county court judge is wrong, and must be set aside. In my opinion section 3 is intended to prevent a tenant and his landlord combining together to defeat the object of the Act, which was passed for the better protection of occupiers of land against injury to their crops from ground game. Morgan, in the present instance, comes within section 2 of the Act as the person who occupies, and is "entitled otherwise than in pursuance of the Act to kill and take the ground game." There is nothing in any part of that section, or in fact in any part of the Act which makes it illegal for such a tenant occupier to enter into an agreement with some third party for money value to enjoy his right of killing the game on the farm land. A tenant occupier was free to make such an agreement before the Act was passed, and there is nothing in the Act which prevents his doing so still.

WRIGHT, J.—I agree, for I think that the words of the agreement may be read conjointly with those of the Act. There is nothing in the agreement inconsistent with the provisions or intention of the Act. The express object of the Act was to secure for the occupier an inalienable right, which he could not part with even if he wished to, of keeping down the game on the land he paid rent for, in spite of any attempt

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

that his landlord might make to prevent him. That I take to be the object of section 3—that a tenant shall not part with his personal right to take game. Section 1 sets out that in pursuance of the Act the occupier shall have the right to kill and take ground game concurrently with any other person who may be entitled to kill and take ground game on the same land, and if he is unable or does not desire to do so himself, there are provisions made in the sub-sections that follow for his getting the game taken by an authorized servant and certain members of his family. Under the agreement, Jackson was in the position of a person duly authorized by Morgan to kill the game as provided by sub-section (1) of section 1, and it would be wrong to hold that because Jackson agreed to pay Morgan for the privilege of shooting his game, therefore the agreement came within the meaning of section 3, and Jackson was released from any liability to pay for the shooting which he had enjoyed. Moreover, I am inclined to think that under section 2, Morgan would still retain his personal right to kill the ground game concurrently with Jackson's right to do so under an agreement such as the one we have been asked to consider.

Order for new trial.

Solicitors for the appellant, *Thomas White & Sons*, for *Garrould*, Hereford.

Solicitors for the respondent, *Saunders, Hawksford, & Bennett*, for *Corner & Co.*, Hereford.

Q. B. Div. (Cave and Wright, JJ.) March 21, 22, 30.

NORRIS v. CRAIG. (a.)

Landlord and tenant—Lease—Sub-lease for a longer term—Assignment by lessee—Reversion by estoppel.

B. demised certain premises to W. for a term of twenty-one years. W. demised the premises to the defendant for a term of forty years less three days. Subsequently W. assigned to the plaintiff the premises demised by B., subject to the under-lease by W. to the defendant. In an action brought by the plaintiff against the defendant to recover arrears of rent,

Held, that, assuming, but not deciding, that W. had a reversion by estoppel subject to the under-lease for forty years less three days, that reversion was not purported to be conveyed to the plaintiff by the assignment from W., and therefore the right to sue on the covenants in the under-lease remained in W., and did not pass by the assignment to the plaintiff.

Appeal of the plaintiff from the judgment of the Recorder of the City of London, sitting at the Mayor's Court, nonsuiting the plaintiff.

The facts of the case were as follows:—

By a lease dated the 1st of February, 1893, one Bolton demised certain premises in Fleet-street to one Wilson for a term of twenty-one years from the 29th of September, 1885, at a yearly rent of £180.

On the 15th of February, 1893, Wilson demised the premises to the defendant for a term of forty years less the last three days thereof, from the 29th of September, 1885, *i.e.*, for a longer term than Wilson himself had.

On the 16th of January, 1894, Wilson assigned to the plaintiff all the said land and premises demised by the lease of the 1st of February, 1893, to Wilson, to hold for the residue of the term of twenty-one years subject to the indenture of under-lease of the 15th of February, 1893, between Wilson and the defendant.

On the 30th of January, 1894, the defendant paid the rent which had become due at Christmas to the plaintiff, who was then acting as Wilson's solicitor. After the next quarter's rent (*i.e.*, that due on Lady Day, 1894) had become due, the plaintiff gave the defendant notice in writing of the assignment by Wilson to him, and requested the defendant to pay the rent to him. The defendant refused to pay the rent due at Lady Day, 1894, on the ground that Bolton, the lessor to Wilson, had previously to the demand of the plaintiff, viz., on the 30th of March, re-entered on the premises for various breaches of covenant in the head lease.

The plaintiff, as assignee of Wilson, commenced this action to recover the quarter's rent due at Lady Day, 1894.

The defendant by his fourth plea pleaded that at the time of the alleged assignment by Wilson to the plaintiff, Wilson was not entitled to any estate or interest of or in the said premises. The defendant also pleaded that Wilson did not assign to the plaintiff.

At the trial an application was made by the plaintiff to the recorder for leave to join Wilson as plaintiff. This application was refused, and the recorder nonsuited the plaintiff.

The plaintiff appealed.

McCall, Q.C., and *Austin Metcalf*, for the plaintiff.—If the action had been brought by Wilson, there could have been no defence, because the defendant could not have denied his lessor's title. The plaintiff, by reason of the assignment to him, stands in the same position, and has the same rights, as Wilson, his assignor. Although there was, in fact, no reversion to assign, there was in law a reversion by estoppel.

They cited *Wollaston* v. *Hakewill*, 3 Man. & G. 323; *Williams* v. *Hayward*, 7 W. R. 563, 1 E. & B. 1040; *Cuthbertson* v. *Irving*, 8 W. R. 704, 4 H. & N. 742, 6 H. & N. 135; *Doe* v. *Bateman*, 2 B. & Ald. 168; *Beardmore* v. *Wilson*, 17 W. R. 54, L. R. 4 C. P. 57; *Hyde* v. *Warden*, 26 W. R. 201, 3 Ex. D. 72.

Lawson Walton, Q.C., and *Frank Gover*, for the defendant.—The nonsuit was right. Assuming that there was a reversion by estoppel between Wilson and the defendant on the sub-lease of the 15th of February, 1893, or, in other words, assuming that, as between Wilson and the defendant, the defendant could not deny that Wilson had a reversion on the term of forty years less three days from the 29th of September, 1885, still there is no estoppel between the defendant and the plaintiff. The plaintiff is not an assignee of that reversion which the defendant is estopped as against Wilson from denying; for the assignment of the 16th of January, 1894, by Wilson to the plaintiff purported to assign, not the reversion on forty years (less three days), but the premises for the term of twenty-one years (subject to the sub-lease to the defendant). But the defendant is not estopped from denying any reversion in Wilson for an interest passed by the lease of the 15th of February, 1893. In point of law and fact Wilson had no reversion, for he had underlet the premises for a term which left no part of twenty-one years in him.

In addition to the authorities mentioned above they cited *Hill* v. *Saunders*, 4 B. & C. 529; *Langford* v. *Selmes*, 3 K. & J. 220, 6 W. R. Ch. Dig. 34; *Weld* v. *Baxter*, 5 W. R. 113, 1 H. & N. 568; *Doe* v. *Seaton*, 2 C. M. & R. 728; *Thorn* v. *Woolcombe*, 3 B. & Ad. 586; *Carvick* v. *Blagrove*, 1 B. & B. 531.

Metcalfe replied.

Cur. adv. vult.

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

March 30.—The judgment of the COURT (CAVE and WRIGHT, JJ.) was read by

CAVE, J.—This is an appeal from a nonsuit in the Lord Mayor's Court. On the 1st of February, 1893, one Bolton granted to Wilson a lease of certain property for twenty-one years. On the 15th of February, 1893, Wilson granted to the defendant Craig what purported to be a sub-lease of the same property for forty years less three days. On the 15th of January, 1894, Wilson assigned to the plaintiff. After that, this action was brought by the plaintiff against the defendant to recover arrears of rent under the lease of the 15th of February, 1893. For the defendant it was objected that Wilson had no reversion to convey to the plaintiff, and that, if he had, he had not assigned it. For the plaintiff Mr. McCall relied on a tenancy by estoppel, which he alleged was created by the lease of the 15th of February, 1893, between Wilson and Craig. Much learning was displayed, and many authorities were cited on the question. It is not, however, necessary for us to consider that point, for, assuming that Wilson had a reversion by estoppel subject to the lease of forty years less three days, that reversion was not assigned to the plaintiff by the deed of January, 1894, as that deed only assigned to the plaintiff, Wilson's interest in the lease for twenty-one years, and conveys to the plaintiff the property in question to hold for the residue of the term of twenty-one years. It is true that the assignment is expressed to be subject to the under-lease to Craig, but it nowhere purports to convey any reversion on the determination of that lease, and consequently the plaintiff is not the assignee of the reversion (if any) created by the under-lease to Craig. Now as the rent runs with the reversion, and as it is only where the reversion passes to the assignee that the benefit of the covenants runs with it, in the position of affairs existing here the right to sue on the covenants remained in Wilson, and did not pass to the plaintiff, consequently the plaintiff could not sue in his own name, and the nonsuit was right.

Appeal dismissed.

Solicitors for the plaintiff, *Norris & Son.*

Solicitors for the defendant, *Martin & Nicholson.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 24, 25, 30.

In re LONDON AND GENERAL BANK. (*a.*)

Company—Winding up—Officers of company—Auditor—Payment of dividends out of capital—Misfeasance—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10—*Companies Act,* 1879 (42 & 43 *Vict. c.* 76), *s.* 7, *sub-section* 1.

The articles of a joint-stock banking company provided that the auditor should be elected by the company in general meeting. They also expressly declared that the auditor should be an officer of the company.

The Companies Act, 1879, *s.* 7, *provides* (1) *for the examination of the accounts of every banking company once at least in every year by an auditor or auditors appointed annually by the company in general meeting; and that a director or officer of the company shall not be capable of being elected auditor of such company.*

(a) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

Held, that a person duly appointed auditor in pursuance of the articles and the Companies Act, 1879, *is an officer of the company within the meaning of section* 10 *of the Companies (Winding-up) Act,* 1890, *and, as such, is liable for any misfeasance or breach of duty on his part.*

In this case there were four appeals from a decision of Vaughan Williams, J., in the winding up of the above company, whereby the judge made the directors and auditors liable for the improper payment of dividends out of capital.

The directors and one of the auditors appealed.

Cohen, Q.C., Cozens-Hardy, Q.C., and *Whinney,* for the auditor.—An auditor is not a trustee or *quasi*-trustee of the company, so that he cannot misapply the moneys of the company. He has nothing to do with the funds or assets of the company, and is not a salaried officer under the control of the directors. In *In re Imperial Land Co. of Marseilles,* 19 W. R. 223, L. R. 11 Eq. 478, a banker of the company was held not to be an officer of the company; so in *In re Great Western Forest of Dean Coal Consumers' Co., Carter's case,* 34 W. R. 516, 31 Ch. D. 496, the solicitor to the company was held not to be an officer; though in *In re Liberator Permanent Benefit Building Society,* 71 L. T. N. S. 406, the solicitor, who was also financial manager, was held to be an officer of the society: see also *In re Canadian Land Reclaiming and Colonizing Co.,* 28 W. R. 775, 14 Ch. D. 660, and *In re The Great Wheal Polgooth (Limited),* 32 W. R. 107. Misfeasance is in the nature of a breach of trust, and the auditor must hold a fiduciary position, so as to be brought within the "misfeasance" section (10) of the Companies (Winding-up) Act, 1890; whereas here he occupies an independent position.

Finlay, Q.C., E. S. Ford, and *Muir Mackenzie,* for the official receiver and liquidator.—The fact that the auditor is independent, makes his position as an officer more important. We rely upon *Leeds Estate Building and Investment Co.* v. *Shepherd,* 36 W. R. 322, 36 Ch. D. 787, where an auditor was held liable for dividends improperly declared.

Cohen, Q.C., replied.

Cur. adv. vult.

April 30.—LINDLEY, L.J.—The question in this case is whether an auditor of this bank can be properly regarded as an officer within the meaning of section 10 of the Winding-up Act, 1890. That section runs thus:—"Where in the course of the winding up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just."

Now it is urged by Mr. Cohen that the auditor of a company is not an officer within the meaning of that section. It appears to me that in order to decide that

question we must examine and consider what an auditor is, how he is appointed, by whom he is paid, and what his duties are. This is a banking company, and the auditor is required to be appointed under the Companies Act of 1879. Now section 7 of that Act runs thus: [His lordship read the section, which deals with the audit of accounts of banking companies, and continued:—] And section 8 says the auditor shall sign a balance-sheet, and so on. Now, reading section 7 alone it seems to me impossible to deny that for some purposes and to some extent an auditor is an officer of the company. He is appointed by the company, he is paid by the company, and his position is described in the section as that of an officer of the company. He is not a servant of the directors. On the contrary, he is appointed by the company to check the directors, and for some purposes and to some extent it seems to me quite impossible to say that he is not an officer of the company. If we pass to the articles of this particular company we shall find there are some which are important. [His lordship read the material articles, and continued:—] I do not know that those articles carry the matter very much further than the section of the Act to which I have alluded, and my observations upon the articles and that Act are those which I have already made—viz., that for some purposes, and to some extent at all events, an auditor is an officer appointed by the company, although in no sense a servant of the directors.

Then it is said that for all that, he is not an officer of the company within the meaning of section 10. And it is put in this way, that an officer within the meaning of section 10 is an officer who in some way or other has control over the assets of the company. Now it is quite obvious that this section applies to something more than the misapplication of assets. Misapplication, or retainer, or becoming liable or accountable for the assets is provided for by the first part of the section which I have read, but in addition to that there is mention made of misfeasance or breach of trust in relation to the company; and with reference to that, provision is made, by the words which authorize the court to compel the person guilty of misfeasance or breach of trust to repay any moneys or restore any property, and to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

I know nothing at all about the charges against this auditor upon the facts; but I suppose that when an auditor, whose business it is to audit accounts and sign balance-sheets, and who knows perfectly well that a balance-sheet so signed by him will be acted upon, shows profits properly divisible as dividend, a dividend will be declared. Suppose that he purposely and fraudulently prepares and signs such a balance-sheet. It appears to me that that is a distinct misfeasance within the meaning of the Act, leading to and intended to lead to a misapplication of the assets. Although that does not show that he is an officer of the company, yet, having regard to the articles of association of this company and the provisions I have just referred to, I do not see how it can be said that, as a matter of law, this gentleman is not an officer of the company and cannot be liable for misfeasance. In my opinion he is an officer, and may be within the mischief contemplated by section 10.

Now it is said that is very hard upon persons who are auditors, and that if they are guilty of negligence, fraud, or misconduct the proper remedy is by an action. But suppose an action were brought against an auditor upon the ground that the accounts had been fraudulently audited, how could that be possibly tried by a jury? It would demand and would necessitate a prolonged investigation of the accounts, and no one who has any experience of trial by jury would for a moment pretend that it could be so tried, and therefore it must be referred to some other tribunal. Therefore the point made by Mr. Cohen, that you are going to deprive him of his constitutional right, really does not apply, and it appears to me that the objection fails; and therefore we are not prepared to say, and cannot say, that the auditor of a company in a case like this is not an officer of the company within section 10.

LOPES, L.J.—I am of the same opinion. The question is whether an auditor, such as the auditor in this case, is an officer within the true meaning of section 10. It is to be observed, in respect of this section, that it does not create any new rights, but it gives a very summary mode of procedure in enforcing rights already existing. Now, if it were not for the word "misfeasance" in section 10 I should not have thought that an auditor, such as the auditor in the present case, came within the meaning of that section. I should have thought that the section, if that word had been absent, was rather directed against those who had the conduct of the business and purposes of the company, who had the control over the assets of the company, and who might have the money or the property of the company in their hands which they might misapply or retain. But I find the word "misfeasance," and, as I understand the word, in this section it means a breach of duty. Now, if it means a breach of duty, one can quite understand a breach of duty which might be committed by an auditor. For instance, he might, in collusion with his directors, prepare a false account which would involve a misapplication of the assets. Now in such a case it seems to me that that would be one of the mischiefs which the section was intended to prevent. I come, therefore, to the conclusion that an auditor, such as that of a banking company, is an officer within the meaning of that section; and I am fortified in that view by the words of the section of the Companies Act of 1879; because it seems to me that that section recognizes the auditor of a banking company as an officer. If you look at the sub-section it says, "If any casual vacancy occurs in the office of auditor," and throughout, the section seems to contemplate that the auditor is an officer of the company. That fortifies the view that I have formed with regard to section 10, and I am also confirmed in that view by the fact that the articles of association of this very banking company recognize the auditor as an officer.

Now, there was a case referred to—*In re Liberator Permanent Benefit Building Society* — which came before Cave and Collins, JJ. That was not the case of an auditor. That was the case of a solicitor. It was not the case of a banking company, but of a building society; and it is true that Cave, J., in the course of his judgment, says: "It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or an auditor if he is appointed auditor to the society." I do not think that the attention of Cave, J., was drawn to the word "misfeasance"; but however that may have been, that was not the case of an auditor, but the case of a solicitor; and it may be again said that the section of the Act of 1879 which relates to the auditor of a banking company would not relate in the same way to a solicitor; and for anything I know (I have not been able to find it out) it does not appear that the arti

of association in that case, so far as I can see, recognize the auditor as an officer.

I come, therefore, to the conclusion that the auditor of this banking company was an officer within the true meaning of section 10 of the Companies (Winding-up) Act of 1890.

KAY, L.J.—I come to the same conclusion, but I wish to guard myself against being understood to hold that in every case of a joint-stock company the auditor employed by the joint-stock company is an officer of the company. I do not at present hold that opinion. It will be observed on looking at the Act of 1879, s. 7, that the auditor is to be appointed by the company in general meeting. The 1st sub-section of section 7 says that "once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors who shall be elected annually by the company in general meeting." So that the election is not, like the election of the ordinary officers of the society, delegated to the directors of the company, but it is prescribed by statute that there shall, in this case, be an auditor elected by the company in general meeting. Then I find, turning to the articles of this society, that they recognize distinctly their duty, and by the interpretation clause of their articles they do define expressly that the auditor of this company shall be an officer of this company. The words have been read, but I will just refer to them again for a moment. The first of the articles is "Auditors and secretary means those respective officers from time to time of the company." Then, again, we find in article 73 a recognition of the fact that auditors duly appointed by the company are officers of the company, and then come the articles which speak of the duties of auditors, articles 107 and 108; and article 108 (some comments were made with regard to the words and the language of that article) provides that no director or officer of the company shall during his continuance in office be eligible as auditor. It was said that that shows plainly that an auditor is not to be an officer of the company, but somebody who is not an officer. I do not read it in that sense. That is a copy of the language of the Act of 1879, which provides in section 7, sub-section 2, that "a director or officer of the company shall not be capable of being elected an auditor of such company." Here the auditor is treated as an officer of the company. They provide also in their articles that the auditor shall not hold any other office in the company. At the same time I take article 108 not to contradict that which has been said in the earlier part of these articles, that an auditor of this company is an officer of the company, but merely to provide, as the statute provides, that while he is an auditor he shall not hold any other office in the company. The object of that section is that he might not hold some other office, the duties of which might bias him in his conduct as an auditor, and therefore, to prevent the danger of that it is provided by that statute and repeated by the articles that he cannot hold at the same time any other office of the company. That seems to me to reconcile these articles with the statute, and dealing with this particular clause, which is all we have got to consider now, I come to the conclusion that in this case the company in its constitution recognized the necessity of having auditors duly appointed under the statute of 1879, and made these provisions, that auditors so appointed should be treated by this company as being officers of the company. In the face of that it seems to me quite impossible to hold that auditors are not officers of the company. Then whether they are officers within section 10 or not seems to be almost concluded when you come to the fact that this company did appoint its auditors as officers of the company. For, after all, all that the section provides is only a convenient mode of dealing with, amongst other things, the misapplication of the funds of the company by its officers. On the other hand also, as to misfeasance (misfeasance other than misapplication of the money of the company, which may lead to an injury and damage to the company, and which is to be met, not by replacing the misappropriated funds, but, as the section says, by compensation to the company), the words "misfeasance" and "compensation" as used in that section seem to me to be clearly correlative; and when that section speaks of the misfeasance of an officer of the company it must mean, looking to the collocated words, misfeasance other than the misapplication or misappropriation of the funds or property of the company. And to remedy that misfeasance the power which that section gives, requires that persons convicted of misfeasance shall make compensation to the company. In the case of this auditor it seems to me that he does come within the section, and that, as I read the terms of this section 10, he can be made liable for misfeasance, and can be obliged to make compensation to the company.

Appeal dismissed.

Solicitors for the appellant, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the official reciever and liquidator, *Phelps, Sidgwick, & Biddle.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Feb. 28; March 1, 14.

In re NEWMAN & CO. (LIMITED). (*a.*)

Company — Director — Misfeasance — Winding up— Presents made to director out of borrowed money— Consent of shareholders — "Private" company— Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Directors cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.

N., the chairman of a company, purchased on behalf of the company the right to a building agreement for £16,000. *In consequence of an objection to the acceptance of the company as tenants, N. was substituted as tenant, and he then sold the agreement to the company for* £26,000, *an advance of* £10,000. *Of this* £10,000 *it appeared from the evidence that* £7,000 *was part of the cost of acquiring the contract, and* £3,000 *was profit actually made by N. A sum of* £3,500 *was spent by N. out of moneys borrowed by the company for the purpose of its business in decorating his private house. Nearly all the shares in the company were held by N. and his family, and these transactions were entered into with the knowledge and approval of all the shareholders. The company being wound up, a summons under section* 10 *of the Companies (Winding-up) Act,* 1890, *was taken out by the liquidator.*

Held (affirming the decision of Vaughan Williams, J.), *that N. was not liable for the* £7,000; *but*

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Held (reversing the decision of Vaughan Williams, J.), *that he was liable for the* £3,000 *and the* £3,500.

Appeal from Vaughan Williams, J.

This was a summons, under section 10 of the Companies (Winding-up) Act, 1890, taken out by the official receiver and liquidator of the above-named company, asking for a declaration that George Newman, the chairman and managing director of the company, was liable to contribute to the assets of the company the following sums—viz., (*a*) the sum of £10,000, being a profit or commission improperly made or retained by him upon the purchase by the company of a certain building agreement relating to land in the rear of the Albert Hall, Kensington; (*b*) the sum of £2,500, being the amount of a cheque drawn by the Liberator Permanent Benefit Building Society on the 12th of June, 1891, in favour of the company, and converted by the said George Newman to his own use; (*c*) two sums of £3,292 16s. 11d. and £204 1s. 5d. expended by the said George Newman out of assets of the company in altering and adapting his private residence. Vaughan Williams, J., dismissed the summons. The official receiver and liquidator appealed.

The facts of the case and the arguments sufficiently appear in the judgment of the court.

H. S. Theobald, for the liquidator, referred to *In re Wheal Emily Mining Co., Cox's case*, 12 W. R. 92, 4 De G. J. & S. 53, and *In re British Seamless Paper Box Co.*, 29 W. R. 690, 17 Ch. D. 467, as being distinguishable. [Lord HALSBURY referred to *Society of Practical Knowledge* v. *Abbott*, 2 Beav. 559, and *In re Crenver and Wheal Abraham United Mining Co.*, 21 W. R. 46, L. R. 8 Ch. App. 45.]

Dunham and *Johnston Edwards*, for George Newman, referred to *In re Canadian Land Co., Coventry and Dixon's case*, 28 W. R. 775, 14 Ch. D. 660.

Theobald replied.

Cur. adv. vult.

March 14.—The judgment of the COURT was delivered by

LINDLEY, L.J.—This is an appeal from the refusal of Vaughan Williams, J., to make an order under section 10 of the Companies (Winding-up) Act, 1890, for the payment, by Mr. George Newman, of certain sums of money to the liquidator of the above-named company.

The company was formed in January, 1886, under articles of association made between George Newman, a builder, of the one part, a Mr. Bromham of the second part, and the several persons who had executed, or should execute, the said articles of the third part; and the company was registered under part 7 of the Companies Act, 1862, as an existing company governed by these articles. Why the company was not formed and registered as it ought to have been under Part 1 of the Companies Act, 1862, does not appear. Seven persons executed the articles as parties of the third part. Four of them were brothers of George Newman; another was a builder named Morgan; and the seventh was a clerk named Shotter. All of them signed in respect of one share each. The articles themselves were 142 in number. Those to which it is necessary to refer are as follows:—(3) States the objects of the company. The first object is declared to be to carry on the business of builder and contractor in all its branches, and also all ancillary businesses. This general description is followed by a long enumeration of other objects in order to enable the company to do anything connected with land and buildings. Amongst the enumerated objects are buying and taking on lease any land or buildings; building operations of every description; lending money with or without security; making arrangement for sharing profits with other persons or companies and financing them; borrowing money; selling, leasing, mortgaging, or otherwise turning to account any property of the company. (4) The nominal capital is £50,000, divided into 5,000 shares of £10 each. (5) George Newman is entitled to 2,500 shares, and each of the persons of the third part to the number opposite his name (*i.e.*, one share each). (6) These are to be treated as fully paid up in consideration of the transfer to the company of certain assets of George Newman, and which may be described as his building property and the goodwill of his business which the company is to take over with its debts and liabilities. (13) The conduct of the company's business is exclusively vested in the directors. (25) Authorizes members to transfer their shares to children and others. (26) Gives the directors power to refuse to register certain transfers, but not any made under article 25, or by George Newman. (32) Provides for the transfer of shares of members who are infants, lunatics, dead, or bankrupt. (51-54) Relate to borrowing, and power is given to the directors to borrow from themselves. (55, &c.) Provision is made for holding general meetings of the shareholders. (73) Guardians may vote for infant shareholders. (80) The number of directors is to be not more than seven, and the first directors are George Newman, William Newman, and a Mr. Wright. (82) Their remuneration is to be determined by the company in general meeting. (87) No director is disqualified from contracting with the company, nor is any director making any profit out of any contract with the company liable to account to the company for such profit by reason only of his office or fiduciary relation. (88) The directors may appoint one of their body a managing director (90) and may fix his remuneration by way of salary, commission, or a share of profits. (102 and 103) The management of the business and control of the company is vested in the directors, and amongst other powers specially enumerated are powers to acquire for the company any property on any terms they think fit, to pay for any services rendered to the company, to give any officer or other person employed by the company a commission on the profits of any transaction and to pay commissions and to make allowances to any persons introducing business to the company or otherwise promoting the business thereof. (141) Is a general indemnity clause in favour of directors and other officers for what they may do on behalf of the company.

It appeared from the evidence before the court that there never were more than fourteen shareholders in this company—viz., George Newman and five brothers and six sons of his, all of whom were infants, and Shotter and Morgan. There never were more than 2,500 shares, which were issued to George Newman as fully paid up under article 5. He distributed 1,831 of them amongst his brothers and sons and Shotter and Morgan, each of these two last-named persons having one each. The directors of the company were George Newman and his brothers, William, Charles, Daniel and John Henry, and, I suppose, Wright, who is named in the articles.

The business of the company was transacted by these persons. Debts were contracted to a large amount; no profits were ever made. The company was ordered to be wound up in November, 1892, and it was then found that the assets of the company were practically *nil*, whilst the debts and liabilities of the company amounted to £88,000 or thereabouts

in respect of money borrowed from the Liberator Building Society and other companies connected with it. The company, so far as it appears, never had any assets except those taken over from George Newman and such as were acquired with borrowed money. Such being a short account of the company, it is necessary to allude to the circumstances which give rise to the present application on the part of the liquidator. He seeks to obtain an order for the payment by George Newman of three sums of money —viz. (1) £10,000 in respect of what is called the Albert Hall purchase; (2) £2,500 in respect of what is called the Albert Hall advances; (3) £3,500 in respect of money of the company expended on George Newman's own house. First, as regards the £10,000, the facts are as follows:—The Commissioners of the Exhibition of 1851 had some land near the Albert Hall, and in 1890 they agreed with a person named Sarl for the erection of buildings on this land and for granting leases of the buildings when erected. This agreement imposed heavy liabilities on the builder, but the ground-rents were at first nominal, although ultimately they were to be £8,000 a year. The agreement, however, was so beneficial to Sarl that he agreed to sell the benefit of it to George Newman for £16,000, and George Newman got £26,000 for it from the company. The company paid him £26,000 for it out of money borrowed by the company for the purpose, and the difference between this sum and the £16,000 paid for it by Newman to Sarl is the £10,000 which the liquidator seeks to recover. The mode in which this transaction was carried out is stated in the report and affidavits filed in this matter, and the truth, though obscured, seems to me as follows:—George Newman was to obtain the benefit of Sarl's agreement for the company, but Sarl had not got any formal agreement which he could assign, and the commissioners would not enter into any agreement with the company. It was therefore agreed that George Newman should himself enter into a formal agreement with the commissioners. On the 3rd of December, 1889, George Newman wrote a letter to the Liberator Society informing them that the company had resolved to take over the agreement, and asking for an advance on its security, which the Liberator Society afterwards agreed to make and did make.

On the 6th of December, 1889, the directors met and discussed the matter and resolved to buy the agreement from George Newman for £26,000 and to pay the commissioners £7,500 for rent in advance, and to indemnify George Newman from all liability under the agreement. On the 18th of December, 1889, the building agreement was executed by Newman, and the commissioners and Newman then paid Sarl's solicitor, Mr. Johnson, £16,000, as agreed, and he also paid £7,500 to the commissioners, to their solicitors, for rent in advance. This completed the matter so far as Sarl and the commissioners were concerned. These moneys were paid by means of cash and bills supplied by the company, and it is plain that in point of law George Newman was a mere trustee of this agreement for the company. On the 18th of December, 1889, another instrument was executed by George Newman and the company, by which George Newman assigned the benefit of the agreement to the company for £26,000, and the company agreed to indemnify him from all liabilities under the same. £10,000, being the difference between the price paid to Sarl and that paid by the company, was obtained by George Newman from the company in the manner detailed in the receiver's report. George Newman says, and his brothers say also, that the directors of the company knew perfectly well that in order to obtain this agreement for the company he would have to pay a great deal more than £16,000 to Sarl, and that he did in fact have to pay, and did pay, large sums of money for commissions, introductions, and other matters, and that only £3,000 out of the £10,000 was in fact got by George Newman out of the transaction. Having regard to the affidavits it must be taken that the directors knew that large sums beyond the £16,000 payable to Sarl would have to be paid in order to obtain the agreement from the commissioners, and that the board gave George Newman £10,000 to cover whatever might have to be paid for that purpose, with liberty to retain what he could for himself.

The question then arises whether the company can now, by its liquidator, recover this sum, or any part of it, from George Newman. Vaughan Williams, J., has decided this question against the company, and as regards everything except the £3,000 profit actually made by George Newman the learned judge was correct. Except as to that sum the evidence is not sufficient to prove any misapplication of the company's assets. The money spent appears to have been part of the cost of acquiring the contract, and that expenditure having been necessary for its acquisition and authorized by the directors the company cannot treat it as a misapplication of its assets.

It was suggested that the money went in bribes, and that the expenditure was therefore *ultrà vires*, but although this suggestion may be true, there is no proof of it on which the court can judicially act. It must be taken that the company acquired the benefit of the contract on certain terms which, as regards the sums expended, are not shown to have involved a breach of trust, and it would not be just to compel Mr. George Newman to repay more than the £3,000 which he actually retained for his own benefit. Whether he can be made to account for this sum is another matter, which will be examined later on. The £2,500 is claimed as the amount of a cheque belonging to the company and improperly given by George Newman to Wright, and applied by him for his own purposes with the knowledge and consent of George Newman. It appears, however, from the affidavits in answer to this charge, and especially from Mr. Stocks' affidavit, that Newman gave the cheque to Wright, who was the solicitor, not only of the company, but also of the Liberator Society, in order that he might take or send it to the company's bankers, to be placed to the credit of the company after he had, as solicitor to the Liberator Society, indorsed a memorandum of it on that society's security. It further appears that the cheque was afterwards misapplied by Wright or Jabez Balfour without George Newman's knowledge. Under these circumstances George Newman cannot be charged with this sum. When he found that the cheque had been misapplied he did not know what to do, and although he ultimately told the secretary to write the amount off and put it to the fees account, it would not be just to infer from this that George Newman sanctioned or approved of what had been done. No part of this sum ever came to Newman; he is no way benefited by the misapplication of the cheque, and on the evidence Wright or Jabez Balfour, and not Newman, is responsible for the loss of this cheque. The last sum claimed by the liquidator is £3,500. The facts relating to this are correctly set out in his report, and are not contradicted or explained. George Newman applied assets of the company to this amount in decorating his own house, and the directors afterwards resolved that no charge should be made for it, and it was accordingly written off.

In answer to the liquidator's claim for this sum, and in answer to his claim to the £3,000 already

referred to, Mr. George Newman relies on the articles of the company and on the fact that all the directors and shareholders knew and sanctioned what was done. It remains to consider this defence with reference to both of these sums. When the facts are understood both these sums were in truth presents by the directors out of the company's assets to G. Newman with the consent of the other shareholders who were of age; and the question is whether these presents can be treated as valid against the liquidator on the winding up of the company, which is hopelessly insolvent, and which was largely in debt when these presents were made. Vaughan Williams, J., has held that they are unimpeachable, and he referred to the case of *The British Seamless Box Co.* as supporting his view. But that case is very unlike this. The directors there had allotted shares to some of themselves as fully paid up. The shares were, in fact, allotted in consideration of some patents taken over by the company; and an agreement to issue the shares as paid up was registered. The transaction, therefore, was *intra vires*, and it was taken to be so both by counsel and by the court. Further, the transaction was perfectly honest throughout, and it was sanctioned by a general meeting of the company, which then consisted of only the directors and one other person, who assented to what was done. More than a year afterwards shares were issued to other people, and, the company being ultimately wound up, the liquidator sought to recover the nominal value of the shares, treating them, in fact, as not paid up. The court held that this could not be done, because the transaction (being *intra vires*) was honest, and was sanctioned by all the members of the company at the time. But in this case the presents made by the directors to Mr. Newman, their chairman, were made out of money borrowed by the company for the purposes of its business; and this money the directors had no right to apply in making presents to one of themselves. The transaction was a breach of trust by the whole of them; and even if all the shareholders could have sanctioned it they never did so in such a way as to bind the company. It is true that this company was a small one, and is what is called a private company; but its corporate capacity cannot be ignored. Those who form such companies obtain great advantages, but accompanied by some disadvantages. A registered company cannot do anything which all its members think expedient, and which, apart from the law relating to incorporated companies, they might lawfully do. An incorporated company's assets are its property, and not the property of the shareholders for the time being; and, if the directors misapply those assets by applying them to purposes for which they cannot be lawfully applied by the company itself, the company can make them liable for such misapplication as soon as any one properly sets the company in motion. All this is familiar law and must be borne in mind in deciding the present case. Mr. George Newman and his co-directors evidently ignored their legal position entirely. They regarded Mr. George Newman as the company, and it never seems to have occurred to them that he and his brothers could not do as they liked with what they regarded as their own property, or rather as his, for he and his children held the bulk of the shares. If this view were correct in point of law, if the corporate body could be disregarded, it would follow that Mr. George Newman and his brothers would be liable without limit for the debts which were contradicted in the name of the company. This would be a just and proper result to arrive at; but the court is precluded by the terms of the Companies Act, 1862, ss. 191 and 192, from adopting it. The court is bound to recognize the company as incorporated, and to give effect to all the consequences of such incorporation. What, then, are the consequences as regards presents to directors? The cases on the subject are few. The law will be found discussed in *The York and North Midland Railway Co.* v. *Hudson*, 1 W. R. 187, 16 Beav. 485, and *Hutton* v. *West Cork Railway Co.*, 31 W. R. 827, 23 Ch. D. 654, but there is no case which quite covers this. Directors have no right to be paid for their services, and cannot pay themselves or each other or make presents to themselves out of the company's assets unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly-convened meeting. The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing, and to make them out of capital or out of money borrowed by the company is a very different matter. Such money cannot be lawfully divided amongst the shareholders themselves, nor can it be given away by them for nothing to their directors so as to bind the company in its corporate capacity. But even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired; but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and to have the benefit of the fact that even if a general meeting could have sanctioned what was done such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly-convened meeting and by a resolution properly considered and carried and duly recorded. The articles of this company, wide as they are, do not authorize such presents as those impeached by the liquidator, and the result is that his appeal must be allowed as to £3,000, part of the £10,000, and as to the £3,500, and Mr. Newman must be ordered to pay these sums, with interest at 4 per cent. He ought also to pay the costs of the appeal and the costs of the summons except so far as they have been increased by the claims to the £2,500 and to the £7,000, part of the £10,000. The costs occasioned by these claims ought to be allowed him and be set off against those which he is ordered to pay.

Solicitors, *Thorne & Welsford; W. Brookes Palmer.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — March 4, 5.

COUNTY OF GLOUCESTER BANK v. RUDRY MERTHYR STEAM AND HOUSE COAL COLLIERY CO. (LIMITED). (*a*.)

Mortgage—Colliery—Mortgage of leaseholds and fixtures—Implied mortgage of colliery business—Receiver and

(*a*.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

manager—Mortgagee in possession—Validity of instrument—Seal of company—Quorum of directors not present.

The defendant company, who were the lessees of a colliery, and carried on the business of a colliery, granted to the plaintiffs by sub-demise a first mortgage of the premises comprised in the lease; the movable plant and some of the machinery being excluded from the mortgage, and no mention being made of the business or goodwill of the colliery. Default having been made in the payment of the money due under the mortgage, the plaintiffs went into possession and appointed a receiver of the income of the property. Upon a motion by the plaintiffs for the appointment of a receiver and manager,

Held (reversing the decision of North, J.), *that the mortgage included and implied the business carried on by the colliery, and that, in spite of the plaintiffs having gone into possession, a receiver and manager ought to be appointed.*

Whitley *v.* Challis, 40 *W. R.* 291, [1892] 1 *Ch.* 64, *distinguished.*

The articles of association of the defendant company provided that the directors should fix the number of directors to form a quorum, and the directors had fixed three as the number. Only two directors were present at the meeting which sanctioned the mortgage to the plaintiffs and at the meeting at which the seal of the company was affixed to the mortgage.

Held, that, as between the defendant company and the plaintiffs, the mortgage was validly executed.

D'Arcy *v.* Tamar, Kit Hill, and Callington Railway Co., 14 *W. R.* 968, *L. R.* 2 *Ex.* 158, *distinguished.*

Royal British Bank *v.* Turquand, 6 *Ell. & B.* 327, 4 *W. R. Dig.* 148, *and* Mahony *v.* East Holyford Mining Co., *L. R.* 7 *H. L.* 869, 24 *W. R. Dig.* 10, *followed.*

Appeal from North, J.

This was a foreclosure action. By an indenture of mortgage, dated the 14th of March, 1893, the defendant company, being the lessees of a colliery, granted to the plaintiffs a first mortgage, by sub-demise, of the land, mines, beds, and seams of coal and other premises comprised in the leases and certain fixtures to secure £6,000. The mortgage excepted some of the machinery and all the movable plant, and made no mention of the colliery business. The original leases provided for the forfeiture of the colliery on the leases ceasing to be worked.

The articles of association of the defendant company provided that the directors should fix the number of directors to form a quorum, and the directors had accordingly fixed that number at three. At the meetings of the company at which the mortgage was sanctioned and the secretary was authorized to affix the seal of the company to the mortgage only two directors were present.

Default was made in the payment of the mortgage money, and on the 9th of October, 1894, the plaintiffs went into possession of the premises, and they subsequently appointed a receiver of the income of the property. After the plaintiffs went into possession no work was done except to keep the water out of the mines.

The plaintiffs moved for the appointment of a receiver and manager of the colliery. The motion was opposed by second mortgagees, and North, J., feeling himself bound by *Whitley* v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64, refused the motion.

The plaintiffs appealed.

Swinfen Eady, Q.C., and *A. dB. Terrell*, for the appellants.—*Whitley* v. *Challis* is distinguishable. In the present case the security is useless unless the mortgagees have power to work the colliery. The colliery must be impliedly included in the mortgage, though not mentioned therein. [They referred to *Campbell* v. *Lloyd's Bank*, [1891] 1 Ch. 136n, 37 W. R. Dig. 96.] As to the validity of the mortgage, the seal was affixed by the secretary, and the mortgagees are entitled to assume that it was affixed by proper authority.

M. L. Romer, for third mortgagees.

J. G. Wood, for second mortgagees.—This is not a demise of a colliery, but of a seam of coal included in a colliery lease. The mortgage did not include personal chattels nor part of the fixed machinery. It cannot, therefore, have been intended to include the colliery business. The court will not assist a mortgagee in possession to relinquish his possession: *In re Prytherch*, 38 W. R. 61, 42 Ch. D. 590. The plaintiffs' mortgage is improperly executed. A quorum of directors was not present at the meeting which sanctioned the mortgage: *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Co.*, 14 W. R. 968, L. R. 2 Ex. 158. [Lord HALSBURY referred to *Royal British Bank* v. *Turquand*, 6 Ell. & B. 327, 4 W. R. Dig. 148, and *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, 24 W. R. Dig. 10].

Lord HALSBURY.—Upon the point that has been argued last, which stands first in order, namely, whether this was a valid mortgage or not, I am of opinion that nothing has been urged before us which would induce us to say that the authority of the company was not given to the making of this mortgage. At least in this case, when the company was dealing with an outside person who had no other means of knowledge, he is entitled to regard the company as having performed its functions in the making of this mortgage, by whatever means it can lawfully do so.

The case relied on was a case in which a bond given by a company was held not to be the bond of the company for this, among other reasons, that by a section of a special Act the business of the company was to be conducted by directors, and by a particular quorum therein, by the special Act prescribed; and it was held that all persons dealing with the company were bound, therefore, to know what were the provisions of the special Act in respect to that matter. If that case were identical in its facts with the case now before us one would be bound by that decision, but I think the facts are not the same at all. Looking at the decision in *The Royal British Bank* v. *Turquand*, and the case in the House of Lords, *Mahony* v. *East Holyford Mining Co.*, a proposition of a very different character is affirmed. Persons dealing with joint-stock companies are bound to look at what one may call the outside position of the company, that is to say, they must see that the Acts which the company is purporting to do are Acts within the general authority of the company, and if those public documents, which everyone has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint-stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would only show this, that by some regulations of their own, what Lord Hatherley described as their "indoor management," they were capable, if they had thought right, of making any quorum they pleased, and an outside person, knowing that, and not knowing the internal regulations, when he found a document sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, I think was entitled to assume that that was the mode by which authority was conferred on the company to make an

instrument of that description. It turns out that by an authority they had the power, but that their own internal regulations were, that the number of directors should exceed two, and that there ought to have been three. But then that is a matter which, as Lord Hatherley says, was known to them, and to them alone. The only internal management of the company of which an outside person would be cognisant would be that they had power to make any quorum they pleased, and having those documents before them, I think we should assume, and that we should be entitled to assume, that the proper quorum had been properly summoned and attended to effect the completion of that instrument. That disposes of the first point as to the validity of the mortgage.

As to the second, which I may call really the substantial part of this case, it altogether depends upon what is involved in a mortgage of colliery leases. It does not appear to be denied that if the business had been transferred, subject to a question which I will deal with in a moment, as to whether the present applicants have put themselves in a worse position by taking possession under the mortgage—subject to that question, with which I will deal separately, it does not appear to be denied that if the business is sought to be conveyed by the mortgage, and intended by the parties to be conveyed, this is a proper and usual application, and one which would be, as a matter of course, granted. The management of the colliery business, if that was granted, is one which essentially required the appointment of a manager, and it would be proper and usual to come to the court to aid the persons who were invoking its assistance for the purpose of carrying on the business. But there are two objections made. It is said, first, the business is not intended to be conveyed, and it is only a naked mortgage of a certain quantity of land and seams of coal. That appears to me to rest entirely on a false foundation. It may be that the mortgage does not contain the words "the colliery" or "the colliery business," and I assume they do not, but it is impossible to disregard the nature of the thing itself. What is a colliery? What are the seams of coal? What is the motive power? What does all that mean but that industrial occupation which we compendiously call a colliery? and what is the meaning of the transfer of these rights of taking away the coal and of working the coal which are involved in the leases? More than that, there is the right of the lessors to terminate all interest in these things if the coal is not properly, continuously, and uninterruptedly worked, and worked according to the best manner of working in the district in which mining goes on. It appears to me that when one looks at the nature of the thing itself it is impossible to doubt that what was intended by the instruments, and by the parties executing them, was that what we, as I say, compendiously call "the colliery" was intended to be transferred, with the right of managing the business.

If I am right in my construction of what the transfer of a colliery means, then this case is covered distinctly by authority, and by authority which Mr. Wood does not seem to contest, if that view of the mortgage is well founded. That, therefore, to my mind, disposes of that question, as I am very clearly of opinion that a colliery means a business, and a conveyance of colliery leases, under the circumstances, includes and implies in its terms the business which is carried on by a colliery.

But then there is this further question. It is said that the parties cannot now make this application, because they have put themselves in the wrong by taking possession, and if they have got possession themselves, and have exercised the power to take possession which a mortgagee has, they are in this difficulty, that they cannot apply to the court to appoint a manager, because if they chose to manage, they can manage themselves. I do not deny the difficulty, and it is possible that they have done what was ill-advised, and that they ought to have made this application before they had themselves taken possession. But then that is not an objection at law, it is an objection only of discretion, and if we see that they have got into a difficulty by doing that which was ill-advised perhaps, but that it is for the advantage of all the parties that we should appoint a manager and a receiver, there is no case, as Mr. Wood candidly admitted, which could stop us doing it. The only question is, that in an appeal to our discretion we should not interfere under ordinary circumstances if the parties themselves have taken possession. Well, I should agree to that, but it appears to me, from what I have already said, that the circumstances of this case are extremely peculiar, and that we ought to cure the mistake that the parties have made if we can, and to put them in a position which will be to the advantage of all parties and will prevent the subject-matter of this security being forfeited, as it probably would be if we were to hold our hands. I am, therefore, of opinion that this appeal ought to succeed, and that my brother North ought to have made the order that was requested.

LINDLEY, L.J.—I am of the same opinion. As to the question of the validity of the mortgage, which was the point raised before us, and not before North, J., I have not the slightest doubt that the mortgage is perfectly good upon the evidence as it stands. Mr. Wood has relied upon the case of *D'Arcy* v. *The Tamar, Kit Hill, and Callington Railway Co.*, which is always referred to when there has been any irregularity in affixing the seal of the company. But that case does not reach this by a very long way. The Court of Exchequer there held that, in an action on the bond and a plea of *non est factum*, they could not say that a bond executed under the seal of the company was good, because there were two Acts of Parliament, one a special one, which rendered it absolutely essential that in the case of any bond issued by the company there should be a quorum of directors present at that particular meeting, and that there was no such quorum and no such meeting, and the court came to the conclusion that, upon the true construction of those Acts, *non est factum* was a good defence. That case has never been applied, that I know of, to these registered companies, where the quorum and so on, depend entirely upon the regulations which the directors may choose to make themselves. The case is governed, not by *D'Arcy* v. *The Tamar, Kit Hill, and Callington Railway Co.*, but by *Royal British Bank* v. *Turquand*, followed, as it has been, by a string of cases too numerous to refer to, the principal one of which is the Irish case in the House of Lords to which Lord Halsbury has referred. Here the directors are directors who may make any quorum they like—it may be two or it may be three. They did appoint, apparently, three. The document in question is under the seal of the company, signed by two directors, and countersigned by the secretary. Now, what could anybody think of that? What is there to put them upon inquiry? What is there to give them notice of anything irregular if there was anything irregular? If a person looked at that and looked at the articles of association there does not seem to be anything irregular at all; he would be at liberty to infer, and probably anyone in the ordinary course of business would infer, that if the directors had appointed a quorum they had appointed the two who signed the deed. But supposing that three were

wanted, he is not bound to go and look at the directors' minutes. He has no right to look at them except as a matter of bargain. That does not affect him at all. There is nothing irregular on the face of it—there is nothing illegal in it. As to a plea of *non est factum*, that could not be raised for a moment, and I have not the slightest doubt myself that that deed is as good as any other deed that ever was sealed. So much for that.

Now, as to the other point, which is an important matter. North, J., has declined to appoint a receiver and manager in this case, because, he says, the first mortgagees, who ask for a receiver and manager, are not mortgagees of the business of the colliery. In one sense that is right; that is to say, they are not mortgagees of the business in so many words. But what is a colliery? What does it mean? This colliery was granted by a lease to the mortgagors, and that lease contained powers to win and get the coal, and it was a lease of a colliery to be worked; that is to say, the lessees were to dig out the coal and sell it—take so much of the ground away and get rid of it for money. There were royalties to be paid, and there were clauses for re-entry, and as to the ordinary dead rent, and so on. That lease was sub-let. What does that mean? What is the sub-lessee to do with such property as that? It is perfectly familiar to everybody in this court, I suppose, that for years and years colliery property has not been property of so much land. Ever since the days of Lord Eldon, and probably long before, there was a distinction drawn between colliery property and ordinary landed property, and in *Jeffreys* v. *Smith*, 1 J. & W. 302, which is one of the leading cases on this point, the Chancellor makes this observation about collieries. It was there a question with regard to a receiver. There were some tenants in common of a colliery. One tenant in common wanted a receiver of the colliery appointed, and it was familiar law in those days that if one tenant in common wanted a receiver of the property in common he could not get it. He must go and enter, and the law allowed all tenants in common to enter into possession. What does Lord Eldon say about this? He says: "The question is whether mines have not been always considered, not altogether, but in some sort, as a species of trade. How it may be in Wales I do not know, but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practical and feasible way? I believe I have a note of a case before Lord Hardwicke which confirms me in the idea that where there are part owners of a mine, and they cannot by contract agree to appoint a manager, this court will manage it for them." That doctrine never applied to tenants in common of ordinary land, and the reason of it is obvious when you come to think of it. Let us see what, in effect, is the mortgage of this colliery. What are they doing? It is intended, of course, as a security; that is the object of the whole transaction. What are they to do? Are they to prevent anybody going into it, are they to leave the mortgagor alone, whether he pays the interest or not, or whether he makes default or not? If they go into possession, what are they to do with it? Bear in mind that if they do nothing the mine will be swamped with water, and the property will not be to them what it was intended to be—namely, a security for this repayment. It is absolutely essential that a sub-lessee of a going concern like this is to be at liberty to dig and work the coal and sell it, and reduce what is due to him on his mortgage. That is a necessary part of the transaction. It has been so treated in, I should think, almost every case of this kind which has come before the courts. It was so treated in that case before Chitty, J., which Mr. Swinfen Eady has referred to: *Campbell* v. *Lloyd's Bank*. That case was substantially like this, I may say exactly like this, except there the sub-lease included the loose plant and materials, which this sub-lease does not. That does not alter the real substantial character of the transaction, and it would be a mere mockery to a mortgagee of a colliery, whether by assignment or a sub-lease, to tell him he is not to touch the minerals. It is ridiculous. Now it appears to me that this is a matter in which, I will not say there is a goodwill, but in which it is absolutely essential to the mortgagees' security that the mine should be worked. If not, it may be forfeited at any moment, and if the mortgagees had not embarrassed themselves by taking possession, I should have thought that under section 10 of the Judicature Act, 1873, it would be almost a matter of course to appoint a receiver and manager. I say under that section, because before that I rather think the first mortgagee was told to go and enter. That practice has been altered, it may be beneficially, by section 10 of the Judicature Act. The mortgagees have entered, and of course they find themselves in a difficulty; they find they have made a false move; they have got themselves into a state of embarrassment by entering into possession, because the second mortgagees attack, and they say, "If you are going to be mortgagees in possession, you have no right to work this; you must do it at your own peril; you must lay out a lot of money in keeping the mine going and then be disallowed it on accounts." Of course, that is very awkward, and of course the first mortgagees want to know where they are, to say the least of it. It appears to me that, there being ample jurisdiction to do it, we ought not to abstain from doing it simply because they have made what now appears to be a false step, and have taken possession. Their mortgagors are being wound up, and will not have anything to do with it, but the third mortgagees support them. The second mortgagees, finding that the first mortgagees, having taken possession, have got into a difficulty, want to keep them there. I do not think that is fair. I think the case for a receiver and manager is amply made out, and that the order ought to be discharged, and the receiver and manager appointed.

A. L. SMITH, L.J.—The first question that appears to me to arise in this case is, What was the security which was given by the defendants to the plaintiffs? Was it a mere security of bare land? was it a mere security of a seam of coal? or was it a security which they had themselves to dispose of—namely, the value of the leases and the leases themselves which they held from the Marquis of Bute? Apart from the phraseology of this mortgage deed, I cannot have any doubt myself that the intention of the parties was that one should convey to the other, by way of security, the security which they had to grant—namely, the leases that were subject also to the covenants, that unless the seams of coal were worked the Marquis of Bute might enter into possession. It does seem to me that the subject of security in this case is not the bare seams, but that it is also the coal and the rights which the mortgagors had to work those seams under their leases. If they were not granted under this mortgage deed, I do not see what security the plaintiffs took at all, because if they did not work it might well be, and probably would be, that the landlord—namely, the Marquis of

Bute—might re-enter for a forfeiture, and the whole of the security would be gone, because the lease would be put an end to by that re-entry. I think that this is the true meaning of this colliery lease. It is entirely unlike the case of *Whitley* v. *Challis*, which my brother North found himself bound by. It is a different thing altogether to mortgage a house or a hotel, and in that case this court held that the business of the hotel and the goodwill of the hotel was not added to the security—it was not comprised in the security—and, that being so, this court held that the mortgagee, by asking for a receiver, could not enlarge the security which he had not got, and they refused to order a receiver or manager to be appointed.

For the reasons given, and for the reasons which have already fallen from Lord Halsbury and Lindley, L.J., I am of opinion that the subject-matter of the security in this case is the colliery and the right to work it, as contended for by the plaintiffs. If the matter had rested there, and nothing had taken place except that on the 10th of January, 1895, this originating summons had been taken out by the plaintiffs for foreclosure of their mortgage and sale, I suppose that under the 10th section of the Judicature Act it would have been held by any court that it was "just and convenient" that a receiver and manager should be appointed. But it is said that something did occur between the granting of a mortgage in March, 1893, and January, 1895, namely, that the plaintiffs entered into possession, and that, therefore, they are not entitled to ask for a receiver. For reasons which have been given by Lord Halsbury and Lindley, L.J., in my judgment the mere fact of their having entered into possession as they did does not render it unjust or not convenient in the present circumstances in this case that a receiver and manager should be appointed.

For these reasons I think that the judgment appealed against should be reversed, and the appeal allowed.

There is one other point about the mortgage not having been duly executed so as to be binding upon the defendant company. I have nothing to add except to say this, that the cases which were cited, the *Royal British Bank* v. *Turquand* and the case in the House of Lords in which Lord Hatherley gave judgment, are conclusive upon the point that this was a duly executed deed. I think, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors, *Riddell, Vaizey, & Smith*, for *Vachell & Son*, Cardiff; *Ince, Colt, & Ince*, for *Ingledew & Sons*, Cardiff.

High Court of Justice.

Chan. Div. North, J. } March 29.

In re A SOLICITOR. (*a.*)

Solicitor—Attachment—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* 4.

The balance found due from a solicitor upon the taxation of his bill, and the costs of the taxation, are within the exception of sub-section 4 *of section* 4 *of the Debtors Act*, 1869.

In re Rush, 18 *W. R.* 331, *L. R.* 9 *Eq.* 147, *followed.*

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Motion.

An order was made, upon the client's application, for the taxation of a solicitor's bill, and for payment by the solicitor of the balance, if any, due from him within four days of the issuing of the taxing master's certificate.

The taxing master certified that £20 17s. 5d. was due from the solicitor.

Upon the 8th of August, 1892, an order was made that the costs of the taxation and of the order should be taxed and paid by the solicitor.

On the 16th of April, 1894, the client gave notice of intention to proceed, and on the 21st of January, 1895, the taxing master certified the costs taxed under the order of the 8th of August, 1892, at £25 12s. 2d. Neither the £20 17s. 5d. nor the £25 12s. 2d. had been paid, and the present application was for leave to issue a writ of attachment in respect of both sums.

R. F. Norton, for the client, cited *In re Rush*, 18 W. R. 331, L. R. 9 Eq. 147, in support of the propositition that a writ of attachment may be issued against a solicitor for the non-payment of the balance found due from him upon taxation, and submitted that a writ might also be issued for the non-payment of the costs of the taxation.

He distinguished *In re Hope*, 20 W. R. 694, L. R. 7 Ch. App. 523, because in that case the solicitor was moving party.

The solicitor did not appear.

NORTH, J., said that, in his opinion, the writ of attachment must go in respect of costs as well as in respect of the other sum due. In *In re Hope* no order was made for the payment of costs, because it was uncertain what the result of the taxation would be, but the *dicta* of the Lords Justices in that case showed that the writ might issue in respect of the costs.

Solicitors, *Edmonds & Jubb*, for *Ford & Warren*, Leeds.

Chan. Div. Kekewich, J. } April 7.

WARREN v. WARREN. (*a.*)

Inland revenue—Income tax—Husband and wife—Divorce—Annuity to wife—Recovery of past income tax.

The trustees of a deed of arrangement made pursuant to an order of the Divorce Court, by which deed an annuity was secured to a wife on whose petition the divorce has been obtained, may deduct income tax in respect of the annuity, but cannot recover income tax which they have neglected to deduct in the past.

Summons.

By a decree absolute of the Divorce Court, dated the 29th of October, 1889, and made on the petition of Catherine Warren, her marriage with Henry Warren was dissolved.

By an order of the said court made on the 9th of August, 1890, it was ordered that the said Henry Warren should secure to the said Catherine Warren the annual sum of £700 as from the date of the decree for the term of her life, and that for such purpose a settlement made by him on the marriage should be varied and that the trustees thereof should pay to her for life the income of the trust property comprised therein up to £700 per annum, and that for the

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

pose of securing the deficiency, if any, between such income and the said amount of £700 per annum it should be referred to one of the conveyancing counsel of the Chancery Division to settle and approve of a proper deed to be executed by all necessary parties.

By a deed, dated the 1st of May, 1891, and duly made pursuant to the said order, it was agreed and declared that the trustees of the said settlement should, as from the date of the said deed, pay to the said Catherine Warren during her life the annual income from the investments subject to the trusts of the said settlement to the extent of and not exceeding £700 a year as from the date of the said deed, and should pay the residue to the said Herbert Warren during his life, and afterwards should hold the said investments and the income thereof in accordance with the trusts of the settlement; and that the trustees of the said deed should thenceforth, and so long as the annual income from the investments for the time being subject to the trusts of the said settlement should not amount to the sum of £700, receive the income of certain investments set out in the schedule to the deed, and pay thereout (or if such income should be insufficient they should raise the deficiency out of the principal thereof) so much of the said annual sum of £700 as should not be paid by means of the annual income of the investments held under the said settlement, and subject thereto should stand possessed of the said scheduled investments and income thereof in trust for the said Herbert Warren absolutely.

Since the date of the said order the trustees of the settlement had paid the whole income of the investments held thereunder to the said Catherine Warren.

That income did not amount to £700 a year, and since that date the trustees of the deed had paid to her so much of the income arising from the investments under the deed as along with the income under the settlement amounted to £700 a year net down to June, 1894, when they received a notice from Herbert Warren, in consequence of which they deducted from the next instalment the whole amount of the income tax payable in respect of the annuity since the date of the said order.

This was an originating summons by Herbert Warren against Catherine Warren and the trustees of the deed to have it declared: (1) That the income tax at the rates current from time to time upon the said annuity ought to be paid by the said Catherine Warren out of the annuity, and not out of the residue of the income of the said investments. (2) That the amount of income tax properly payable out of the annuity since the date of the deed, and which had been paid out of such residue, might be repaid to the plaintiff as being entitled to the residue of the income of the said trust funds by the defendant, Catherine Warren, or otherwise that the same might be deducted from the future payments of the annuity and paid over to the plaintiff. (3) How the income tax on the said annuity ought to be borne and paid.

T. T. Methold, for the plaintiff.

Raphael, for the wife; and

Godefroi, for the trustees, argued the case in chambers, and referred to *Pemberton* v. *Pemberton*, 2 Notes of Cases, 17; Browne and Powles on Divorce, 5th ed, p. 118; Robinson on Income Tax.

KEKEWICH, J., having adjourned the case into court, delivered the following judgment:— There seems to be no settled practice in the Probate Division as to whether income tax should be deducted from an annuity payable by way of alimony. It is stated in several of the books of practice that it should be deducted; but I do not find that the statement is borne out by any decision. There is no reason, however, why that should affect this case, because here the annuity is payable under a deed, and it must be governed by the law of deeds, and has no special reference to the practice in the Probate Division. [His lordship read the deed.] It is a deed of trust securing an annuity of £700. I cannot find anything in it which exempts the annuity from payment of income tax. Nothing points that way. Then, that being so, I am at a loss to see why it should not be governed by the general law according to which income tax ought to be deducted.

Then what happened? For a time the trustees paid the annuity free of income tax. Then the husband insisted on income tax being deducted. That was right as regards future payments. But the trustees have not only deducted income tax from the last payment, but have deducted that of previous years also. In doing that it seems to me that they were wrong. There are no doubt some conflicting decisions on the point, which may be found on pp. 242, 243 of Robinson on Income Tax. But to my mind there is no doubt that the trustees cannot deduct what might have been deducted before. The lady is not liable to repay to the trustees what has already been paid to her. If she had declined to give it up on the trustees demanding it, they might have been entitled to deduct it, but they cannot get it back now. There is nothing like set off. They must pay back to the lady the income tax which they neglected to deduct in the past, and can only deduct it in the future. They are both entitled and bound to give up the income tax which they have retained. I have nothing to do at present with her rights as against her husband. I am concerned only with her rights as against the trustees. As regards costs, the husband has come here to have a deed explained to which he was himself a party, and by which it is to be observed he is providing for his wife's maintenance. Further, he might, if he had chosen, have required the trustees to render an account of each half-yearly payment of the annuity, but did not do so. Either ground seems sufficient to make him liable for the costs of the proceedings.

The trustees are entitled to deduct income tax from future instalments of the annuity. They must repay to the wife the income tax deducted in respect of past instalments, and the husband must pay the costs of the action.

Solicitors, *Budd, Johnson, & Jecks; W. Smee; Valpy, Chaplin, & Peckham.*

Chan. Div.
Kekewich, J. } April 3, 4.

In re ENGLAND.
STEWARD *v.* ENGLAND. (*a.*)

Limitations, Statute of—Charge on lands—Settlement of charge—Devise of lands charged to tenant for life of charge—Real Property Limitation Act, 1874 (37 & 38 *Vict.* c. 57), s. 8.

A father charged a certain real estate in favour of the trustees of his son's marriage settlement (the son being tenant for life thereunder), and covenanted to pay the money charged. The estate he subsequently devised in fee to the son, who took possession of the lands, but made no claim on the personal estate for twelve years.

Held, that the claim was barred against the personal estate.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Coope *v.* Cresswell, 15 *W. R.* 252, *L. R.* 2 *Ch. App.* 112, *followed.*

Burrell *v.* Lord Egremont, 7 *Beav.* 205, *and* Topham *v.* Booth, 35 *W. R.* 715, 35 *Ch. D.* 607, *distinguished.*

By a settlement dated the 20th of September, 1870, William England covenanted to pay (in the events which subsequently happened), within twelve calendar months after his death, to the trustees of the settlement a sum of £4,000 sterling, together with interest thereon at 4 per cent., and that the hereditaments specified in the schedule and known as the Hindringham Estate should be charged with the sum and interest. The trusts of this sum were declared by a deed of even date, and under them William George England, the son of the settlor, took the first life estate.

By his will William England devised the Hindringham Estate to his said son absolutely. The testator died on the 1st of June, 1871, and his will was proved on the 2nd of September following. Of this will the son, William George England, was an executor and trustee.

The son took possession of the Hindringham Estate on the death of his father, and had been in possession or receipt of the rents and profits ever since. The land had fallen considerably in value, and was, according to a valuation recently made, worth no more than £3,500.

The present summons was taken out, and asked, *inter alia*, that it might be determined whether the residuary real and personal estate of the testator, W. England, was liable, and to what extent and in what proportions, to make good the £4,000 covenanted to be paid and charged by the settlement.

L. S. Bristowe, for the trustees of the settlement.—The fact that there was no payment of interest is immaterial: *Topham* v. *Booth*, 35 W. R. 715, 35 Ch. D. 607. There has been what amounts to payment of interest, and the covenant is kept alive: *Dibb* v. *Walker*, 41 W. R. 427, [1893] 2 Ch. 429. The personal estate is in the position of surety: *In re Frisby, Allison* v. *Frisby*, 38 W. R. 65, 43 Ch. D. 106; *In re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291, 34 W. R. Dig. 108. Section 8 of the Real Property Limitation Act, 1874, applies. The remedy against the real and personal estate are co-extensive in point of time: *Sutton* v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511.

He also referred to *Burrell* v. *Lord Egremont*, 7 Beav. 205.

Ingpen, for W. G. England and the other beneficiaries under the will.—I do not dispute that the charge is valid as against the land.

He referred to *Fearnside* v. *Flint*, 31 W. R. 318, 22 Ch. D. 579, but took no further part in the argument.

Warmington, Q.C., and *Badcock*, for the residuary legatees.—The case is really within *Coope* v. *Cresswell*, 15 W. R. 252, L. R. 2 Ch. App. 112, which followed *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52, 11 W. R. Ch. Dig. 55. The former case established that where a mortgagor of two estates devises one to A. and the other estate to B., payment of interest by A. will not keep the charge alive as against B. *Burrell* v. *Lord Egremont* and *Topham* v. *Booth* do not apply. A tenant for life is under an obligation to those entitled in remainder not to allow interest to accumulate; but a tenant in fee cannot be said to owe a duty to any one.

Bristowe, in reply, cited *Forsyth* v. *Bristowe*, 1 W. R. 356, 8 Ex. 716; *Francis* v. *Grover*, 5 Ha. 39; *Roddam* v. *Morley*, 5 W. R. 510, 1 De G. & J. 1; and *Peare* v. *Laing*, 19 W. R. 653, L. R. 12 Eq. 41.

Badcock replied on the cases cited.

KEKEWICH, J., stated the facts, and continued:—It is common ground that the £4,000 still remains unpaid. It is also common ground that interest has not been paid for more than twelve years before the commencement of these proceedings, so that if section 8 of the Act of 1874, which is the statute now applicable, touches the case, there is no remedy open to those who are entitled to the £4,000 and interest. As often happens in these cases, there is an overlapping interest between the person entitled to the charge and the person entitled to the property charged, and in addition the tenant for life of the charge under the settlement is also devisee in fee of the estate charged, and he has been so for many years. He has not actually paid interest, but in one sense he may be properly said to have paid interest to himself. It is not argued that the charge is gone as against the real estate, notwithstanding that no payment has been made and no acknowledgment has been given. Probably the case is within *Burrell* v. *Lord Egremont* and the cases of *Roddam* v. *Morley*, *Dickenson* v. *Teasdale*, and *Topham* v. *Booth*. There are numerous other cases besides those which I have mentioned in which payment by a tenant for life has been held to be sufficient to keep the charge alive as against the personal estate, and the cases go, further, to this, that where the tenant for life has to receive and to pay, there is no necessity for any cross cheques, or other sham payments, entries in books or the like. The mere fact that the hand to pay and the hand to receive is the same is sufficient. The novelty of the present case is that the person in possession is not tenant for life, but tenant in fee. Every tenant for life owes to those entitled in remainder a clear duty, which consists in keeping down the interest, and that duty those entitled in remainder can enforce. But a tenant in fee does not owe any duty to anyone, and he may, if he pleases, allow the charge to drop. It has also been put on the ground of agency, as was done by Chitty, J., in *Dibb* v. *Walker*, where he says: "The additional reason given by Lord Wensleydale in *Forsyth* v. *Bristowe* is not a mere *dictum*, but a ground of the decision itself. He lays it down that payment of interest by the assignee of the equity of redemption (which plainly includes the tenant for life of the equity of redemption) is clearly payment of interest, and that the statute 3 & 4 Will. 4, c. 42, s. 5"—the rule is not altered by the more modern statute—"did not expressly require that it should be made by the party liable or his agent, and that if it implied it, the assignee of the equity of redemption who covenants to pay is sufficiently an agent for that purpose. In regard to this doctrine of agency, it is to be observed that payment of interest by an agent is not expressly mentioned in the 5th section of the statute under consideration, but it appears to be imported from the other part of the section, which speaks of acknowledgment made by writing by the party liable by virtue of the indenture or specialty or his agent; or by the general tenor of the section, which treats payment of interest as an acknowledgment." Looked at from that point of view, it may be that the tenant in fee of the charged estate is the agent having a duty to perform; or, putting aside the duty and independently of the consideration, a tenant in fee may be the agent of the persons entitled to the personal estate, and liable to pay because the real estate is insufficient to satisfy the charge. In reality there is no connection between them. They claim possibly through the same person but under different lines of inheritance, and I fail to see how a tenant in fee can in any way be said to be the agent of these parties. If the tenant for life owes

a duty, it would be easy to say he is agent for the purpose of doing it, but it seems to me extremely difficult to say that there is a duty or agency.

Now I am not entirely without authority, although I have not one directly in point. In *Coope* v. *Cresswell* the question was not whether the statute was in operation so as to bar the claim as against the personal estate by means of any payment or acknowledgment of the owner of the real estate, but whether a payment by those entitled to the personal estate had kept alive the charge as against the real estate. That came, in the first instance, before Kindersley, V.C. (14 W. R. 568, L. R. 2 Eq. 106), and it is as well, when reading a decision of the Court of Appeal, from so learned and accurate a judge as the Vice-Chancellor was, to see how he treated it. He states the question in this way: "The question resolves itself into this, whether payment of interest within twenty years"—it was twenty years then—"by those whose duty it was to apply the personal estate and the proceeds of sale of the Pinkney estate, in payment of debts, prevents the devisee of the Devon estate from setting up the statute." That case is therefore precisely in point with the one before me. In the course of his judgment, which deserves attention, the Vice-Chancellor said that he intended to decide according to *Roddam* v. *Morley*, and not to decide adversely to *Dickenson* v. *Teasdale*; and, on the authorities, felt justified in holding that the defendants could not plead the Statute of Limitations. This judgment was carefully examined by the Lord Chancellor, who had therefore before him *Roddam* v. *Morley* and *Dickenson* v. *Teasdale*, and the Vice-Chancellor's remarks upon them. Upon the appeal the Lord Chancellor held, reversing the decision of below, that the payment on account of the personal estate had not kept the charge alive as against the real estate. It seems to me that I have a decision of the highest importance, and as I cannot see any difference in principle between *Coope* v. *Cresswell* and the present case, I hold that the claim of the trustees of the settlement are barred by the statute against the real estate.

Solicitors, *Rhodes & Son; Blount, Lynch, & Petre; S. W. Johnson & Son.*

Chan. Div.
Vaughan Williams, J. } April 3.

MARWICK v. LORD THURLOW. (a.)

Company — Practice — Debenture-holder's action — Declaration of charge.

It is the practice of the judges of the Chancery Division to allow a declaration of charge to be inserted in the judgment in a debenture-holder's action; but, after a winding-up order, the declaration will not be made without the assent of the official receiver and liquidator.

This was a debenture-holder's action.

No defence was put in, and the statement of claim was delivered and notice of motion served for judgment together with a declaration that the debenture-holders were entitled to a charge upon the undertaking of the company and upon all its property, present and future, including uncalled capital.

The official receiver was *ex officio* provisional liquidator. The action was set down as a short cause, and the minutes of judgment containing the declaration of charge were approved by the solicitors to the trustees for the debenture-holders and the official receiver, but no one except the plaintiff appeared on the motion.

A. à Beckett Terrell, for the motion.

VAUGHAN WILLIAMS, J.— Some time since Romer, J., declined to make such a declaration as is now asked for, on the ground that there ought first to be an inquiry as to the validity of the debentures. There being a doubt, however, I have consulted the judges of the Chancery Division, Romer, J., himself being present, and they think that, however advantageous the omission of the declaration might be, it is not in accordance with the practice. I feel bound to follow the practice. But I do not feel bound to make the declaration in the present case, in the absence of the official receiver. I do not wish to have his hand tied too tightly by the practice. I do not like it much, and for this reason: Debenture-holders' actions, commenced before a winding-up order has been made, are often transferred to me after judgment had been given. One of the matters to be inquired into in the winding up is frequently the validity of the debentures. While the company is solvent and a going concern, those who have the direction and management of it do not always take the same view as that which I might take, especially where the directors are the nominees of the vendors. And after a winding-up order the liquidator does not invariably take the same view as that previously taken by the directors. But when an inquiry as to the validity of the debentures is suggested, the court is frequently hampered by the existence of a declaration, perhaps made on a short cause, which—it is said—establishes beyond hope of recall the validity, though of course not the priority, of the debentures. I have often and often felt that it would be to the interest of everybody that inquiry should not be burked in this way. The present case, at any rate, is not one in which the declaration ought to be made without due consideration. So much do I regard a company insolvent and in winding up, and therefore *plus* its creditors, as a different entity from a going company not in liquidation, that after a winding-up order I will not make the declaration asked for without the assent of the official receiver and liquidator being placed on record. The official receiver must attend in court. Expense may be incurred by his so doing, but I will take care that it shall be so small as to be unworthy of consideration.

Later in the day one of the assistant official receivers attended and gave an explanation to his lordship.

VAUGHAN WILLIAMS, J.—I am informed that it was doubted whether the debentures could be disputed, having regard to the fact that the petition had been presented by a debenture-holder. I do not think that that fact is material, and under the circumstances I shall not at present make a declaration of charge, but I will order the trusts of the deed to be carried into execution and direct the inquiries asked for.

Solicitor, *G. M. Folkard.*

(a.) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

Q. B. Div.
(Charles and Wright, JJ.) May 2.

MAYOR, &c., OF WOLVERHAMPTON (*Appellants*) *v.* COUNTY COUNCIL OF SALOP (*Respondents*). (*a.*)

Highway—Extraordinary traffic—Mode of conducting traffic—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 23.

The carting of coal along a main road in carts driven every weekday in strings of four or five carts at a time, each cart being drawn by one horse, with only two or three drivers in charge, the number of journeys per day being five each way, and the carts being so driven that they keep the same track, and thus do not distribute the wear of the road, is "extraordinary traffic," as it is a carriage of articles over a road in a mode which substantially increases the burden.

This was a case stated by the justices of the peace for the county of Salop under the statutes 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, s. 33, for the purpose of obtaining the opinion of the court upon questions of law.

At a petty sessions holden at the police court in Shifnal in and for the division of Shifnal, in the county of Salop, on the 5th of October, 1894, a complaint was preferred by the county council of the county of Salop (the respondents) against the mayor, aldermen, and burgesses of the county borough of Wolverhampton (the appellants) under section 23 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), complaining that by the certificate of Alfred Thomas Davis, the surveyor to the respondents, dated the 28th of July, 1894, it appeared that, having regard to the average expense of repairing the highways in the neighbourhood, extraordinary expenses amounting to the sum of £174 had been incurred by the county council from the 25th of March, 1893, to the 25th of March, 1894, in repairing a certain portion, in length 1 m. 2 fur. 115 yds., or thereabouts, of the main road, commonly called or known as the Hatton-road, leading from Shifnal to Wolverhampton (being a main road and repairable by the said county council) within the said county by reason of the damage caused by extraordinary traffic thereon, and that such extraordinary traffic had been conducted by or by order of the appellants.

From the case stated it appeared that:—

(1) The said road was a main road.

(2) The appellants were the owners of the Cosford Waterworks, situate at Cosford, in the parish of Albrighton, in the county of Salop, a distance of about nine miles from the town of Wolverhampton.

(3) The appellants in connection with the said Cosford pumping station used a large quantity of coal for their engines, and such coal had for a period of sixteen years been conveyed in trucks to a siding of the Great Western Railway Co., near Bonemill Bridge, and thence carted along a lane called Bonemill-lane to a point where the main road is joined by the said lane, and thence to the point where the said main road passes the entrance to the Cosford pumping station.

(4) The coal so conveyed for the use of appellants was, in the years 1893 and 1894, carted along the said main road in carts belonging to them, the same being driven on all weekdays, either five carts or four carts at a time (each cart being drawn by one horse) following in a string with only three or two drivers in charge, the average number of journeys per day being five each way. Thus the expenses of labour were economized, and the carts kept the same track, and the wear of the road was not distributed.

(5) The quantity of coal conveyed during the year ending the 31st of March, 1894, was 7,855 tons or thereabouts.

(6) By reason of the traffic of the appellants in manner aforesaid, and the frequent daily journeys by a number of carts driven in the same track, the said road became much broken up and damaged, and heavy extraordinary expenses were incurred by the respondents in necessary repairs.

(9) The traffic of the appellants was not in connection with a recognized industry of the neighbourhood, but was purely incidental to the appellants' undertaking in supplying the town of Wolverhampton with water from a local source.

The justices found that the traffic of the appellants was extraordinary traffic within the meaning of the Highways and Locomotives Amendment Act, 1878.

The question for the opinion of the court was whether, under the circumstances stated, the justices were right in deciding that the appellants' traffic was extraordinary traffic.

Bosanquet, Q.C., for the appellants.—The traffic as described in the stated case does not amount to "extraordinary traffic" within *Hill* v. *Thomas*, 42 W. R. 85, [1893] 2 Q. B. 333. There was nothing excessive in the weight.

Jelf, Q.C., and *A. Graham*, for the respondents, were not called upon.

CHARLES, J.—In this case the magistrates have come to the conclusion that the traffic of the appellants along the main road described in the special case was extraordinary traffic within the meaning of section 23 of the Highways and Locomotives (Amendment) Act of 1878. Now many decisions have been given as to the meaning of the words of that section; all of them are fully dealt with in the judgment of the Court of Appeal, which was delivered by Bowen, L.J., in *Hill* v. *Thomas*, and it is unnecessary to refer to any of those cases, inasmuch as the case of *Hill* v. *Thomas* is now the last and most authoritative declaration as to what the meaning of the words "extraordinary traffic" is in the section in question. At p. 340 of his judgment, [1893] 2 Q. B., Bowen, L.J., says this: "Extraordinary traffic is really a carriage of articles over the road at either one or more times, which is so exceptional in the quality or quantity of articles carried or in the mode or time of user of the road as substantially to alter and increase the burden imposed by ordinary traffic in the road, and to cause damage and expense thereby beyond what is common." In other words, there must be an exceptional user of the highway by a person who uses the road of some sort or other.

Now, keeping in mind what was there laid down as to the real meaning of "extraordinary traffic," I find that, although the appellants for a period of sixteen years had been in the habit of conveying quantities of goods in carts along the road in question, it is not until the years 1893 and 1894 they adopted the plan which in those years they did adopt for carrying the goods, and in those years the magistrates said that coal was carted along the main road in carts belonging to them, "the same being driven on all weekdays, either five carts or four carts at a time (each cart being drawn by one horse) following in a string with only three or two drivers in charge, the average number of journeys per day being five each way. Thus the expenses of labour were economized, and the carts kept the some track, and the wear of the road was not distributed." They further state that by reason of the traffic of the appellants in manner

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

aforesaid, and the frequent daily journeys by a number of carts driven in the same track, the road became much broken up, and under those circumstances they were of opinion that the traffic was "extraordinary traffic." It appears plain to my mind that the magistrates were warranted in considering that this was a carriage of articles over a road in a mode which substantially increased the burden of expenses which otherwise would not have been imposed upon them. That being so, we come to the same decision at which they have arrived.

WRIGHT, J.—I agree.

Judgment for the respondents, with costs.

Solicitors for the appellants, *Sharpe, Parker, & Co.*, for *Horatio Brevett*, Town Clerk, Wolverhampton.

Solicitors for the respondents, *Chester & Co.*, for *E. C. Peele*, Clerk of the Council, Shrewsbury.

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Wills, Charles, and Lawrance, JJ.) — Feb. 2.

REG. *v.* MUNSLOW. (*a.*)

Criminal law—Libel—Form of indictment—Absence of averment of malice—Libel Act, 1843 (6 & 7 *Vict. c.* 96), *s.* 5.

Section 5 *of the Libel Act,* 1843, *which enacts that "if any person shall maliciously publish any defamatory libel," he shall upon conviction be liable to fine or imprisonment, does not create or define the offence, and an indictment for libel which does not contain an averment of malice is not bad by reason of the omission of such an averment.*

Semble (per Lord Russell of Killowen, C.J., *and* Charles, J.), *even if the averment of malice be necessary, the omission of it is a defect which may be cured by verdict.*

Case stated by Cave, J., as follows:—

George Munslow was tried before me at the last assizes at Warwick, on an indictment for libel under section 5 of 6 & 7 Vict. c. 96. The indictment contained three counts, each setting out a separate libel. The language of each count, so far as it affects the question of law raised before me, was identical, and for the purpose of the present case it is only necessary to set out the material words of the first count, which were as follows:—"The jurors of our Lady, the Queen, upon their oath, present that George Munslow unlawfully did write and publish a certain defamatory libel of and concerning Henry Truslove, according to the tenor and effect following—that is to say (here follow the specific words of the particular libel complained of)."

The prisoner pleaded not guilty, whereupon counsel, on his behalf, applied to me to quash the indictment, on the ground that it did not contain any averment that the prisoner published the libels, or any of them, maliciously, and did not, therefore, sufficiently disclose any offence under the aforesaid section.

I refused this application, and allowed the case to proceed, and the prisoner having been convicted on all the counts, his counsel again raised the same question by way of motion in arrest of judgment. I thereupon postponed sentence, and took bail for the prisoner to come up for judgment, if called upon, at the next assizes, and consented to state a case for the consideration of this court.

The question for the opinion of the court is whether judgment ought to be arrested on the ground taken by the prisoner's counsel.

The Libel Act, 1843, s. 5, enacts that "if any person shall maliciously publish any defamatory libel, every such person being convicted thereof shall be liable to fine or imprisonment, or both, as the court may award," &c.

Stanger, for the defendant.—The indictment is bad for want of an averment that the libel was published maliciously. That word is used in section 5 of the Libel Act, 1843, while in section 3, which deals with publication "with intent," it is omitted, the intent supplying the malice. The omission of this material word is fatal: *Reg.* v. *Harvey*, 19 W. R. 446, L. R. 1 C. C. R. 284. [Lord RUSSELL OF KILLOWEN, C.J.—In that case the indictment was under a section which defines the offence, here the section merely prescribes the punishment, and contains no definition.] The section applies only to "malicious publication," and at least gives the correct description of the common law offence, and shows that malice is an essential ingredient. The omission of such an ingredient cannot be cured by verdict: *Reg.* v. *Aspinall*, 25 W. R. 283, 2 Q. B. D. 48; *Reg.* v. *Mayor of Poole*, 36 W. R. 239, 19 Q. B. D. 602. [Lord RUSSELL OF KILLOWEN, C.J.—The offence is a common law, and not a statutory offence, and the malice may be proved by inference, and need not be specifically alleged: *Rex* v. *Harvey*, 2 B. & C. 257; *Bromage* v. *Prosser*, 4 B. & C. 247.] Although malice may be proved by inference, it must be found by the jury, and must, therefore, be alleged. Indictments have been held to be bad for want of such words as "wilfully" or "unlawfully": *Rex* v. *Ryan*, 2 Moo. C. C. 15; *Rex* v. *Cox*, 1 Leach, 71; *Rex* v. *Davis*, *Ibid.* 493. Neither is the indictment made good by 14 & 15 Vict. c. 100, s. 24, which provides that indictments are not to be held insufficient for want of the averment of any matter "unnecessary to be proved." The precedents in books of pleading all give the word "maliciously": Archbold's Criminal Pleading, 21st ed., pp. 69-73.

Hugo Young, for the prosecution.—Even if malice must be proved and ought to have been alleged, the verdict necessarily involves a finding of malice, and cures the defect (if any) in the indictment: *Heymann* v. *Reg.*, 21 W. R. 357, L. R. 8 Q. B. 102. But the indictment itself is good, and even if it was intended to be framed under the statute the jury could convict of the common law offence: *Boaler* v. *Reg.*, 37 W. R. 29, 21 Q. B. D. 284. It is clear that in a civil action for libel at common law, malice need not be alleged: *Mercer* v. *Sparks*, Noy. 35; *Bromage* v. *Prosser*, and the same rule applies to criminal proceedings for libel. [He was stopped by the court.]

Stanger replied.

Reg. v. *Goldsmith*, 21 W. R. 791, L. R. 2 C. C. R. 74; *Rex* v. *Abingdon*, 1 Esp. 226; and *Emmens* v. *Pottle*, 34 W. R. 116, 16 Q. B. D. 354, were also referred to.

Lord RUSSELL OF KILLOWEN, C.J.—This indictment contained three counts, and the language of each count may be taken to be identical. The defendant was charged with having unlawfully written and published a defamatory libel, the word "maliciously" being omitted: had the words "unlawfully and maliciously" been employed the case would not now be before us. To my mind it

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

is a deplorable state of the law if such an omission could not have been then and there cured by the judge. However, the point which we have to determine is whether the indictment was bad. The case was presented to the jury as being within section 5 of the Libel Act, 1843, but how and for what purpose was it said to be within that section? [His lordship read the section, and continued:—] The section does not, as its language discloses, create a new offence, nor does it purport to give a definition of an existing offence; but it merely states what is to be the punishment following on conviction for what was already an offence at common law. It follows, therefore, that that class of cases in which the language of a statute creating an offence has been required to be followed, many of which have been cited to us, have no application. The word "maliciously" was introduced into the section because without it the section would have worked gross injustice. Anyone who publishes defamatory matter of another, tending to damage his reputation or expose him to contempt, is guilty of publishing a defamatory libel, and the word "maliciously" was introduced in order to show that, though the accused may be *primâ facie* guilty, yet if he can rebut the presumption of malice attached to such publication he is not liable. It is for the judge to determine whether the alleged libel is capable of being regarded as a libel; his function is then ended, and it is for the jury to find whether it is in fact a libel or not: if the jury determine it to be a libel, then, in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or that the matter complained of was true, and that its publication was for the public benefit; and that class of case is meant to be excluded from the purview of the section by the use of the word "maliciously."

Here the case went to the jury after the objection was taken, and we must assume that the judge thought the language capable of bearing the innuendo placed on it and was capable of being a libel; the jury found that it was in fact a libel, and that there was no lawful excuse for its publication. In that state of facts, is the prisoner to be absolved from the consequences of the verdict and is the conviction to be quashed merely because the word "maliciously" was not used in the indictment? The argument for the defendant is that the indictment was framed under the statute, and is in respect of an offence under the statute. In my judgment that is a mistaken view; the indictment is for a common law offence, but it was no doubt intended to be so framed as to bring it within the section for the purpose of punishment. It is common ground that the rules of pleading in civil and criminal cases are the same; if, therefore, the authorities show that in an action for libel the declaration is good on demurrer although the word "maliciously" is omitted, it follows that an indictment is not bad by reason of a similar omission.

The first authority to which I need refer is *Rex* v. *Harvey*, decided in the year 1823. In that case the defendants were indicted for a libel imputing mental insanity to George IV., and though this precise point did not arise, the language of the judges upon a motion for a new trial on the ground of misdirection throws great light upon the subject. The jury at the trial required to know from the Lord Chief Justice whether it was necessary that there should be a malicious intention in order to constitute a libel, and the answer given was: "The man who publishes slanderous matter, in its nature calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about unless he can show the contrary; and it is for him to show the contrary." Upon the motion for a new trial, Bayley, J., said that in his opinion that direction was right. And Holroyd, J., said: "It is not necessary to aver in such an indictment any direct malice, because the doing of such an act without any excuse is indictable"; and again: "It appears, therefore, that it was not absolutely essential to aver malice in the indictment or to prove it at the trial; but it is unnecessary to discuss that point, because I think, upon the rules and principles of the common law, malice was to be inferred from the evidence laid before the jury." I will only observe that the proof at the trial would be the proof of publication of a libel of such a nature that the law would infer malice from the fact of its publication.

That case was followed by *Bromage* v. *Prosser*, which was an action of slander; but on this point there was no difference between actions for slander and for libel. In delivering the judgment of the court Bayley, J., says: "If in an ordinary case of slander (not a case of privileged communication) want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law implies such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong." And again he says: "In an ordinary action for words it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in Styles (p. 392), and was adjudged upon error in *Mercer* v. *Sparks*." Those decisions seem to me to be direct authorities upon the present case. The last case I shall mention is *Heymann* v. *Reg.*, where it is laid down that at common law there is no distinction in pleading in civil and criminal proceedings for libel; and the general principle is that civil and criminal pleadings are the same where the criminal proceedings are not taken under a statute defining the offence in particular language.

I have come, therefore, to the conclusion that this indictment is perfectly good; it would be monstrous if it were held bad. For myself, I should be ready, if it were necessary, to say that an indictment which begins by alleging that the defendant "unlawfully wrote and published" a defamatory libel may, when it is being considered after verdict, be treated as an imperfect averment which has been cured by verdict. I do not decide however, upon that ground, but upon the broad ground that the indictment is good, that it is not in respect of an offence under or created by the section and that the true view of the section is that it does not define or describe the offence, but enjoins the character of the punishment to be awarded to an existing offence.

POLLOCK, B.—I concur in thinking that the conviction should stand, upon the ground that the indictment was sufficient in law. It is not an indictment which is framed under any particular section of a statute which creates a crime, and we must always bear in mind that the rules of pleading as to libel are the same in criminal and in civil proceedings. It may be generally stated as a proposition of law that when an action for libel lies without special damage an indictment may charge the document as being a libel, and the person who publishes the libel is within the criminal law, although he had no malicious intention in the publication. The principle has been followed out in all the cases referred to, commencing with *Mercer* v. *Sparks*; but I may mention one of

which affords a peculiar illustration of it—that of *Haire* v. *Wilson*, 9 B. & C. 643—in which the jury were directed to find for the plaintiff if they thought that the defendant intended to injure him by publishing the libel. But the court *in banc* said: "The judge ought not to have left it as a question to the jury whether the defendant intended to injure the plaintiff, for every man must be presumed to intend the natural and ordinary consequences of his own act. If the judge thought the tendency of the publication injurious to the plaintiff, he ought to have told the jury it was actionable, and the plaintiff was entitled to a verdict." That principle was adopted in *Bromage* v. *Prosser* and other cases, and the authorities come to this, that it is not necessary in law that such an indictment as the present should aver as a fact what is a necessary inference of law. And it is clear that when the facts are sufficiently alleged in an indictment in such a manner as that, if proved at the trial, the judge would direct the jury that the offence was committed, unless the presumption of malice was displaced, it is not necessary to aver malice in the indictment, for it is not necessary to prove it by direct evidence. I think, therefore, that this indictment is good.

WILLS, J.—I am of the same opinion. It is clear to me that this is a good indictment at common law. The use of the word "unlawfully" excludes all such cases as publication on a privileged occasion, and the words "libel" and "publish" exclude what is called an accidental publication, for, as I understand the judgment of Lord Esher, M.R., in *Emmens* v. *Pottle*, an accidental publication is no publication at all. And in *Rex* v. *Abingdon* Lord Kenyon treats an accidental publication as not being a libel; but if I had to decide between the two views I should prefer that of Lord Esher as being the more technically correct; either view, however, excludes all notion of an accidental publication. It seems, therefore, that every case is excluded in which the law would not supply the inference of malice; and if that is so, the averment of malice cannot be the less effectually made because it is made by inevitable inference.

CHARLES, J.—I agree that the indictment is good, and have nothing to add to the reasons already given. For myself, however, I may say that I agree with my lord that if the absence of the word "maliciously" is a defect the defect has been cured by verdict.

LAWRANCE, J.—I am of the same opinion.

Conviction affirmed.

Solicitors for the prosecution, *Wood & Bourne*, Southam.

Solicitors for the defendant, *W. B. Sanderson*, Warwick.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — April 24.

KELLY v. METROPOLITAN RAILWAY CO. (a.)

County court—Practice—Costs—Action founded on contract or tort—Personal injury to passenger on railway—Negligence of railway company—Less than £50 recovered—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action by a passenger lawfully travelling in a train belonging to a railway company for personal injuries caused by the negligence of the company is an action "founded on tort" within the meaning of section 116 *of the County Courts Act*, 1888, *whether the statement of claim be framed in contract or in tort; and a plaintiff who recovers £20 or upwards is entitled to costs on the High Court scale.*

Taylor *v.* Manchester, Sheffield, and Lincolnshire Railway Co., ante, *p.* 120, [1895] 1 *Q. B.* 134, *discussed.*

Appeal from chambers.

The action was brought in the High Court to recover damages for personal injuries. The statement of claim alleged that the plaintiff was a passenger upon the defendants' railway for reward, and the defendants agreed to safely and securely carry him from Northwood Station to Baker-street Station; yet the defendants, in breach of their duty and agreement, so negligently managed the train that it came into collision with the dead end of Baker-street Station, whereby the plaintiff was injured. The defendants admitted that the collision was caused by the negligence of the engine driver in not applying the brake or shutting off steam soon enough, and at the trial the jury assessed the damages at £25, and judgment was entered for the plaintiff for that amount with costs.

Upon the taxation of the costs the master was of opinion that the action was founded on contract, and that the plaintiff, having recovered less than £50, was only entitled to costs upon the county court scale under section 116 of the County Courts Act, 1888.

Day, J., at chambers, affirmed the decision of the master.

The plaintiff appealed.

Kemp, Q.C. (*Cagney* with him), for the plaintiff.—The plaintiff had to prove negligence in the defendants, and it was not necessary to prove a contract to give him a cause of action. That being so, the action was founded on tort. It makes no difference in such a case whether the negligence consists in an act of omission or of commission. In *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, *ante*, p. 120, [1895] 1 Q. B. 134, the court, in drawing a distinction between active negligence and negligence consisting of nonfeasance, was dealing with a case in which, to get the duty, there must be a contract.

J. Lawson Walton, Q.C. (*G. Elliott* with him), for the defendants.—The foundation of this action is contract. The plaintiff took a ticket, and thereby the defendants undertook to take due care of him as a passenger. The act of negligence was an act of omission in not putting on the brake or shutting off the steam soon enough. That was the omission to take such care of the plaintiff as by the contract the defendants were bound to take: *per* Lindley, L.J., in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* In *Foulkes* v. *Metropolitan and District Railway Co.*, 28 W. R. 526, 5 C. P. D. 157, Bramwell, B., says that where there is no duty of contract there is no cause of action for a nonfeasance. The plaintiff, therefore, is only entitled to county court costs.

Lord ESHER, M.R.—In this case the plaintiff was a passenger on the defendants' railway, and he was injured by an act of the defendants' servants. The case was tried upon the assumption that the defendants' servants were guilty of negligence. Upon the one hand it is said that, as the plaintiff has brought his action in contract, he can only recover costs on the county court scale. Upon the other hand it is

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

said that, whatever may be the form of the pleadings, the action is really an action of tort. In old times it was a disputed question whether such an action as this was an action of contract or tort. It was settled in the end that a plaintiff might maintain an action on either view. He may allege that the company contracted to carry him with reasonable care and skill, and that they failed to do so, and he may maintain the action upon that ground. He may also allege that he was lawfully in the train with the consent of the railway company, and that they were bound, whether they carried him under a contract or not, not to injure him by negligence on their part. The plaintiff may sue in either form, and to determine the question before us the form of the pleadings is immaterial. In either view the question to be determined is the same, namely, whether the defendants were guilty of negligence, and in such a case any distinction between active or passive negligence is, to my mind, wholly immaterial. There must be the negligent omission to do that which it was reasonably right for the defendants to do, or the negligent doing of something which it was wrong for them to do. If the jury find negligence in the defendants, and that the negligence is the cause of the injury to the plaintiff, the cause of action is complete. The action, therefore, no matter how the pleadings are framed, is an action of tort. If that is so, then the plaintiff, having recovered £25 in an action of tort, is entitled to full costs.

The appeal must, therefore, be allowed.

A. L. SMITH, L.J.—There appears to have been some misapprehension as to what was decided in the case of *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, to which I was a party. The plaintiff in the present case was a passenger on the defendants' railway, and whilst lawfully riding in one of their carriages was injured by its being negligently run into a dead end by the defendants' driver. It has been thought by the master and Day, J., that, because the negligence consisted in the omission of the driver to turn off steam, that constituted a nonfeasance or omission within what was said in the above-mentioned case, and, as the plaintiff had recovered £25 and no more, he was only entitled to county court costs. I am clearly of opinion that this is not what was decided in that case, nor is any such statement to be found in the judgment. The distinction between acts of commission and misfeasance, and acts of omission and nonfeasance, does not depend on whether a driver or signalman of a defendant company has negligently turned on steam or negligently hoisted a signal, or whether he has negligently omitted to do the one or the other. The distinction is this: if the cause of complaint be for an act of omission or nonfeasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action at all, because no duty apart from contract to do what is complained of exists, then the action is founded upon contract and not upon tort; if, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from the relation only, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort. This is what was laid down in the above-mentioned case as regards the County Court Acts and costs.

The appeal must be allowed.

RIGBY, L.J.—I agree. It seems to me that the attempt to dissect the acts of the engine driver, and to say that this is a mere omission to turn off steam, fails. The engine driver of the defendant company was in charge of the train. A passenger in that train, lawfully there with the permission of the company, apart altogether from any contract, was injured in consequence of the train being negligently brought into collision with the dead end of the station. In my opinion you cannot take the immediate act and say that the omission to turn off steam was a mere nonfeasance within the meaning of the cases relied upon. The act of negligence was the entire act of so managing the train as to allow it to come, by negligence, into contact with the dead end of the station and so cause the accident. It is a case in which the company, by their servants, neglected a duty which they owed to the plaintiff—that is to say, it was an action of tort.

Appeal allowed.

Solicitor for the plaintiff, *B. H. Van Tromp.*

Solicitor for the defendants, *C. A. Mason.*

From Prob. Div. & Adm. Div. (Lord Esher, M.R., and Lopes and Rigby, L.JJ.) — March 28, 29.

"THE SATANITA." (*a.*)

Shipping—Collision—Liability—Statutory limitation—Special contract—Merchant Shipping Act Amendment Act, 1862 (25 & 26 *Vict.* c. 63), *s.* 54.

The owners of yachts, in entering them for a race at a regatta, undertook to be bound by certain rules while engaged in the race. The rules provided that the owner of a yacht which disobeyed the rules should be liable for all damages resulting from the breach thereof.

Held, that the rules constituted a contract between the owners of competing yachts, and that the damages recoverable for a breach of the rules were not confined within the statutory limitation of damages enacted by section 8 *of the Merchant Shipping Act Amendment Act*, 1862.

Appeal of the defendant from the judgment of Bruce, J.

The action was brought by the Earl of Dunraven against Mr. A. D. Clarke to recover damages sustained by reason of the collision of the defendant's yacht, *The Satanita*, with the plaintiff's yacht, *The Valkyrie*.

The collision took place whilst the two yachts were cruising about in the river Clyde preparatory to the start of a race at the Mudhook Yacht Club Regatta, for which race both yachts had entered.

It was admitted at the trial that the collision was caused by the failure of *The Satanita*, when close hauled on the port tack, to keep out of the way of *The Valkyrie*, she being close hauled on the starboard tack. It was also admitted that the collision occurred without the actual fault or privity of the defendant. The only question between the parties was whether the plaintiff could recover as damages the whole amount of the loss sustained by him, or whether the liability of the defendant was limited by section 54 of the Merchant Shipping Act Amendment Act, 1862, to £8 per ton of the tonnage of *The Satanita*. On this latter basis the amount recoverable would have been £952 7s. 4d., which sum the defendant had paid into court.

By the entry forms for the regatta, which were signed by the master of *The Valkyrie* and by the owner of *The Satanita*, the owners of the yachts

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

agreed to be bound by the sailing rules of the Yacht Racing Association, which rules were by the bye-laws of the Mudhook Yacht Club to govern all matches at the regatta.

It was admitted that at the time of the collision the yachts were amenable to the sailing rules.

The following are the material rules:—18. When two yachts are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows—viz: A yacht which is close hauled on the port tack shall keep out of the way of a yacht which is close hauled on the starboard tack.

24. Each yacht must go fairly round the course, and must not touch any buoy, boat, or vessel used to mark it out, but shall not be disqualified if wrongfully compelled to do so by another yacht. Any yacht causing a mark vessel to in any way shift her position to avoid being fouled by such yacht shall be disqualified. If a yacht in consequence of her neglect of any of these rules shall foul another yacht or compel other yachts to foul, she shall forfeit all claim to the prize, and shall pay all damages.

32. Any yacht disobeying or infringing any of these rules, which shall apply to all yachts, whether sailing in the same or different races, shall be disqualified from receiving any prize she would otherwise have won, and her owner shall be liable for all damages arising therefrom.

Bruce, J., gave judgment for the defendant.

The plaintiff appealed.

Sir W. Phillimore, Q.C., and *J. Walton, Q.C.* (*L. L. Batten* with them), for the plaintiff.—The defendant is not entitled to the statutory limitation of damage, for the parties have contracted themselves out of the statute. The contract is between the owners of all yachts competing in the regatta, they having all agreed to be bound by the regatta rules. Under the rules the owner of the yacht in fault is to be liable for "all damage." Those words must be construed in their ordinary sense, and are wider than the words of the statute.

Sir R. Webster, Q.C., and *Pollard* (*Hon. C. G. Colville* with them), for the defendant.—There is no such contract as suggested between the owners of competing yachts, and no consideration for any such contract. The only obligation of the yacht-owner is with the regatta committee. The words "all damages" mean all damages which can be recovered at law—*i.e.*, as provided by statute.

They referred to *Wahlberg* v. *Young*, 24 W. R. 847; *The Warkworth*, 33 W. R. 112, 9 P. D. 145.

Walton, Q.C., replied.

LORD ESHER, M.R.—In this case the owner of a yacht has brought an action against the owner of another yacht, and although the action is brought in the Admiralty Court it really turns on the question whether the latter yacht has broken the rules of a regatta in which the two yachts were competing, and, if so, can her owner be sued for that breach by the owner of the damaged yacht? The question, therefore, is whether there was any contract between the owners of these two competing yachts, and it may be put in this way: Did the owner of *The Satanita* enter into any obligation with the owner of *The Valkyrie* that if *The Satanita* broke any of the rules of the regatta and thereby injured *The Valkyrie* he would pay damages to the owner of *The Valkyrie* for the injury so caused? In my opinion it is clear that he did undertake such an obligation, and the way in which he did so was this: The regatta committee offer prizes for sailing matches. They promulgate certain rules, and, in effect, tell the owners of yachts that if they sail their yachts in any of the matches at the regatta they must submit to the committee's conditions. One of those conditions is that the owners of competing yachts must enter in an obligation with each other that if by a breach of the rules one yacht damaged another, the owner of the yacht in fault must make good all the damage so done. If that was so, that constitutes a relation between the yacht-owners. There are other conditions with regard to these sailing matches which create a relationship between the yacht-owners and the committee, but the fact of that relation does not affect the other relation existing between the various yacht owners themselves. In this case, therefore, the defendant entered into a relation with the plaintiff, when sailing their yachts in the regatta, which relation contained an obligation that if the defendant's yacht, through a breach of the regatta rules, injured the plaintiff's yacht, the defendant should be liable to the plaintiff for all damages thereby sustained. It is admitted that *The Satanita*, broke one of the rules, and that the consequence of the breach was the sinking of *The Valkyrie*.

The question now arises, What damages is the plaintiff entitled to? By reason of the particular relation existing between the parties, that question depends on considerations different from those which apply to an ordinary case of collision between two ships on the ocean. We have to apply to this case the rules of the regatta committee, which include the rules of the Sailing Association. These rules are binding on all the yachts sailing in the regatta, but on no other vessels. The governing rule which we have to construe is rule 32. [His lordship read the rule.] Now, that liability to pay all damages cannot be an obligation undertaken by the yacht owner towards the committee, for if one yacht is run into by another yacht, the damage done does not in any way affect the committee, who have no interest in any of the yachts, except that of giving the prize to the winner. Clearly, therefore, it must be the owner of the yacht who can claim the damage, and, if rule 24 is referred to, it becomes obvious that that must be the meaning. [His lordship read rule 24.] Now, what is the meaning of "shall pay all damages"? If it had been "shall pay damages," the rule would have been futile, because, apart from any rule, that would have been the liability of the yacht in default on negligence being proved. Why, then, was the word "all" inserted? No one has been able to give any meaning to the rule, except that "all damage" must refer to all the damage sustained by the owner of the yacht fouled. Of course, if the owner of a yacht chose to take on board his yacht such things as his wife's jewels, he could not recover for the loss of them, such a loss not being, in the contemplation of the parties, a possible result of a breach of the rules.

I therefore come to the conclusion that the effect of the word "all" in these rules is to do away with the limitation of liability contained in section 54 of the Merchant Shipping Act, 1862. There is, moreover, a very reasonable foundation for the rule, because one of the conditions of the regatta was that yachts should be steered either by their owners or by other amateurs. The owners of yachts who are intending to compete have not, therefore, the same means of judging of the sailor-like capacity of their opponents as they would have if the yachts were to be sailed by certificated masters. For these reasons I am of opinion that the decision appealed from was wrong, and ought to be reversed.

LOPES, L.J.—If we were not differing from the judgment of the judge in the court below I should

not think it necessary to deliver a separate judgment in this case, but under the circumstances I will shortly state my views.

There are two questions to be considered. First, was there any contract between the plaintiff and the defendant? secondly, if so, what was the contract? It is admitted that *The Satanita* and *The Valkyrie* entered for a race at the regatta in question, and that their owners had agreed to be bound by the rules of the Yacht Racing Association, and that *The Satanita* violated one of these rules, and damaged *The Valkyrie*. In my opinion there was a contract between each yacht-owner and the committee in certain cases, but there was also a contract between the owners of each competing yacht to this effect, that each owner undertook to pay damages to the owner of any other yacht for injury sustained through his infringement of the rules. That contract attached directly a yacht was entered for and sailed in one of the races. Then it was said that, even if there was such a contract as I have stated, the amount of damages recoverable is limited by reason of section 54 of the Merchant Shipping Act, 1862. On that point I turn to rule 32. I do not neglect rule 24, but I prefer to base my judgment on rule 32. Now it is said by Sir Richard Webster that the word "all" in rule 32 means all the damages recoverable by law, and, therefore, the damages must be limited by the Act. If that is the true construction, I can see no necessity whatever for the insertion of the word "all," because the same result would have followed without the use of the word. Again, this anomaly would happen, that there would be one scale of damages where there was no improper navigation, and another scale where the injury was caused by improper navigation.

I am unable to see why no effect is to be given to the words "all damages," and I think that any other construction would be contrary to the intention of the rule. Now, does that meaning given to the word "all" lead to any absurdity? No, it does not. I think the word was used deliberately and for a purpose, because the yachts are to be steered by the owners or other amateurs, but not by professional sailors, and therefore it is reasonable that an owner should not be exposed to a great risk through other yachts being steered by incompetent persons, whose skill the owner has no means of judging beforehand.

RIGBY, L.J.—I am of the same opinion. All that is necessary in this case to constitute a contract between the plaintiff and defendant is to bring home to them knowledge that the race was to be sailed under the rules in question, and that they then entered their yachts for the race and sailed them in it. With regard to the amount of damages recoverable, the words "all damages" in rule 32 must be construed according to their ordinary legal meaning, and that includes the value of a yacht which has been sent to the bottom. It was argued that if the full meaning is given to the word "all," that would include matters which are not legal damages at all. That argument is met by saying that "all damages" means all damages according to law. We are not bound by our construction of the rule to include everything which resulted, however indirectly, from a breach of the rules. As to the statutory limitation, all that the section in question says is that under certain circumstances the owner of the ship in default shall not be answerable in damages beyond a certain amount. But if the statutory limit be applied to the construction of the words "all damages" in these rules, the effect would be that these words must be construed to mean those damages which would have been the legal consequences if there had not been any such contract as in fact exists between the parties. There is, in my opinion, no justification for adding any such words to the rule, nor can I see any reason for supposing that the draftsman of the rules intended to confine the damages recoverable within the amount of the statutory limitation. There is no reason why the Act should be referred to when the rules use perfectly plain language which is inconsistent with the application of the Act.

Appeal allowed.

Solicitors for the plaintiff, *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for the defendant, *Thomas Cooper & Co.*

High Court of Justice.

Chan. Div. Chitty, J. — May 3.

In re SALT.

BROTHWOOD *v.* KEELING. (*a.*)

Administration—Marshalling assets—Debts—Pecuniary legacy—Real estate charged with debts.

A testator, after directing payment of his funeral and testamentary expenses and debts, gave a pecuniary legacy and devised the residue of his personalty and all his realty to his executors upon trust for realization and conversion. The general personal estate was insufficient to pay the legacy in full after payment of the funeral and testamentary expenses and debts, but there was a surplus arising from the proceeds of real estate.

Held, that the legatee was entitled to have the assets marshalled, so as to stand in the shoes of creditors against proceeds of real estate.

In re Stokes, Parsons *v.* Miller, 67 *L. T. N. S.* 223, 41 *W. R. Dig.* 3, *followed.*

In re Bate, Bate *v.* Bate, 43 *Ch. D.* 600, 38 *W. R. Dig.* 6, *not followed.*

Summons.

By his will, dated in 1891, Samuel Salt, brewer, after directing payment of his funeral and testamentary expenses and debts, gave to his son Samuel £1,500 in addition to his share of the said testator's estate, and gave, devised, and bequeathed all his real and the residue of his personal estate to the executors named in his will upon trusts for realization and conversion and investment of net proceeds, and to pay the income to his wife during her life, and after her death to convert his whole estate into money and divide the same equally between his children, including his said son Samuel. The testator died on the 15th of December, 1891, and his will was shortly afterwards proved by the executors named therein.

The testator's widow died on the 10th of December, 1893. The realization of the testator's estate did not take place until after the widow's death, when it was found that the personal estate was not sufficient for the payment of the testator's funeral and testamentary expenses and debts, which included considerable trade liabilities. The real estate of the testator realised nearly £8,000 net. The testator's son Samuel died on the 23rd of October, 1893, and his administratrix was made a defendant in the above-named application.

The personal estate amounting to less than £1,500, the question arose whether the administratrix of Samuel was entitled to have the estate of the testator

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

marshalled so as to throw the whole of the funeral and testamentary expenses and debts upon the testator's real estate.

Seddon, for the executor and trustee.

Levett, Q.C., and *Clare*, for the administratrix of Samuel.—The debts are charged on two funds, the legacy on one fund. The assets ought, therefore, to be marshalled in our favour: *In re Stokes, Parsons* v. *Miller*, 67 L. T. N. S. 223, 41 W. R. Dig. 3. [CHITTY, J.—Is it admitted that the general direction to pay debts constitutes a charge on the real estate?] Yes.

Byrne, Q.C.; Dunham; and *Wadsworth*, for other defendants.—*In re Bate, Bate* v. *Bate*, 43 Ch. D. 600, 38 W. R. Dig. 6, is conclusive against marshalling. [CHITTY, J.—The authorities were not brought before the court in that case. In *In re Stokes* not only were the older cases cited, but *In re Bate* itself was considered.] Except in one instance all those cases were cases in which the property was made expressly subject to legacies, and that is not so here.

CHITTY, J.—In my opinion the legatee is entitled to have the assets marshalled. The creditors have two funds to which they can resort; the legatee has one fund only. The creditors ought not to be allowed to disappoint the legatee by their election. I follow the decision of Stirling, J., in *In re Stokes*, whose reasoning appears to me to be entirely in accord with the principles of the court.

Solicitors, *Charles Robinson & Co.*, for *A. G. Hooper*, Dudley; *Harman, Ward, & Collier.*

Chan. Div. }
Stirling, J. } April 24, 25.

In re OTWAY.
OTWAY *v.* OTWAY. (*a.*)

Will—Life interest—Forfeiture clause—Liable to be deprived—Bankruptcy—Annulment.

Under the will of his mother H. O. was entitled to a reversionary life interest expectant on the death of his father, but subject to a proviso for the cesser thereof in case he should do or suffer any act or thing whereby he would be deprived or be liable to be deprived of the beneficial enjoyment thereof.

In October, 1894, *H. O. committed an act of bankruptcy, and a petition in bankruptcy was presented against him. In November*, 1894, *his father died. In February*, 1895, *the Court of Appeal dismissed the bankruptcy petition under section* 7, *sub-section* (3), *of the Bankruptcy Act*, 1883.

Held, that H. O. had forfeited his life estate.

White *v.* Chitty, 14 *W. R.* 366, *and* Samuel *v.* Samuel, 12 *Ch. D.* 153, *discussed.*

This summons raised the question whether one of the sons of the testatrix, Mr. Harold E. Otway, had incurred a forfeiture of his life interest under the terms of the will.

The testatrix, Mrs. Otway, left certain property upon trust to pay the income to her husband for his life, and after his death she gave a certain share to her son Harold Otway, for his life; but that life interest was made subject to a proviso for the determination of it in the following terms—namely, That if the said Harold E. Otway should at any time become bankrupt, or assign or attempt to assign or incumber or anticipate the income directed to be paid to him, or do or suffer any act or thing whereby either directly or by operation of law he would be deprived or be liable to be deprived of the beneficial enjoyment thereof, then the trustees should apply the income, or such part thereof as they should think fit for the benefit of the said H. E. Otway, his wife and children, in manner therein mentioned.

The testatrix died in the year 1885. Her husband survived until the 10th of November, 1894.

On the 6th of October, 1894, Harold Otway was served with a bankruptcy notice requiring him to satisfy a judgment debt which had been recovered against him. He failed to do so, and on the 26th of October a petition in bankruptcy was presented against him. That petition was pending at the death of his father, the tenant for life. On the 2nd of December a second petition was presented against him in bankruptcy, and this petition was founded on the same non-compliance with the said bankruptcy notice. The present summons was taken out on the 7th of January, 1895, under the above circumstances. Meetings of the creditors of Harold Otway were held, and ultimately on the 18th of January, 1895, the creditors passed a resolution that the affairs of Harold Otway should not be wound up in bankruptcy.

On the 18th of February, 1895, the first petition was brought on, and resulted in the registrar making an order upon it. The debtor appealed from that order, and the Court of Appeal set aside the registrar's order and dismissed the petition.

Brinton, for the trustees, stated the case, and referred to *Oldham* v. *Oldham*, 15 W. R. 300, L. R. 3 Eq. 404, at p. 409, and to *In re Sartoris*, 40 W. R. 82, [1892] 1 Ch. 11.

Buckley, Q.C., and *Hart*, for Harold Otway, argued that "liable" meant "necessarily" in this forfeiture clause; and, further, that if Harold Otway had in fact become "liable" yet that such liability had ceased to affect him when the summons was heard, and that *White* v. *Chitty*, 14 W. R. 366, L. R. 1 Eq. 372; *Samuel* v. *Samuel*, 12 Ch. D. 152, 28 W. R. Dig. 250; and *In re Parnham's Trusts*, 46 L. J. Ch. 80, 25 W. R. Dig. 326, therefore applied, and the life estate was not forfeited.

Costelloe, for Mrs. Harold Otway, argued, having regard to the bankruptcy petitions, founded upon the failure of Harold Otway to comply with the bankruptcy notice, he had "become liable to be deprived" within the meaning of the proviso. That "liable" meant "in peril," not certainty, and that if at any point of time he put himself in peril of being deprived the forfeiture would take effect.

He referred to *Ex parte Dawes*, 34 W. R. 752, 17 Q. B. D. 275; *In re Parnham*, 20 W. R. 396, L. R. 13 Eq. 413; *Ex parte Eyston*, 26 W. R. 181, 7 Ch. D. 145; *In re Amherst's Trusts*, 20 W. R. 290, L. R. 13 Eq. 464, at p. 469, and *In re Sartoris*.

Methold, for the children of Harold Otway, adopted the arguments urged by counsel for Mrs. Otway, and also cited *Yarnold* v. *Moorhouse*, 1 Russ. & Myl. 364.

Buckley, Q.C., in reply.—"Liable" here means that the person taking under the will has effectually made himself liable to lose his interest. [STIRLING, J.—The words are "would be deprived or liable to be deprived."] Within the meaning of those words Harold Otway has never made himself liable. [STIRLING, J.—Costs are in the discretion of the court, yet a person is liable to pay them.] The question really is, whether the case is within *Samuel* v. *Samuel*. [STIRLING, J.—Where is the limit of time to be drawn? In *White* v. *Chitty* the person who

(*a.*) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

became bankrupt got the bankruptcy annulled before any rent was paid. In *Samuel* v. *Samuel* Sir George Jessel says that the annulment must take place before the period of distribution: 12 Ch. D., pp. 158, 159.]

He referred to *Ex parte Eyston*, and also to *Hill* v. *Cowdery*, 4 W. R. 681, 1 H. & N. 360.

STIRLING, J., stated the facts, and proceeded as follows:—The Court of Appeal dismissed the bankruptcy petition on two grounds: first, the want of good faith on the part of the petitioner; and, secondly, that the petition was not one which would benefit the creditors, because it appeared that the only property of the debtor which was brought to the notice of the court was this property, and that one of the events on which his interest was determinable was his bankruptcy. That dismissal was granted under the 7th section of the Bankruptcy Act, 1883, sub-section 3. [His lordship read the sub-section.] The court therefore exercised its judicial discretion as to making the order on this bankruptcy petition.

Now, it was contended before me on behalf of Harold Otway, first, that, under these circumstances, he never at any time did or suffered any act or thing whereby, or in consequence whereof, either directly or by operation of law, he would, if absolutely entitled for life to the income, be liable to be deprived of the beneficial enjoyment thereof within the meaning of the proviso in question; and, secondly, it was said that, even if he did at any time become so liable, that liability ceased to exist at a period which calls for the application of the principle laid down in *White* v. *Chitty*, and followed by the late Master of the Rolls in *In re Parnham* and in *Samuel* v. *Samuel*. These two points have to be considered.

The first question is, What is the meaning of the words "be liable to be deprived of the beneficial enjoyment"? It is contended that a person is not "liable to be deprived" within the meaning of that clause unless it is a necessary consequence of the act that he should be "deprived"; that is to say, that the act should be such that the court, upon the facts being brought to its notice, would, without any exercise of its discretion, be compelled to adjudge that the act was one which deprived Mr. Otway of the beneficial enjoyment of this income. Now, it is important to observe the language of this particular clause, which is in terms that have not occurred in any instrument which has called for judicial determination. [His lordship read the clause.] The words are not merely "be deprived," but "be deprived or be liable to be deprived." The words "be liable to be deprived" are meant to add something to the words which go before. It seems to me that the earlier words apply to acts of the nature of those which it is said on behalf of Mr. Harold Otway would make him liable to be deprived—that is to say, the necessary consequence of which is that he will be deprived. It seems to me that the second clause must be read as including acts which, so far as the person who commits them is concerned, put it out of his power to have any voice in the matter, and "leave" it to a court of justice to say whether he is or is not to be deprived. It seems to me that the act of bankruptcy followed by two bankruptcy petitions was an act which rendered him liable to be deprived of the beneficial enjoyment of the property. If that be so, and a liability did exist at the death of the tenant for life, was that liability got rid of at a time to bring the case within the doctrine of *White* v. *Chitty*. [His lordship stated the facts in that case.] What Lord Hatherley says there (14 W. R., at p. 376) is: "The question is, Has a forfeiture occurred when, before any actual demand made, or possession taken by the official assignee, before one sixpence had accrued to him, the bankrupt, by his diligence and activity, obtained an annulment of the bankruptcy, so that at the time when the first rents accrued there was no hand but his to receive them?" [His lordship then stated the facts in both the cases of *In re Parnham* and also of *Samuel* v. *Samuel*, and read the portion of Sir G. Jessel's judgment in *Samuel* v. *Samuel* beginning with the words "there is a general principle" on page 158 (12 Ch. D.) and ending with the words "points expressly to the death of the tenant for life" on page 159 (12 Ch. D.), and proceeded as follows:—] There appears, therefore, to be a difference of opinion between Lord Hatherley and Sir George Jessel as to the exact line at which the operation of the doctrine, admitted by both the learned judges to be a sound one, is to be applied. According to Sir George Jessel's views the liability ought to have ceased at the time of the death of the tenant for life. According to Lord Hatherley it ought to cease before the arrival of the first time of payment. I am not concerned to decide which of these two views ought to prevail. Having regard to what is said by Sir George Jessel, I think I should follow Lord Hatherley if it were necessary to form an opinion. It seems to me that, adopting Lord Hatherley's views, the liability ought to have been got rid of before the 31st of January, 1895, at the latest. It had not been got rid of then, as I have already pointed out. On the 31st of January both petitions were still pending, and at that moment the liability in my opinion existed within the meaning of the proviso.

I am therefore of opinion that the forfeiture clause has taken effect, and that the discretionary trust has come into operation as from the death of the tenant for life.

Solicitors, *Ellis & Ellis; Michael Abraham & Sons; Lumley & Lumley; The Official Solicitor.*

Chan. Div. } March 6, 14.
Kekewich, J. }

BONHOTE v. HENDERSON. (a.)

Settlement—Voluntary settlement—Rectification—Intention—Satisfactory evidence—Oral evidence.

The court is not disposed to rectify a voluntary settlement where the evidence of the settlor's intention consists of his statement alone, unsupported by written instructions or the like, notwithstanding that the suggested rectification would bring the settlement more into harmony with precedent.

In such a case the court will not in general dispense with oral evidence.

Action.

This was an action to rectify a voluntary deed, the circumstances being as follows:—

By a declaration of trust dated the 15th of July, 1880, executed by the plaintiffs and the defendant, which recited that by a deed poll of even date it was declared that two several sums of £8,000, subsequently increased to £9,000, should be paid to the defendant to be held by him upon the trusts in favour of two of the plaintiffs' unmarried nieces respectively declared by the said declaration of trust, it was provided that the defendant should stand possessed of one of the said sums upon trust for investment, and upon further trust to pay the income to the elder of

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

the plaintiffs' said nieces during her life for her sole and separate use without power of anticipation, and after her decease, as to as well the capital as the income, upon trust for the children of such niece as she should by deed or will appoint, and in default of such appointment upon trust for such of her children as should attain twenty-one as tenants in common, and in case she should die without leaving a child who should attain that age, then, if she should have survived her sister, the younger of the plaintiffs' said nieces, upon trust for her next of kin as tenants in common; but if she should be survived by such younger niece, then upon trust to pay the income of such sum to such niece during her life, and after the decease of such niece, as to as well the capital as the income, upon trust for such of her children as she should appoint, and in default of appointment upon trust for such of her children as should attain twenty-one, and in case she should die without leaving a child who should attain that age, upon trust for such person or persons as she should by will appoint, and, in default of appointment, then upon trust for her next of kin. And that, as to the other sum of £8,000, the defendant should stand possessed thereof upon similar trusts to those thereinbefore expressed, the name of each of the plaintiffs' said nieces being substituted for that of the other.

Kekewich, J., on the case coming on as a non-witness action, was not satisfied that a case for rectification was made out by the affidavit, and directed the case should be put in the witness list in order that the several deponents should be cross-examined on their affidavits, and the case now came on for hearing.

The circumstances in which the deed was prepared and executed are fully set forth in the judgment; and it is only necessary to say, further, that the plaintiffs, whose infirmity prevented them from giving oral evidence in court, stated in an affidavit that the deed was prepared by George Dawes, since deceased, their solicitor; that previous to its preparation they gave him verbal instructions to the effect that their intention was that in the event of either of their said nieces dying without a child she should have the right to dispose as she pleased of the sum of £9,000 to which she had been entitled for life; that it was not their intention and that they never instructed him that in that event the destination of the income and capital of the fund to which such niece had been entitled for life should be as it was by the deed; that they did not understand nor was it ever explained to them that such would be their destination; that after the preparation of the deed they advised their said nieces to make their wills, believing that they had power to dispose by will of the said funds; that had the effect of the document been explained to them at the time it was brought to them for signature they would not have signed it in its existing form, but would have required it to be altered to meet their views as above expressed, and that they were desirous that it should be altered accordingly.

Warmington, Q.C., and *Kirby*, for the plaintiffs.—*James* v. *Couchman*, 33 W. R. 452, 29 Ch. D. 212.

Badcock, for the defendant.—This is a family matter, and the defendant does not oppose the proposed rectification.

Warmington, Q.C., and *Kirby*, in reply.—The plaintiffs are only desirous of inserting in the deed what every settlement of a lady's property would contain in the absence of instructions to the contrary.

KEKEWICH, J.—The jurisdiction of the court to reform, or, as the phrase generally goes, to rectify deeds, is ancient and original. The principles on which it depends and according to which it is exercised have been so often and so fully stated, and moreover are so familar to all practitioners, that it would be waste of time to attempt exposition here. Suffice it to say that a judgment reforming a deed proceeds on the basis that the deed, as it stands, does not express the real bargain between the parties, of which real bargain the court has satisfactory evidence. This, of course, is not directly applicable to voluntary deeds, that is, deeds made without valuable consideration, where, therefore, there is no bargain capable of proof. It is within my knowledge that the extension of the jurisdiction to deeds of this character was not always regarded with favour or as being sound, but it was upheld by the Court of Appeal in *Walker* v. *Armstrong*, 4 W. R. 770, 8 De G. M. & G. 531. I myself assisted to establish it in *Courthope* v. *Daniel*, reported with *Daniel* v. *Arkwright*, 2 Hem. & M. 95, 12 W. R. Ch. Dig. 75. Given the jurisdiction, it is obvious that the court must approach the exercise of it with caution, at least equal to that required in dealing with the investigation of bargains, and the difficulty is necessarily increased by the circumstance that in the nature of things the court cannot have the same advantages of criticism and opposition. If there are documents, such as written instructions, evidencing the intention of the parties, the course may be clear, but if that intention rests on statements of settlors, made, perhaps, long after the date of the deed, when haply precise memory is wanting and circumstances have changed, it behoves the court to act warily. It may be too much to say that no effect is to be given to a statement on oath that if the settlor had known the deed to be what it is, he or she would not have executed it. But the operation of the human mind is so complex, so easily swayed first by one motive and then by another, that I hesitate to attribute much effect, and I decline to attribute cogent force, to the belief and opinion, for really it is no more, that something would or would not have been done in years gone by, in possible events which did not in fact occur.

Before dealing with the merits, it is well to mention one point of procedure. The case was first heard as a non-witness action on affidavit evidence. I declined to grant the relief asked, not only because not satisfied that a case for rectification was made on the evidence as it stood, but also because I am extremely reluctant to hear any case of this character on affidavit evidence. I must not be understood as saying that it never can be done. On the contrary, I have often done it, and am prepared to do it again, where the circumstances, in my judgment, justify that course—as, for instance, where written instructions are proved, and the deed as executed departs from them, and there is no reason to doubt that they were final. It must, too, be remembered that in the Court of Chancery, on which we depend for our authorities on this branch of the law, suits were heard and determined on evidence of this character. But I am satisfied that in a large majority of cases it is unsafe and unwise to dispense with oral evidence, and I frequently decline to do it. That it is competent for the court to require oral evidence is settled. The question was fully discussed in *Lovell* v. *Wallis*, 53 L. J. Ch. 494, 32 W. R. Dig. 77, and although I then entertained, and still entertain, some doubt whether Kay, J., was right in refusing relief, I am sure that he took the proper course in having the evidence thrashed out in the witness-box. A perusal of the report on the trial fully supports this conclusion.

Unfortunately, in the present case the infirmities of the plaintiffs have rendered it impossible to cross-examine them, or to obtain from them information on

the points which their affidavit leaves at large, and Mr. George Dawes being dead, the only available witness was Mr. Trotter, his former clerk. I must, therefore, do my best with the affidavit evidence and exhibits supplemented by such information as Mr. Trotter was able to give. These materials were fully considered when the case first came before me, and have been reconsidered in connection with the cross-examination of Mr. Trotter. But, although involving some details worth investigation, they may for the present purpose be briefly stated. The plaintiffs were minded to make provision for their three nieces, one married the other two unmarried, and it was determined to do this by settlement rather than by absolute gift. They had the assistance of a thoroughly competent solicitor, and also of the defendant Mr. Henderson, an equity counsel, a nephew, and a trusted friend, who gave them the full benefit of his experience and advice in that character. The relative positions of the plaintiffs and defendant were well known to the solicitor, Mr. George Dawes, and, it may be assumed, also to his clerk, Mr. Trotter, and this fact accounts, I think, for the absence of explicit entries and letters which might otherwise be expected to throw light on the transaction. Indeed, the inference from the proved circumstances is that in the later stages of the transaction Mr. Dawes and his clerk treated themselves as doing little, if anything, more than carrying out ministerially arrangements made between the plaintiffs and defendant. On the facts before me it is impossible to say that they were not in this perfectly right. Both drafts were carefully settled by the defendant. There appears to have been more discussion, both before this and subsequently, respecting the settlement in favour of Mrs. Wilson, but looking at the drafts themselves and the defendant's letters to be presently mentioned, it is clear that both drafts had the defendant's best attention and care. It seems to me to be useless narrowly to inquire what had been previously said respecting the contents of the particular settlement, because confessedly the point now in question had not then really been considered. In returning the settled drafts to Mr. Dawes on the 12th of July, 1880, the defendant wrote the first letter of that date, in which alterations in both drafts were referred to and an interview between Mr. Dawes and the settlors thereon was suggested. He added that he was about to have a little talk with the plaintiffs that afternoon. If the matter had rested there I should have been at a loss to understand why Mr. Dawes did not see the plaintiffs before having the settlements engrossed and executed and take their instructions on the alternatives made, or why no entry of any such attendance or explanation is to be found in the day-book of the firm. But later in the day a second letter was addressed by the defendant to Mr. Dawes. In this letter he states that since writing the former letter he had had a long conversation with the plaintiffs about the proposed settlement, and as regards the point now in question says, "The settlement on my unmarried sisters will remain as settled by me, unless you think it advisable to consult them yourself on my alterations before execution." It is clear from the entries that Mr. Dawes did not think it necessary to consult the plaintiffs, and that both settlements were engrossed without further instructions. It must be concluded, too, that no explanation of the particular settlement was given at the time of execution, and that it was not even read over, although that in favour of Mrs. Wilson apparently was. Mr. Henderson's recollection of what took place at his interview with the plaintiffs on the 12th of July is not precise. This is not unreasonable. Far from it. But it leaves a void in the history which cannot otherwise be supplied. I understand from his affidavit that he did not fully explain the particular settlement, and probably did not dwell on it, if he at all pointed out the testamentary power which has given rise to the present litigation.

Is it possible for me to say that the plaintiffs did not assent to the settlement as altered by the defendant, or to hold that they are now entitled to have it rectified, according to what they state their intention to have then been, though it was in no wise expressed. It is possible, and indeed probable, that they did not thoroughly understand how the provisions of the settlement would or might work out and even careful explanation might have failed to make them grasp the possible results. What I think most likely is, that they were content to adopt and act on Mr. Henderson's advice, and to believe that the settlement was best in the form into which he had altered it.

At any rate, I do not see my way to reforming a deed on these, the only available materials, notwithstanding that now it operates otherwise than is wished, and even though, as was strongly urged, the proposed rectification would bring the settlement more into harmony with recognized precedents, and the reasonable views of ladies desiring to make provisions for unmarried nieces.

Action dismissed.

Solicitors, *Dawes & Sons.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, JJ.) — May 14.

BARRY AND CADOXTON LOCAL BOARD *v.* PARRY. (a.)

Local government—Paving expenses—A street not being a highway repairable by the inhabitants at large—Liability of the frontager—Works done to the satisfaction of the urban authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Section 150 *of the Public Health Act,* 1875 *provides that "where any street within an urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority," such authority may, by notice, require the adjoining owners to make it good.*

So long as a street has not become repairable by the inhabitants at large under section 152, *the urban authority are not precluded from requiring the owners to level, pave, &c., the street under section* 150 *by reason only that, on a former occasion, the street has been levelled, paved, &c., to their satisfaction, whether expressed or implied.*

Appeal from the decision of the judge of the Cardiff County Court.

In 1886 the owner of certain property within the jurisdiction of the rural sanitary authority of Cardiff Union proposed to lay out two streets, Oban-street and Kenilworth-road. Plans of the streets, including the necessary sewers, paving, and channelling, were laid before that authority, and were approved by them.

In 1887 the work was done in accordance with the plans.

In 1888 the jurisdiction over the district was transferred to the plaintiffs, who are an urban

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

authority. They did not express either approval or disapproval of the work, but in 1891, the paving and channelling of the streets being in a bad condition, the plaintiffs served the defendant, who was a frontage-owner in the streets, with notice to metal, pave, and channel the two streets. This notice not having been complied with, the plaintiffs did the work, and sought to charge the defendants with the expenses under section 150 of the Public Health Act, 1875. The county court judge found for the plantiffs in respect of the metalling, but with regard to the other matters held, on the authority of *Bonella* v. *The Twickenham Local Board*, 36 W. R. 50, 20 Q. B. D. 63; *Hornsey Local Board* v. *Davis*, [1893] 1 Q. B. 765, 41 W. R. Dig. 127; and *Fulham Board of Works* v. *Goodwin*, 1 Ex. D. 400, 25 W. R. Dig. 156, that, the work having been originally done in accordance with the plan, as approved, the plaintiffs must be taken to have been satisfied therewith and to have taken over the streets, and, further, that the plaintiffs, not having expressed dissatisfaction within a reasonable time, must be taken to have been satisfied.

The plaintiffs appealed.

Lowe (*Plews* with him), for the appellants.—The cases cited before the learned judge dealt with sewers. The sewers are in a different position to streets. Sections 13 and 15 provide for their vesting in the authority so soon as they are constructed, provided they are built to the satisfaction of the authority. But there are no sections which show that a street is to come under the control of the local authority in the same way. The plaintiffs never approved of the work, and it is not found that their predecessors, the rural authority, approved of the work, but in any case that approval would not bind the plaintiffs.

Jackson, for the respondent.—I submit that the word "reasonable" ought to be read into the section before the words "satisfaction of the urban authority," and that, once the local authority has been reasonably satisfied with the road, the owners are relieved from further responsibility, otherwise there would be no limit to the owners' liability. The Private Streets Works Act, 1892 (55 & 56 Vict. c. 57), s. 20, is only adoptive, and does not apply in the case of this district. The authority in this case expressed their satisfaction with the work in the sense that they did not express any dissatisfaction with it for three years, and, at any rate, the rural authority who preceded them had approved, and they were bound by that approval.

Lord RUSSELL OF KILLOWEN, C.J.—I think the county court judge was wrong. The best course for us to pursue will be to remit the case to him with a statement of our views. The facts are these. The defendant is the owner of property abutting upon two streets, Kenilworth-road and Oban-street. In 1886 the land now occupied by these streets was within the jurisdiction of the rural sanitary authority of Cardiff Union. At that time the owner desired to lay out the streets, and it seems clear that plans were submitted to the authority then existing, setting forth the manner in which the owner proposed to deal with the sewering, paving, channelling, &c. It also appears that those plans were approved, but it is suggested by the counsel for the appellants that that authority had no power to approve of the plans so as to bind them. It further appears that following on that approval the work was done. It does not appear that there was any express approval of the work; but it is found as a fact that the work was done in accordance with the plans, and there is no evidence that the then existing authority did not approve of the work.

The area continued within the jurisdiction of that authority till 1888. Then the present authority, which is not a rural authority, but an urban authority, came into existence. It is suggested that they ought straightway to have made up their minds as to whether they were satisfied with the manner in which the streets had been paved and channelled. I do not think so. Very great inconvenience would result from their having to do this, even if a reasonable time were allowed.

But they did not do so, and on the 25th of August, 1891, they gave notice to the respondent to do certain things with regard to the streets in question. The work was not done. Whereupon the appellants did it themselves. The work consisted of several items. With regard to the metalling, the respondent admits his liability to do that part of it; therefore our consideration is confined to the paving, channeling, &c., the question being whether the local board are entitled to enforce payment of the money expended by them in respect of those items.

That question depends upon section 150 of the Public Health Act, 1875. To get at the meaning of that section we must contrast it with section 149. Section 149 is addressed to streets which are then highways repairable by the inhabitants at large. As regards such streets, the effect is to vest them in the board, and place them under their control, and to put upon the board the expense of levelling, paving, &c. Section 150 deals with streets which are not repairable by the inhabitants at large. [His lordship read the section, and continued:—] What is the proper construction of that section?

It is said by the respondent's counsel that satisfaction had been expressed with the work in the time of the rural authority, and that, satisfaction once expressed, there was an end to the obligation, and anything else must be done by the local authority itself. This is not so unreasonable as at first sight might appear, for though it is the case that the better the roads are kept the greater the value of the adjoining property, yet there are also certain public considerations which would give the local board an interest in the proper maintenance of the streets.

But I see no room for that contention in the words of the section; nor do I see from the words of the section any reason why paving, channelling, &c., should not be in the same category as sewers, were it not that the latter are dealt with in another part of the Act, and put in an entirely different position. I read the section to mean in its grammatical and literal sense, "So long as a street is not repairable by the inhabitants at large, and that street is not repaired, paved, channelled, &c., in such a way as to meet with the reasonable satisfaction of the local authority, that authority may require the owners to do the necessary repairs." But with regard to sewers, sections 13 and 15 show how differently they are to be treated. All sewers are to vest in the authority, and any future repairs are to be done by them.

It is said that it is a great hardship that owners should be subjected to recurring demands to repair. But we ought not to presume that this would be so; and in any case there is a safeguard, for if the street is in a condition with which a reasonable person ought to be satisfied it is sufficient. Then it is pointed out that that state of things might go on for ever. But it must be borne in mind that in many cases it is an advantage to the owners to retain control over the street, and they sometimes have reason to object to its being taken over by the public authority. However, those are more arguments for the Legislature than for us. We must give effect to the section according to its grammatical meaning.

In the present case, if I saw any reason for saying

that the county court judge thought that the authority were, in fact, satisfied with the road, I should be slow to disturb his decision; but it seems to me his decision amounts to this, that because the road was once in a satisfactory condition that was enough, and the owner was discharged from further liability, and on that ground I think he was wrong. The reference I made to sections 13 and 15, distinguishing the case of sewers, makes it unnecessary for me to deal with any of the cases cited.

CHARLES, J.—I am unable to agree with the view the learned county court judge took of section 150. It seems to me that unless and until a street is declared, under section 152, to be a highway, the provisions of section 150, with regard to levelling, &c., apply. The case of sewers is different. There is in the same statute a section which vests all sewers in the urban authority, and a further section imposes on them the liability to repair; but streets do not vest in the authority until they have become highways repairable by the inhabitants at large. The cases cited only apply to sewers, and with regard to sewers the position of the authority is exactly analogous to the position of the commissioners under the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 53. In the case of *Corporation of Portsmouth* v. *Smith*, 32 W. R. 123, 13 Q. B. D. 184, it was held, under that Act, that when once an owner had repaired at the instance of the authority, the authority could not again require him to do so, because when once the street was made good the duty of repairing fell upon the authority. A similar duty arises under the Metropolis Management Acts. But here there is no such duty, and I cannot see any reason why, with regard to paving, &c., the urban authority should not call on the owner to pay as often as required.

Case remitted.

Solicitors for the appellant, *Burton, Yeates, & Hart*, for *J. Arthur Hughes*, Cadoxton.

Solicitors for the respondent, *Bell, Brodrick, & Gray*, for *W. Cousins*, Cardiff.

Q. B. Div.
(Charles and Wright, JJ.) May 2.

COUNTY COUNCIL OF KENT (*Appellants*) v. HUMPHREY (*Respondent*). (a.)

Local government—Weights and measures—Validity of bye-law of county council as to the providing and carrying of correct weighing machines by vendors of coal—Weights and Measures Act, 1889 (52 & 53 *Vict.* c. 21), s. 28.

By section 28 *of the Weights and Measures Act*, 1889, *any local authority may from time to time make, revoke, and alter bye-laws* (a) *regulating, for the purposes of this Act, the sale of coal in quantities not exceeding two hundredweight; and* (b) *requiring, either in or generally specified classes of cases, a weighing instrument of a form approved by the local authority to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.*

Under this section the Kent County Council made the following bye-law: "Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall re-weigh the coal upon being requested to do so by the purchaser or anyone on his behalf, or by an inspector of weights and measures."

On an appeal from the decision of justices refusing to convict a coal merchant for not providing a weighing machine, on the ground that the bye-law was invalid, indivisible, and ultrà vires,

Held, that so much of the bye-law as required the coal dealer to provide and carry a weighing machine was valid, and that it was within the competency of the appellants to make such bye-law. The bye-law was divisible; whether the latter part of the bye-law as to re-weighing coal was good or not, it was not necessary to decide.

Case stated.

At a petty sessions held at Dartford in and for the county of Kent on the 5th of January, 1895, the defendant, George Humphrey, the respondent in this case, was charged by George Tucker, an inspector of weights and measures to the complainants, the Kent County Council, the appellants in this case, "for that he, the said George Humphrey, on the 1st of December, 1894, being a coal dealer, did unlawfully fail to provide for one Albert Watts, being a person then employed by him, and who was then on his behalf conveying coal for delivery from a vehicle to a purchaser, one John Rowe, for carriage therewith a correct and stamped weighing machine," contrary to the bye-law of the said county council.

Upon the hearing of the said information the following facts were proved:—

(*a*) That the said George Tucker was an inspector of weights and measures to the appellants, who were the local authority for the county of Kent.

(*b*) That the bye-law hereinafter set forth was duly made and published by the appellants as required by the 52 & 53 Vict. c. 21, s. 28, and that the same was approved by the Board of Trade as by the said section provided.

(*c*) That the appellants had duly approved a form of weighing machine for the purposes of the said bye-law.

(*d*) That the respondent was a coal dealer, and had in his employ on the 1st of December, 1894, one Albert Watts, who was, on the said 1st of December, 1894, as servant to the respondent, carrying in a wagon half a ton of coal for delivery to a purchaser, John Rowe.

(*e*) That on the said 1st of December, 1894, George Tucker saw Albert Watts delivering the coal to John Rowe, and asked him to weigh the same, to which Albert Watts replied that he could not, as he had no scales or weights.

(*f*) That the said George Tucker thereupon went and saw the respondent, and told him in substance the facts stated in the last preceding paragraph (*e*), to which the respondent replied, "Yes. I told him (meaning the said Albert Watts) to leave them (meaning the scales and weights) on the wharf."

52 & 53 Vict. c. 21 provides, by section 28 (which section is further divided under heads *a*, *b*, *c*, and *d*) that any local authority may from time to time make, revoke, and alter bye-laws.

(*b*) Requiring either generally or in specific classes of cases a weighing instrument of a form approved by the local authority to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.

The appellants, under and by virtue of the provisions of the section aforesaid, made the following bye-law:—

"Every coal dealer shall provide, and any person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such person shall re-weigh the coal, upon being requested to do so by the purchaser or anyone on his behalf, or by an inspector of weights and measures."

Any person failing to observe this bye-law is liable to a penalty of £5.

It was contended on the part of the respondent that he had committed no offence against the bye-law because the said bye-law was *ultrà vires* and invalid on the grounds that (1) the power of the appellants to make bye-laws is strictly confined to the matters set out under headings *a*, *b*, *c*, and of section 28; (2) section 28 (*b*) does not authorize the making of so much of the said bye-law as requires that the respondent should provide a weighing instrument, and that the person employed by the respondent should re-weigh the coal upon being requested to do so by the purchaser or anyone on his behalf, or by an inspector of weights and measures; (3) inasmuch as section 26 (*b*) enacts that the local authority may erect and maintain fixed weighing instruments at convenient places for the purpose of weighing coal, and may provide, furnish, and maintain portable weighing instruments for the same purpose, the duty, if any, of providing weighing instruments is cast upon the appellants themselves; (4) inasmuch as section 27 provides for the weighing of coal, and afterwards provides that where any coal has, at the instance of the purchaser, been weighed and found to be of the weights stated in that behalf by the sellers of the coal or person in charge of the vehicle, the purchaser shall be liable to the payment of all reasonable costs actually incurred and incidental to the weighing or re-weighing, the bye-law was bad in so far as it required that every such person shall re-weigh the coal upon being requested to do so by the purchaser or anyone on his behalf, or by an inspector of "weights and measures," being made without authority, and was beyond the scope of section 28 (*b*), and was contrary to the provisions of section 27 (*b*). It was further contended that the bye-law if bad in part, was bad in its entirety and indivisible, and that even if the said bye-law was good there was no evidence that the respondent had not provided a weighing machine in accordance therewith.

It was contended, on the part of the appellants, that no offence had been committed by the respondent against the said bye-law, and that the same was valid: (1) because there was no obligation on the appellants under section 26 or 27 of the Act, or at all, to provide weighing instruments for the purposes of a bye-law made under section 28 (*b*), and that as the appellants had the power under section 28 (*b*) by way of a bye-law, and in the circumstances of the case, to require a weighing instrument to be provided, it was the duty of the respondent to provide a weighing instrument for the purpose of the said bye-law, whether the delivery was effected by the respondent or his servant; (2) because so much of the said bye-law as required that "every such person shall re-weigh the coal upon being requested to do so by the purchaser, or anyone on his behalf, or by an inspector of weights and measures," was authorized by and within the scope of section 28 (*b*), and further, that, the Act of section 28 (*b*) being for the protection of the purchaser, it was impossible to say, it being lawful for the appellants to require a weighing machine to be carried, that it was unlawful to require the said machine to be used by the respondent for re-weighing the coal, without which no protection was afforded; (3) that in any event the bye-law was divisible.

The justices were of opinion that the bye-law was *ultrà vires*, invalid, and indivisible, and dismissed the information.

The question for the opinion of the court was whether the justices upon the above statements of facts came to a correct determination and decision in point of law.

G. F. Hohler, for the appellants.

No one appeared on behalf of the respondent.

CHARLES, J.—In this case I am of opinion that the magistrates did not arrive at a right decision. I think that the county council clearly have the power to make the bye-law in question, by which it is provided that the coal dealer shall provide and carry with the vehicle a correct weighing machine, and that such bye-law is without doubt perfectly valid, and I am of opinion that, having regard to the language of section 28 of the Weights and Measures Act, 1889, the bye-law is within their competency. As to the validity of the second part of the bye-law—namely, that part requiring that the dealer shall re-weigh the coal at the request of the purchaser or inspector, I think it is unnecessary to pronounce any decision. The contention, however, that the whole bye-law is bad because the requirement as to re-weighing might be bad, is, I think, without foundation and cannot be supported. I think, therefore, that this appeal must be allowed, and the case be remitted to the justices.

WRIGHT, J.—I am of the same opinion. I may add that I think it is quite possible that the proviso requiring that weighing machines should be carried may imply that the appellants have authority to make a bye-law as to their use. That however it is not necessary for us at present to decide, as there is no need to go beyond the first part of the bye-law.

Appeal allowed and case remitted.

Solicitors, *Palmer & Bull*, agents for *Brennan & Turner*, Maidstone.

Q. B. Div.
(Wills and Lawrance, JJ.) Feb. 14.

HALESTRAP *v.* GREGORY. (*a.*)

Contract—Agistment—Accident arising from negligence of agister's servant—Damage too remote or not—Liability of agister if accident is a "natural consequence" of such negligence.

Under a contract of agistment the defendant put the plaintiff's mare to graze with three horses of his own in a field, part of which, divided off by a wire fence, was let to a cricket club. Through the negligence of the defendant's servant the gate in the fence dividing the two parts of the field was left open, and the four horses strayed through it on to the cricket ground. Some cricketers attempted to drive the horses back, and three of them passed quietly through the gate, but the plaintiff's mare, becoming frightened, ran against the wire fence and was seriously injured.

Held, that the damage to the mare was not too remote, but was the natural and probable consequence of the servant's negligence in leaving the gate open, and that the defendant was liable for damages under the contract.

Appeal by the plaintiff from the decision of his Honour Judge Lushington, sitting at the Wandsworth County Court.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The action was brought upon a contract of agistment to recover damages to a mare under the following circumstances:—

The mare was placed to graze by the defendant with three horses belonging to him in a field, part of which was divided off by a wire fence, in which there was a gate, and was let by the defendant to a club for the purposes of a cricket ground.

On the morning of the day in question the defendant's servant left the gate open between the two parts of the field, and some time afterwards the four horses found their way through it on to the cricket ground. Some cricketers, seeing the horses on their ground, and fearing they would injure the pitch if allowed to remain there, tried to get them to go back. Three of the horses went off through the gate quietly enough to their proper part of the field, but the plaintiff's mare became frightened, and in attempting to jump the wire fence was seriously injured.

The plaintiff sued for damages. The learned county court judge held that he had no case, for although the defendant's servant had been guilty of negligence in leaving the gate unfastened, the cricketers had only done what was reasonable in attempting to turn the horses off their ground, and the injury sustained by the mare could not be considered as the natural and probable consequence of the negligent act of the defendant's servant.

The plaintiff appealed.

W. Addington Willis, for the appellant.—I submit that the decision of the county court judge was wrong. Under a contract of agistment the agister is bound to take all reasonable care of the animal entrusted to him. Here the plaintiff did not do so, as admittedly he was, through the act of his servant, guilty of negligence. As soon as negligence is admitted or proved on the part of the agister, he will be liable for any damage that may result to the animal as a natural consequence upon such a breach of his contract to take all reasonable care that the animal is properly looked after. That is laid down in the case of *Smith* v. *Cook*, 24 W. R. 206, 1 Q. B. D. 79; *McMahon* v. *Field*, 7 Q. B. D. 591, 29 W. R. Dig. 70; *Broadwater* v. *Blot*, Holt's N. R. Rep. 547, 17 R. R. 677. Here the damage was certainly not more remote than it was in the case of *Powell* v. *Salisbury*, 2 Y. & J. 391, decided in 1828. In that case the defendant was bound under a contract to keep in repair the fences of his field, but neglected to do so, "*per quod* the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a haystack." The court there held that the damage was not an unnatural consequence of the defendant's negligence and that the action was maintainable. *Lawrence* v. *Jenkins*, 21 W. R. 577, L. R. 8 Q. B. 274, is another case equally in my favour. There some cows belonging to the plaintiff died from eating the leaves of a yew tree growing upon the defendant's close, and the evidence showed that there was a prescriptive obligation on the part of the defendant to maintain in repair the party fences so as to keep the plaintiff's cattle off his close. Through the negligent felling of a tree by the defendant the fence was broken. The court held that the damage was not too remote, and that the defendant was liable for the cost of the cows. [He cited also *Burrows* v. *The March Gas and Coke Co.* (*Limited*), 20 W. R. 493, L. R. 7 Ex. 96, to the same effect.] There are numerous authorities which show that the defendant is liable for such an act of negligence by his servant from the time that *Scott* v. *Shepherd*, 1 Smith's L. C., 9th ed., 480, was decided, down to that of *Clark* v. *Chambers*, 26 W. R. 613, 3 Q. B. D. 327, where the cases on this subject are discussed at length in a considered judgment by Cockburn, C.J.

Hammond Chambers, for the respondent.—I submit that the injuries to the mare were the result of a pure accident, and that the judge was absolutely right in nonsuiting the plaintiff. Such questions as this must be decided on the facts of each particular case, and the learned judge has held that the accident was not one which could reasonably be held to be the natural consequence of the negligent act complained of. The damage could not have been foreseen as the natural consequence of the horses straying through the gate, and there is no proof that it was caused by the fault or carelessness of the cricketers. The contract with the defendant was that the mare should be put to graze in this particular field. The plaintiff saw the field, and knew of the wire fence, and knew also that the adjoining portion of the field was used as a cricket ground. The defendant took the same care of the mare as he did of his own horses, and the risk of injury from the wire fence was just as great for them as for the mare.

WILLS, J.—I think that the learned county court judge was wrong, as, in my opinion, this is one of those cases in this class of action in which the court may reasonably hold that the damage was such as would be likely to follow from the negligent act of the defendant's servant. For my part, I seldom get any assistance from cases in questions of this kind, for, assuming that negligence is admitted or proved, then in every case the court has to consider whether, under the particular circumstances of the case itself, there is evidence upon which it may reasonably be held that the damages resulted as a natural and probable consequence of that act of negligence. The utmost that the authorities cited to us to-day can be said to assist us in forming our judgment in the present case is this: they show that it has been held that far more remote damage than that in the present case has been held to be not too remote, and to be a natural consequence of the negligent act of the defendant. In other words, they show that the view contended for by the respondent is much too narrow. This is very clearly laid down by the remarkable cases of *Powell* v. *Salisbury* and *Lawrence* v. *Jenkins*.

It seems to me that where there are two adjoining fields belonging to A. and B. respectively, and A.'s servant carelessly allows the cattle to stray out of A.'s field on to B.'s field, B. is within his rights if he drives those cattle back again, and, provided he does so with reasonable care, A., and not B., is the person answerable to the owner for any accident that may happen to the cattle. It was a very natural thing that the cricketers should wish to protect their pitch, and it was also natural that the animals when being driven should follow their natural and acquired instinct. That the horses of the defendant, accustomed to graze on the field, should quietly return would be expected; but that the plaintiff's mare, strange to the place and her companions, when she found herself being driven should make a bolt and try to get through the fence seems to me an equally probable and natural consequence of the negligence, and where there was wire fencing about damage was very likely to be done.

In my opinion the accident was the natural consequence of the servant's negligence, and the appeal therefore, must be allowed.

LAWRANCE, J.—I agree.

Order for new trial.

Solicitors for the appellant, *Alpe & Ward.*

Solicitors for the respondent, *Clement, Chess, Green.*

IN BANKRUPTCY.

Q. B. Div.
(Vaughan Williams and Kennedy, JJ.) April 2, 4.

In re EDWARDES.
Ex parte EDWARDES. (*a.*)

Bankruptcy — Married woman carrying on a trade separately from her husband — Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (5).

A married woman can be made a bankrupt in respect of a business carried on by her, but entirely managed by her husband, provided that he has no control over the money in, or assets of, the business.

In re Helsby, Ex parte Helsby, 1 *Manson*, 12, *explained.*

Appeal against a receiving order made by the registrar of the county court at Pontypridd.

The debtor, Mrs. Florence Edwardes, had, upon the bankruptcy of her husband some years ago, borrowed a sum of money, placed it in a bank in her own name, and used it to start a business in her own name. This business, however, was almost entirely managed by her husband, she herself only assisting when there was unusual pressure of work.

In 1894 a receiving order was made against her in respect of her separate property as a married woman trading separately from her husband.

She appealed upon the ground that she was not trading separately from her husband.

Glascodine and *H. G. Snowden*, for the appellant.—The husband had the entire management of the business, which was really carried on by him in his wife's name. She cannot be said to have been trading separately from him: *In re Helsby, Ex parte Helsby*, 1 Manson, 12.

Muir Mackenzie, for the respondent.—This case is distinguishable from *In re Helsby*, for the business was been started with the wife's money alone, and though the husband may have managed it, he was only the servant of the wife.

H. G. Snowden replied.

VAUGHAN WILLIAMS, J.—This case really depends upon a question of fact. The principle upon which we have to decide it was laid down by us in *In re Helsby*: "A married woman cannot be made a bankrupt in respect of a business carried on by her if the business is either wholly or partially under the control of her husband." By "control" I did not mean control as manager of the business or servant to the wife, but control of money, of the assets of the business. In this case it does not appear that the husband could have called upon his wife to account for the profits, or that he had any interest in the assets of the business. She started the business with money she had herself borrowed, and has carried it on in her own name, and I think she was trading separately from her husband.

KENNEDY, J., concurred.

Solicitors for the appellant, *Davis & Ingram*, Pontypridd.

Solicitors for the respondent, *Gibson, Welldon, & Gough.*

Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div.
Admiralty. Dec. 4.

"THE TYNWALD." (*a.*)

County court — Admiralty — Jurisdiction — Appeal — Damage — Practice — Hearing by judge assisted by nautical assessors — County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 10 — *County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.

Notwithstanding the provisions of the 101*st section of the County Courts Act*, 1888, *enabling a plaintiff to require a jury to be summoned "in any action" where the claim exceeds £5, and the action is not one of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice, causes of collision, salvage, or towage appointed to be heard in a county court having admiralty jurisdiction must, on the request of either party to the cause, be heard, not by a judge and jury, but by the judge of the court assisted by nautical assessors.*

This was an appeal from the county court of Lancashire holden at Liverpool.

By the order appealed against, the judge of the court below (His Honour Judge Collier) had, in a cause of damage instituted on behalf of the flat *Gibson* against the Isle of Man Steam Packet Co., the owners of the steamship *Tynwald*, to recover the sum of £275 7s. for damage sustained in a collision between the two vessels, refused the defendants' application for directions as to the mode of trial of the cause.

From the process transmitted to this court by the registrar of the court below it appeared that such registrar had given notice that the cause "would be tried by a jury, the plaintiffs having summoned a jury therein," and that the defendants had requested that nautical assessors should be summoned to assist the judge at the hearing of the action, and that the judge of the court below had expressed an opinion, when the application as to the mode of trial had been before him, that as a jury had been demanded by the plaintiffs, and a request made by the defendants that nautical assessors should be summoned, he was bound "to allow the questions of fact to be tried by a jury, and that nautical assessors being summoned did not exclude a jury."

Leave to appeal having been given, and the defendants having asserted their appeal, the appeal was heard on the 10th of November last before the President (Sir Francis Jeune) and Bruce, J.

Sir Walter Phillimore, Q.C., and *Steel*, for the appellants.

Walton, Q.C., and *Horridge*, for the respondents.

Their arguments fully appear from the judgment.

The following cases, not there mentioned, were referred to during the hearing:—*The Temple Bar*, 34 W. R. 68, 11 P. D. 6; *Reg.* v. *Judge of the Southend County Court*, 13 Q. B. D. 142; *The Princess Royal*, L. R. 3 A. & E. 27, 18 W. R. Adm. Dig. 22.

Cur. adv. vult.

Dec. 4.—JEUNE, P.—In this case a question arises as to the mode of trial in a county court of a cause of collision within the admiralty jurisdiction of the court. The question is whether, where one party asks for a jury, and the other party asks for assessors, the trial should be by a judge and jury, by a judge and assessors, or by a judge, jury, and assessors. The learned judge of the county court has

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

decided in favour of the third of these modes of trial, and accordingly he has expressed no opinion as between the other two.

The question turns on the construction of the County Courts Admiralty Jurisdiction Act, 1868, and the County Courts Act, 1888. By the former of these Acts jurisdiction was given to the county courts to try admiralty causes, and by the 3rd section of the Act claims relating to salvage, towage, necessaries, wages, damage to cargo, or damage by collision were enumerated as admiralty causes. By sections 10 and 11 of the Act it was provided as follows:—

Section 10: "In an admiralty cause in a county court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in county courts; save and except that in any admiralty cause of salvage, towage, or collision the county court judge shall, if he thinks fit, or, on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors."

Section 11: "In any such admiralty cause as last aforesaid it shall be lawful for the judge of the county court, if he thinks fit, and he shall, upon request of either party, summon to his assistance, in such manner as General Orders shall direct, two nautical assessors, and such nautical assessors shall attend and assist accordingly."

The effect of these two sections appears to me to be clear so far as is necessary for the decision of this case. With regard to admiralty causes other than causes of salvage, towage, or collision, the cause is to be heard and determined in the same manner as ordinary civil causes were heard and determined in county courts. I do not think it is necessary to decide what the phrase "ordinary civil causes" imports. We are dealing with an admiralty cause of collision, and with regard to admiralty causes of salvage, towage, or collision the rule appears to me to be clearly laid down by the words of the exception. In these causes the trial is to be by the judge, unless either party or the judge desire that there should be assessors.

It is clear that the exception in section 10 modified any right to a jury which the previous words may have been supposed to have given. It could modify such right only in one of two ways, that is to say, by allowing assessors either as an addition to or in substitution for a jury. Now, I confess it seems impossible to suppose that it was intended by the words of this exception to introduce into our judicial system trial by a judge, *plus* assessors, *plus* a jury. The words do not appear to be apt for the purpose, because it is the judge who is to be assisted by assessors, and he is to be assisted by them in the same way as the judge of the High Court of Admiralty is assisted by them. But I cannot for a moment suppose that it was intended by this provision to create so novel a tribunal as a judge, jury, and assessors.

I am not sure that a jury and assessors are not inconsistent in principle, because assessors exclude expert evidence, at least in the courts of admiralty, and a jury is bound to decide according to the evidence, so that they must give a verdict without any evidence on the most material points. The only answer suggested to this is that the advice of assessors, which the judge would, I suppose, convey to the jury, is evidence, but it is not. It is a substitute for evidence. I am sure, however, that the practical difficulties in trying a cause of collision or salvage with a jury as the sole judge of fact would be great. I do not say the thing would be impossible, but it implies a novel system of procedure in the conduct of such a trial on which the Act is wholly silent.

Trial by judge and assessors has, I think, always been regarded by the Legislature as an alternative of trial by jury. It is so, I think, under section 5 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and under section 103 of the County Courts of 1888, and it is so in terms under the 6th section of the Employers' Liability Act, 1880, and the Rules of the Supreme Court (see ord. 36, r. 7 (*a*)).

It is not worth while further to elaborate this point, because it does not appear that a construction compelling a county court judge to sit with a jury and assessors in admiralty causes has ever, till this case, been placed on the Act of 1868, and indeed it is only faintly, if at all, suggested before us that such a construction could be maintained. I think, therefore, that it follows that the exception in section 10 enables any party or the judge in cases of collision, towage or salvage to say that the trial shall be by a judge and assessors, and so the law stood from 1868 to 1888.

But it is said that the language of section 101 of the County Courts Act, 1888, gives to either party an absolute right to a jury where the claim is above £5 in all actions other than the Chancery cases which are specially excepted, and that, therefore, on the view above taken, trial by judge, jury, and assessors cannot be supposed to be intended, that must, at the demand of a party, be a trial by judge and jury. [His lordship read section 101, and continued:] I do not think it is possible to say that the term "action" as defined by section 186, which section provides that action shall include suit, and shall mean every proceeding in the court which may be commenced by plaint, does not include Admiralty causes. Nor does it appear to me that there are any inferences to be drawn from the rules which really throw light on the matter. It is also an argument of force that the single exception of certain Chancery actions appears to shew that the section was intended otherwise to be exhaustive. It is further clear from the decision of this court in *The Eden*, 40 W. R. 3 [1892] P. 67, and in *The Hero*, 40 W. R. 143, [1892] P. 294, and from the recent decision of the Court of Appeal in *The Delano*, *ante*, p. 65, [1895] P. 40, that as regards admiralty causes the Act of 1868, which is not one of those expressly repealed by the Act of 1888, must be read with it.

Must, then, section 101 of the Act of 1888 be construed to repeal section 10 of the Act of 1868 so as to establish a new rule for the trial of admiralty causes of collision, towage, and salvage. I do not think that it need be so read, and I think that the exception in section 10 of the Act of 1868 may stand as an exception to the general provision of section 101 of the Act of 1888. I agree that this takes from section 101 the general application of which the words in themselves are capable. But I think, on principles similar to those approved by a majority of their lordships in the House of Lords in the case of *Cox* v. *Hakes*, 39 W. R. 145, 15 App. Cas. 506, especially as stated by Lord Halsbury, a limitation ought to be placed on the generality of the language of section 101. In that case, although the words of section 19 of the Judicature Act, 1873, gave in terms jurisdiction to hear appeals from any judgment or order of the High Court, and also made an exception in certain cases afterwards mentioned, it was held that an appeal lay from an order of the Queen's Bench Division in a matter of *habeas corpus*. The decision may be stated generally to have proceeded on the nature and history of the writ of *habeas corpus*, and on this ground, that it could not

supposed that the Legislature intended by general words to alter previous procedure without more specific provision than to be found in the Act. On similar principles it appears to me impossible to suppose that the Legislature intended that whenever any party so desired admiralty causes of collision, salvage, and towage in county courts should be tried by a jury. Such an enactment would have worked a change more complete than I can believe would have been carried out. It is true that cases of collision between ships have in some cases been tried at common law by juries, and it is also true that there was a power under the Act of 3 & 4 Vict. c. 65 (though, I believe, only once employed) to send an issue from an Admiralty Court for trial by a jury, and quite recently my learned brother, Barnes, J., tried an admiralty cause of collision in which no scientific question was involved with a jury, but the whole matter turned on an alleged conspiracy*; but in the Admiralty Court collision cases have with this exception invariably been tried by a judge, and almost invariably by a judge with assessors. It cannot, I think, have been intended at the option of any party to a cause, not only to bring a jury, but also (if I am right in thinking assessors and jury incompatible) to oust the assessors, and thus provide for the trial of admiralty collision cases in the county court in a manner wholly different to that in force in the High Court of Justice. The difficulty appears to me to be greater still as regards salvage cases. An action for salvage services at common law proceeds on a *quantum meruit*, and I should suppose the compensation would be assessed on the same principles as in any other case of implied contract. But in the Admiralty Court salvage services are remunerated on principles of a special kind, into which considerations of public policy largely enter, and which do not proceed on any such basis as that of contract between the parties. Such principles have never yet, so far as I know, been submitted to a jury, and it would be extremely difficult, if not impracticable, to submit them to that tribunal.

It is, perhaps, only another way of expressing the views I have just indicated to say that there is something in the subject of certain admiralty causes within the meaning of the definition clause of the Act of 1888, s. 186, repugnant to the inclusion of such causes in the actions referred to in section 101 of the Act.

For these reasons I think that in an admiralty cause of collision in a county court, if one party asks for a jury and the other for assessors the trial must be by judge and assessors. The judgment of the county court must accordingly be reversed.

BRUCE, J.—I agree with the President, and perhaps I might be content to add nothing to the judgment he has delivered. But as I have arrived at the same conclusion by a somewhat different method, it is, I think, right that I should state my reasons for concurring in his judgment. In order to arrive at a right conclusion as to the construction of the County Courts Act, 1888, we must consider the earlier statute.

The Act of 1868 (31 & 32 Vict. c. 71) conferring admiralty jurisdiction on the county courts enacts (section 10): [His lordship read the section and proceeded:—] By the 34th section of the same Act it is enacted that the Act "shall be read as one with so much of the County Courts Act, 1846, and the Acts amending or extending the same as is now in force."

The 69th section of the County Courts Act, 1846, above referred to (9 & 10 Vict. c. 95) enacts "that the judge of the county court shall be the sole judge in all actions brought in the said court, and shall determine all questions of fact as well as of law, unless a jury shall be summoned as hereinafter mentioned." The 70th section of the last-mentioned Act enacts that in all actions where the amount claimed shall exceed £5, it shall be lawful for the plaintiff or defendants to require a jury to be summoned to try the action; and in all actions where the amount claimed shall not exceed £5, it shall be lawful for the judge in his discretion, on the application of either party, to order that such action shall be tried by a jury.

The 28 & 29 Vict. c. 99 conferred on the county courts a limited equitable jurisdiction, and by section (1) of that Act the county courts were given all the powers and authority of the High Court of Chancery in the suits or matters which fell within the equitable jurisdiction so conferred. It followed, therefore, that, as the Court of Chancery had in certain cases the power to summon a jury for the trial of certain matters, the county court, in the exercise of its equitable jurisdiction, had a similar power, but as in the Court of Chancery the usual mode of trial was by the judge alone, so also in equity proceedings in the county court the usual mode of trial was by the judge alone.

The 24 & 25 Vict. c. 134, which in 1868 regulated the proceedings in bankruptcy, conferred by the 3rd section upon the judge of every county court other than the metropolitan county courts the jurisdiction in bankruptcy previously vested in the commissioners of the district courts of bankruptcy. And I cannot find that any provision was in force at the time for the trial of bankruptcy matters by a judge and jury. There was therefore vested in the county courts at the time of the passing of the County Courts Admiralty Jurisdiction Act jurisdiction to hear and determine civil causes of various kinds.

There can, I think, be no doubt that the phrase "civil causes" is wide enough to comprehend all the various matters included in the jurisdiction of the county courts. Lord Selborne, in the case of *Green* v. *Lord Penzance*, 30 W. R. 218, 6 App. Cas., at p. 671, says of the word "cause": "It is not a technical word signifying one kind or another; it is *causa jurisdictionis* any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular court."

What, then, is the meaning of the provision of the 10th section of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that admiralty causes shall be tried in like manner as ordinary civil causes. It would be, I think, to put a very narrow and strained construction upon the words "ordinary civil causes" to hold that they applied only to common law causes, they obviously, as it seems to me, apply to all the causes or matters over which the judge ordinarily exercised jurisdiction. Then if these words apply to all classes of causes, in what manner were such causes heard or determined. The "manner," no doubt, refers to the procedure of hearing causes in a summary way without pleadings, but I think it also refers to the mode of trial, and as the mode of trial is now the matter to be determined we must consider what was the mode of trial common to all classes of cases. The only mode of hearing and determining common to all classes of cases was the hearing and determining by the judge alone.

In some common law actions a jury might be demanded by either of the parties, and in some causes on the equity side the court in its discretion might order a trial by judge and jury. But, unless special application was made by either party, the judge himself determined all matters brought in the court, and

* See the case of *The Ibis* (1893—S—Folio 400), heard the 13th, 14th, and 15th of March, 1894.

many of the matters brought in the court could not in any case be determined save by the judge alone. I think, therefore, that where, in the first part of the section, the Legislature referred to the manner in which ordinary civil causes were then heard and determined in county courts, it meant to refer to the hearing and determining of causes by the judge alone. That was the ordinary manner of trial, it was the method by which many causes could alone be tried, and by which all causes were tried in the absence of any special application by one of the parties.

But for the purpose of the question now before the court, it is not, I think, necessary to rest alone upon the earlier words of the section. The provision for the judge being assisted by nautical assessors is, as it seems to me, absolutely inconsistent with trial by jury. The section provides that the judge shall, if he think fit, or on the request of either party, be assisted by nautical assessors, "in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors." But if the judge is not to determine the facts, it is difficult to understand how assessors could assist him, certainly they could not assist him in the same way as assessors assist the judge of the Court of Admiralty.

Assessors could not assist him in charging the jury, because the jury can only give their verdict in accordance with the evidence before them, and I apprehend it would be in contravention of their oaths if the jury were to be guided in their verdict by the opinion of the assessors on matters of nautical skill. Questions of nautical skill are matters of fact, not of law, and if they are to be determined by a jury, are matters upon which the evidence of experts should be received, but if these questions are to be determined by a jury upon the evidence of experts, there can be no advantage in having assessors. According to the practice of the Admiralty Court, where the judge is assisted by assessors, evidence is not admissible on points on which it is the province of the assessors to advise the court: *The Kirby Hall*, 31 W. R. 658, 8 P. D., at p. 75.

One of the great advantages of the presence of assessors is the saving of the expense and difficulties which almost always arise upon the reception of the conflicting evidence of experts on technical questions. For these reasons I cannot resist the conclusion that the Legislature, when it conferred the right to have, in certain Admiralty causes, nautical assessors to assist the judge, intended the mode of trial by judge and assessors to exclude the mode of trial by judge and jury. But apart from these reasons some of the matters to be tried are, from their very nature, unsuitable for trial by judge and jury. It is impossible to suppose that the Legislature could have contemplated the trial of a cause of salvage by a judge and jury. What directions would it be possible for the judge to give to the jury as to the principles to guide them in the assessment of the amount of the salvage award? It cannot, I think, be said that the salvage award is to be assessed upon the principle of a *quantum meruit*, because the causes mentioned in the County Court Admiralty Jurisdiction Act, 1868, are spoken of as "admiralty causes," and the very title of the Act is "An Act for conferring admiralty jurisdiction." The value of the property salved, the nature of the risk incurred, and all the various elements which have been recognized as fit for the consideration of the court in awarding salvage must be dealt with by the tribunal which is charged with the fixing of the amount of salvage reward, and it seems to me to be incredible to suppose that Parliament could have intended to enact that such a question should be determined by a jury.

The County Courts Admiralty Jurisdiction Act, 1868, s. 26, provides that an appeal may be made to the High Court of Admiralty from a final decree or order of a county court in an admiralty cause. This right of appeal, which still exists, is not limited to matters of law, but includes matters of fact. But it would be contrary to all experience and principle to allow an appeal from a finding by a jury on matters of fact. From 1868 down to the passing of the County Courts Act, 1888, the practice, so far as I can ascertain, was universal, to have admiralty causes in the county court tried before a judge alone, or before a judge assisted by nautical assessors.

The question to be decided is whether the County Court Act, 1888, which is entitled "an Act to consolidate and amend the County Courts Acts," operates to abrogate the practice which, founded upon the Act of 1868, regulated up to 1888 the procedure in admiralty causes. I may observe, in passing, that I am not prepared to expect, in an Act which is substantially a consolidation Act, a change of so vital a character as that involved in the substitution of trial by jury in the place of trial by a judge with or without assessors. But the particular provisions of the statute of 1888 demand consideration.

The 101st section provides that in all actions where the amount claimed shall exceed £5 it shall be lawful for the plaintiff or defendant to require a jury unless the action is of the nature of the cases or matters assigned to the Chancery Division of the High Court of Justice. The word "action" is by the interpretation or supplementary section (section 18) to mean "every proceeding in the court which may be commenced as prescribed by plaint." This is, I think, wide enough to include an admiralty case. But the supplementary section is introduced by a provision that the words used in the statute shall have the prescribed meaning, unless there is anything in the subject or context repugnant thereto. Is, then, the application of the word "actions" to admiralty cases in the 101st section repugnant to the subject or context? For the reasons I have already given I think it is. I think, therefore, that the interpretation clause does not apply to extend the word "actions" to admiralty causes, and that the words in the 101st section of the County Courts Act, 1888, have no more application to admiralty causes than had the same words in the 78th section of the earlier Act of 1846, which has already been referred to.

But the same result may, I think, be arrived at in another way.

The Act of 1888, by section 188, sub-section 1, enacts that any enactment "referring to any Act or enactment hereby repealed shall be construed to refer to this Act or to the corresponding enactment in this Act." The 34th section of the Act of 1868 enacts, as before stated, that the Act of 1868 shall be read as one Act with so much of the County Courts Act, 1846, and the Acts amending or extending the same, as are now in force.

The Act of 1846 and all the Acts amending or extending the same referred to in the Act of 1868, s. 34, are repealed by the Act of 1888.

The County Courts Admiralty Jurisdiction Act, 1868, is therefore to be read as one with the Act of 1888, and as if the Act of 1888 were referred to in the 34th section of the former Act.

We therefore find in the earlier of two Acts a special provision giving a complete rule as to the manner of hearing and determining "admiralty causes," and in the later of the two Acts, which is to be read as part of the earlier Act, a general provision as to the mode of trial of "actions." It would, I think, be contrary to all the recognized principles of interpretation to treat the special provisions of

earlier Act as repealed by the general provisions of the later Act incorporated with it. It is to be observed that it is not merely that the two Acts are to be read as one, but the earlier Act, the Act of 1868, is to be read as if it incorporated the later Act of 1888. It would be doing violence to the rules of construction to hold that the provisions of an Act which specially provides for the trial of admiralty causes "by a judge or by a judge assisted by assessors" are to be overruled and in many cases rendered nugatory by a general enactment contained in the same Act, providing for the trial of actions "by a judge or jury": see the observations of Lord Selborne in the *Vera Cruz*, 33 W. R. 477, 10 App. Cas., at p. 68, and the remarks of Lord Westbury in *Ex parte St. Sepulchre's*, 12 W. R. 499, 33 L. J. Ch. 372. The conclusion at which I have arrived is, I think, not in conflict with the decision of this court and the Court of Appeal in the case of *The Delano*. That decision was on the 120th section of the County Courts Act, 1888, which took the place of the 6th section of the County Courts Act, 1875. That section was held to apply to appeals in admiralty causes: see *The Humber*, 32 W. R. 663, 9 P. D. 12; because it was considered that the appeal given by the County Courts Act, 1875, might well co-exist with the mode of appeal provided by sections 26 and 27 of the County Courts Admiralty Jurisdiction Act, 1868. The decision in *The Delano* determined that the word "actions" in the 120th section of the Act of 1888 included all those proceedings which were included in the Act of 1875, and was in accordance with the established practice and the previous course of legislation.

Solicitors for the appellants, *Batesons, Warr, & Wimshurst.*

Solicitor for the respondents, *J. W. Thompson.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — May 16.

ABBOTT & CO. *v.* WOLSEY. (*a.*)

Sale of goods — Contract — Acceptance — Recognition of pre-existing contract — Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-sections* 1, 3.

The plaintiffs and the defendant agreed orally that the plaintiffs should sell, and the defendant should buy, a quantity of hay over £10 in value. The plaintiffs having delivered the hay at the defendant's wharf, the defendant went on board the barge in which the hay had been conveyed, took a sample, and said, "This hay is not up to my sample, and I won't have it." In an action in the county court for non-acceptance of goods, the county court judge found that the defendant had done an act which recognized a pre-existing contract of sale, and, therefore, there had been an acceptance such as to satisfy section 4 of the Sale of Goods Act, 1893.

Held, that there was evidence on which the county court judge might reasonably so find.

Decision of the Queen's Bench Division (ante, *p.* 270) *reversed.*

Appeal from the judgment of a divisional court (Wills and Wright, JJ.) on an appeal from a county court, reported *ante*, p. 270.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

This was an action for non-acceptance of goods. In July, 1894, the plaintiffs, having received an order from the defendant for the purchase of a quantity of hay, sent the defendant a sale note in the following terms:—"Sold to W. H. Wolsey, Nine Elms, about twenty tons second quality Dutch hay at 72s. 6d. per ton, delivered alongside Wolsey's Wharf, two clear days allowed for discharging . . . barge to be alongside before Saturday, the 21st of July, or order cancelled." The plaintiffs were unable to deliver the hay by the 21st of July, but on the 4th of August they sent a message by word of mouth to the defendant asking whether he would still take the hay. He sent back an oral answer, "I will take the hay if the barge is alongside by Wednesday, the 8th of August." Accordingly the plaintiffs' lighterman took the hay to the defendant's wharf on the 8th of August, and handed a delivery note to the man in charge of the wharf. No corresponding receipt note was given in return. The defendant came on board the barge, looked at the hay, rolled over a portion, and, taking a sample, said, "This hay is not up to my sample, and I won't have it." The defendant subsequently wrote to the plaintiffs, saying that he stood on the terms of the contract for delivery on the 21st of July, and declaring the contract cancelled. The plaintiffs, having sold the hay at a loss, brought this action in the county court to recover damages from the defendant. The question raised at the trial was whether there was any contract between the parties as to which there had been a compliance with the requirements of section 4 of the Sale of Goods Act, 1893. The county court judge found that though the original contract had become cancelled there was a new oral contract to take delivery on the 8th of August, and that the goods were accepted and received under that contract within the meaning of section 4 of the Sale of Goods Act, 1893. He gave judgment for the plaintiffs for £23.

Section 4 of the Sale of Goods Act, 1893, enacts as follows:—"(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not."

Section 35, which is included in Part III. of the Act, under the heading, Performance of the Contract, is as follows:—"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The Divisional Court were of opinion that there was no evidence of such a dealing with the goods by the defendant as to constitute an acceptance of them by him within section 4, sub-section 3, of the Sale of Goods Act, and they accordingly reversed the judgment of the county court judge: see *ante*, p. 270.

The plaintiffs appealed.

Channell, Q.C., and *Forman*, for the plaintiffs.—The county court judge decided in the plaintiffs' favour, the only question which was seriously dis-

puted, viz., whether there was an acceptance within the meaning of section 4 of the Sale of Goods Act, 1893, which is now substituted for section 17 of the Statute of Frauds. The intention of the new enactment is to confirm the decision of *Page* v. *Morgan*, 33 W. R. 793, 15 Q. B. D. 228. An examination of goods by a purchaser to see if they are in accordance with a pre-existing contract is an acceptance within the Act, though the examination results in his coming to the conclusion that they are not in accordance with the contract. Acceptance of goods as being in accordance with the contract is quite a different matter; that is the acceptance which is spoken of in section 35 of the Act. The county court judge having found that the defendant did an act which recognized a pre-existing contract of sale, the Divisional Court had no power to set that finding aside, unless it could be said that there was no evidence at all to support it. But it is clear that there was ample evidence to justify the finding.

Witt, Q.C., and *S. J. Fraser Macleod*, for the defendant.—The act referred to in sub-section 3 as being a compliance with the statute is an act which is only consistent with a pre-existing contract of sale. There was no such act here. The Divisional Court rightly preferred the authority of *Taylor* v. *Smith*, 40 W. R. 486, [1893] 2 Q. B. 65, to that of *Page* v. *Morgan*.

Lord ESHER, M.R.—In my opinion the judges of the Divisional Court missed the point which was before them in this case. This was an appeal from a judgment of a county court. Therefore the only jurisdiction which the Divisional Court had was to determine a question of law, that is, some question of law which had been raised before the county court judge. The only point which was really disputed before the county court judge was whether there had been such an acceptance of goods as is mentioned in section 4 of the Sale of Goods Act, 1893; no question was raised as to whether there had been delivery or not, or as to whether the goods were equal to sample or not. Therefore the only question of law was whether there was evidence on which the county court judge could reasonably find, as he had found, that there had been such an acceptance as is mentioned in sub-section 3 of section 4.

Cases have been cited to us which were decided before the passing of this Act, and which show that there was some difference of opinion as to the meaning of acceptance in section 17 of the Statute of Frauds. But any doubt on this point was intended to be done away with by the recent enactment; the Legislature have now declared what the law is, and we are bound by this statute alone. Our attention has been called to section 35, and I think that that section helps to show the meaning of section 4. Section 4 requires, as the Statute of Frauds required, that one or other of certain conditions must be fulfilled before the court can enforce a contract for the sale of goods of the value of £10 or upwards. One of the conditions is that the buyer shall accept part of the goods so sold and actually receive the same. The questions, therefore, in a case where this condition is in dispute, are: First, did the seller deliver and the buyer receive part of the goods? Secondly, did the buyer accept them? Delivery alone was never considered to amount to acceptance; therefore it is necessary to ask also the second question, Was there acceptance? Now "acceptance" is used in two senses in this Act of Parliament. First, there is such an acceptance as will satisfy the Statute of Frauds or this section; and next, there is such an acceptance as binds the person who takes goods to pay for them. The first sort of acceptance, with which we here have to deal, is merely that acceptance which is requisite in order to show that there is a contract into which the court may inquire. And section 4 itself declares what that acceptance is; sub-section 3 says, "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale." Section 35, on the other hand, speaks of the second kind of acceptance, that acceptance which binds a person who takes goods to pay for them.

The question, therefore, which the Divisional Court had to determine was not whether there was evidence of an acceptance such as would bind a person taking goods to pay for them, but whether there was evidence of an acceptance within the meaning of sub-section 3, that is to say, evidence of any act which recognized a pre-existing contract of sale.

The evidence showed that the plaintiffs, having been unable to perform a contract to deliver hay to the defendant by a certain date, sent a verbal message to the defendant after that date to ask whether he would still take the hay, and that the defendant replied verbally that he would take it if it were delivered by the following Wednesday. The plaintiffs thereupon sent the hay to the defendant's wharf with a delivery note. That was an act which was only consistent with the fact of there being a contract between the parties. The sending of such a delivery note is an intimation that the sender therewith delivers the goods named therein. If the person to whom the note is sent keeps it, that is an acceptance of the delivery of the goods in pursuance of a contract, though not of course an acceptance of the goods themselves as being in accordance with the contract. The defendant went and looked at the hay. That alone was not an act which recognized a pre-existing contract. But he did something more, he took a sample out of the bulk delivered to him, and said, "This is not up to my sample." That seems to refer to some sample previously taken. He took a sample of this hay to see if it was equal to the other sample. That act of the defendant as explained by his words appears to me to have been an act which recognized a pre-existing contract of sale. At any rate I am of opinion that it cannot be contended that there was no evidence on which the county court judge could reasonably find that the defendant did an act in relation to the goods which recognized a pre-existing contract of sale. I therefore think that it was not open to the Divisional Court to say that sub-section 3 had not been satisfied. They seem to me to have treated the case as if it had depended on section 35. In my opinion the appeal must be allowed.

A. L. SMITH, L.J.—The defendant's case is that there was no acceptance to satisfy section 4 of the Sale of Goods Act. And as an appeal from a county court only lies on a matter of law, the question before the Divisional Court was whether there was any evidence at all before the county court judge on which he could find that there had been such an acceptance. What sort of acceptance of goods is it that satisfies the Act? It is unnecessary to go to the cases which have been cited, for the Act itself codifies the law in the matter. Sub-section 3 of section 4 says, "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." The acceptance spoken of in the last clause of this sub-section, an acceptance in performance of the contract, is dealt with in section 35. We have here to deal with the acceptance spoken of at the beginning of the sub-section. The question, therefore, is whether there is any evidence that

buyer did any act which recognized a pre-existing contract of sale. I am of opinion, on a consideration of the facts, that there was evidence on which the county court judge could so find, and that the Queen's Bench Division could not properly overhaul his finding.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiffs, *W. Batham.*

Solicitor for the defendant, *Henry Foskett.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 29, 30.

In re DENSHAM & SONS' TRADE-MARK. (*a.*)

Trade-mark — Registration — Word "Mazawattee"— Motion to expunge—Deceptive word—Descriptive word —Geographical name—Patents, Designs, and Trade-Marks Acts, 1883 (46 *&* 47 *Vict. c.* 57), *ss.* 64, 73; 1888 (51 *&* 52 *Vict. c.* 50), *s.* 10.

In 1887 *D. & Sons registered the word "Mazawattee" as a trade-mark for tea, and in* 1890 *they registered the same word as a trade-mark for all goods in class* 42 *except tea. The word "Mazawattee" was compounded of two words—"mazadhar," a Hindoo word meaning "luscious," and "wattee," a Singalese word meaning "garden" or "growth"; the suffix "dhar" in the former word being omitted. It appeared from the evidence that the names of some tea estates in Ceylon ended in "wattee," such as "Mariawattee" and "Agrawattee," but there was no such estate as "Mazawattee."*

Upon a motion to rectify the register by expunging these marks, upon the ground that the word "Mazawattee" was deceptive or descriptive,

Held (affirming the decision of Romer, J.), *that the marks were rightly registered, the word being a "fancy word not in common use" within the meaning of section* 64 *of the Patents, &c., Act of* 1883, *and an "invented word having no reference to the character or quality of the goods, and not being a geographical name," within the meaning of section* 10 *of the Patents, &c., Act of* 1888.

Appeal from Romer, J.

In 1887 Densham & Sons registered the word "Mazawattee" as a trade-mark for tea, and in 1890 they registered the same word as a trade-mark for all the goods in class 42 except tea.

In 1892 A. H. Deakin applied to register the word "Marza" in class 42 among others. This application was opposed by Densham & Sons, on the ground that "Marza" had such a resemblance to the word "'Maza,'" by which (as the abbreviated form of "Mazawattee") the tea sold by the "opponents . . . is so largely known, as to be calculated to deceive."

In support of this opposition a declaration was filed by a member of the firm of Densham & Sons, which stated that the word "Mazawattee" was arrived at in the following manner: "In or about the beginning of the year 1886, my said firm determined to establish a separate branch of their business for the purpose of selling teas in packets, and were advised that for their protection it would be necessary to identify their trade with a particular name, and to register it as a trade-mark, and they then determined to get a word or combination of words which would express as nearly as possible the wording in the body of the label they intended to adopt, especially the word 'luscious.' One of the firm accordingly went to the Guildhall Library and searched in the books there for the purpose of obtaining some word or combination of words for the purpose, and upon his report they took the Hindoo word 'Mazadhar' as meaning 'luscious' and the Singalese word 'wattee' as meaning 'garden' or 'growth.' First of all they joined these two words together, making the word 'Mazadharwattee.' But on the suggestion of the printer they struck out the 'dhar' at the end of the first word, making it 'maza,' and the compound word 'Mazawattee.'"

The label referred to in this declaration contained the following words: "Mazawattee Blend, principally composed of tea from the sweet scented island Ceylon, which produces the most luscious tea in the world."

It also appeared from the evidence that there were in Ceylon certain tea estates the names of which ended in "wattee," such as "Mariawattee" and "Agrawattee."

Deakin's application to register the word "Marza" in class 42 was not proceeded with, and the comptroller allowed the registration of the word in other classes.

On the 19th of December, 1893, Deakin gave notice of motion to rectify the register by expunging the "Mazawattee" marks, upon the ground that the word was deceptive or descriptive.

On the 3rd of February, 1894, Deakin again applied to register the word "Marza" in class 42 as a trade-mark for certain goods in that class other than tea. This application was directed to stand over till after the motion for rectification had been disposed of.

Romer, J., refused the motion, with costs.

Deakin appealed.

Moulton, Q.C., Hopkinson, Q.C., and *J. Cutler,* for the appellant.—First, as to the registration under the Act of 1883, the word "Mazawattee" is not "a fancy word not in common use." In *In re Van Duzer,* 35 W. R. 294, 34 Ch. D. 623, Lindley, L.J., said that a "fancy word" must be "obviously meaningless when used as a trade-mark," and Cotton, L.J., said that it must be "a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is." In the present case the word has a definite meaning. The termination "wattee" is a common one in the names of tea estates in Ceylon, and a Singalese would assume that the word was the name of an estate. The whole word conveys the idea of luscious tea coming from some particular estate in Ceylon. Not only is that so, but the word was chosen for the express purpose of conveying that sense, as appears from Mr. Densham's declaration. This case comes within the principle of *In re Jackson & Co.* (Kokoko), 6 P. R. 80, 37 W. R. Dig. 186. [LINDLEY, L.J.—That case was something like the *Red Star case, In re Société Anonyme des Verreries de l'etoile Marchienne Trade-Mark,* 42 W. R. 420, [1894] 2 Ch. 26; *In re Vignier,* 6 Pat. Cas. Rep. 490, 38 W. R. Dig. 198, where "Monobrut" was considered to mean "very dry" and therefore not to be a fancy word; *Davis* v. *Stribolt,* 6 Pat. Cas. Rep. 77, 37 W. R. Dig. 186; *In re Talbot's Trade-Mark* ("Emolliolorum") 42 W. R. 501, 11 Pat. Cas. Rep. 207. LOPES, L.J., referred to *Hodgson* v. *Sinclair,* 9 Pat. Cas. Rep. 22, where it was held that no word was a fancy word unless the word considered by itself was a fancy word. KAY, L.J., referred to the "*Anatolia*" *case, McAndrew* v. *Bassett,* 12 W. R. 777, 4 De G. J. & S. 380.] With regard to the registration under the second Act, the case is still stronger. It is not an "invented word" any more than a "fancy word." But even if it were,

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

it certainly has reference to the character and quality of the goods. In *In re Farbenfabriken, &c., Application*, 42 W. R. 488, [1894] 1 Ch. 645, registration of the word "Somatose" was refused because, though the word had no meaning even to educated persons, the proprietors themselves said that it was descriptive. [KAY, L.J.—It is quite possible that if the word "Somatose" had been on the register for many years, as "Mazawatte" has been, the decision might have been different.] The word "Monobrut" was struck off though it had been on the register for five years. Moreover, the word "Mazawattee" is a geographical name. For a word to be a geographical name it is not necessary that it should be the name of an actual place. There is an estate called "Mariawattee." That word, of course, could not be registered. It is impossible to lay down a line upon one side of which would be "Mariawattee" and on the other "Mazawattee."

Sir R. Webster, Q.C., Cozens-Hardy, Q.C., Neville, Q.C., and *Sebastian*, for the respondents, were not called upon.

LINDLEY, L.J.—I confess I had thought that this appeal was about as hopeless a one as I have ever heard, and I think so still. I think there is nothing in it at all. The reasons given by Romer, J., cannot, I think, be very well improved upon by me, but I will make one or two observations upon the case to show that I understand it, and the reasons why I concur in his view.

The application is to take off the register of trade-marks a word which has been on ever since 1887. Messrs. Densham & Sons registered this word "Mazawattee" in respect of tea in that year. Later on, some time in 1890, they registered it for other goods in class 42.

Now it appears, for the reasons which have been explained by Mr. Moulton, that the present applicants desire to have that removed. They say they are persons aggrieved because, in attempting to register some other word, they have been embarrassed by the existence upon the register of this word "Mazawattee." I do not pause to consider whether they are aggrieved or not, or whether they have a *locus standi* to appeal.

Now, what is the objection? First of all, let us take the original word, which was registered in 1887. That was registered under the Act then in force, which was the Patents, &c., Act of 1883, and under that Messrs. Denshams were entitled to register a word under the head in section 64, sub-section 1, clause C, of "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." They say this was a "fancy word not in common use." Now, was it? The answer to that, I think, is clear. It certainly was a word not in common use. As to its being a fancy word, did anybody ever hear of it before? That is one test. Then it is asked, How is it compounded? I do not care how it is compounded. It is said it is compounded of the word "wattee," which, in Singalese, means "estate" or "garden," and "maza," which is part of a larger word, "mazadhar," meaning "delicious," which it was proposed to have. Now, let us look at the word, and ask anybody who knows Hindustani, who knows Singalese, who knows English, who knows the tea trade, whether he knows or ever heard of such a word, and he would tell you, No. To say that such a word as that is not a fancy word is, I confess, beyond me altogether. If it is not a fancy word I should like to know what is. I do not believe that any human being could invent a word which would be a fancy word if this word is not one. I say no more about that, and if I talked for a month I could say no more.

Now, with regard to the Act of 1888, in which the language is a little different, what is requisite there is an "invented word," subject to this qualification, that it must have no reference to the character or quality of the goods, and must not be a geographical name. As to its being invented, I have said enough about its being that in the sense which I have mentioned, and I cannot think there can be any dispute about its being an invented word. The real question is whether it comes within the qualification; that is to say, whether it refers to the character or quality of the goods and is not a geographical name.

Now let us take the character or quality of the goods. With regard to that, I have heard ingenious remarks made by Mr. Moulton and Mr. Hopkinson upon this point, and I can only put it in the shape of a question. What character or what quality is referred to? If you talk about its being a descriptive word, I ask what it describes. That is the best way to get at it. The answer is that it describes nothing. It does not refer to the character of the goods or to any quality of the goods. Then Mr. Hopkinson has made this point. He says Mr. Densham himself tells us that he wanted a word, if he could find one —a nice fancy word—which would describe, as nearly as possible, what he has got on his packets; and what he has got on his packets is this: [His lordship read the label above set out, and continued:] Mr. Densham says he would like something which would more or less imply all that, and he found the word "Mazadharwattee." Well, says Mr. Hopkinson, that is a combination of a Hindustani word and a Singalese word; and Mr. Hopkinson's argument is that the word must be taken to denote, more or less, what he wanted—that is to say, to refer more or less, not very distinctly, perhaps, to the character or quality of the goods. The simple answer is that that is not the word adopted, and that is what made me remark a little while ago that possibly this gentleman owed something to his printer. He has not taken the word "Mazadharwattee," which possibly might with a certain amount of ingenious explanation, be held to refer more or less to the character or quality of the goods. He has not taken that. He has not taken a word which is so descriptive as that, but he has taken a word which you cannot find anywhere and which you cannot compound except in the ingenious way suggested, that there is now in Hindustani, the word "Maza," and there is in Singalese the word "wattee"; and the word "Maza" is known as signifying "taste" or "pleasure." That is what is suggested. Such reasoning is really too childish for serious argument.

Then with regard to the Act of 1888, let us ask ourselves: Does this word "Mazawattee" refer to the character or quality of the goods? My answer is, certainly not in any sense which, having regard to the evidence, is at all intelligible to my mind.

Then it is said if it does not, it is at all events a geographical name. The name of what? There is no such place. It is said you can make it out in this way: "Wattee" means an "estate" or "garden," and it refers more or less to Ceylon. That is not the question. The question is whether this word "Mazawattee" is a geographical name. The answer is "No; there is no such place known; there is no such place discovered." Then it is suggested that a name may be a geographical name although there is no such place; and Mr. Hopkinson put it that if Ptolemy had made a mistake and had used some geographical name it would be bound to be so considered and regarded, though nobody could find the place. I do not know whether that would be so or not; but when you come

modern times and call "Mazawattee" a geographical name, a place which cannot be found and which has never acquired by reputation or otherwise a geographical name, the thing is really absurd. I think is is a ridiculous appeal. I do go this length, and I wish it to be distinctly understood that it is not our business to fritter away this Act of Parliament. If we were to accede to the argument pressed upon us I defy anybody to invent a word which would satisfy the provisions of the Act of Parliament.

LOPES, L.J.—I am quite of the same opinion. I quite agree with what has been said by my learned brother Lindley, L.J., that the cases have gone quite far enough; and if they go any further I think the effect will be to entirely nullify the provisions of the Act of Parliament with regard to these trade-marks.

Now I do not propose to give any definition of "fancy word" beyond that which I gave in *Van Duzer's Trade-Mark case*. I am by no means, I hope, as a general rule, enamoured of a general definition of my own. Quite the contrary; but I think, as far as I can judge, that that definition was not an inaccurate one, and I am the more confirmed in that view because I think the definition in that case—I do not mean given by myself—has been followed in subsequent cases which have arisen. It merely comes to this: to be a fancy word it should be meaningless, it should be obviously, notoriously inappropriate to the article to which it is applied. I am dealing now, at the present moment, with the Act of 1883.

Now, is not this a "fancy word" within that definition? I do not know any better way of dealing with that point than to read what was said by the learned judge of the court below. He says: "Now I have to consider this. Has the term 'Mazawattee' any meaning in England in the first place? I come to the conclusion that in English it is meaningless. It conveys no meaning to any ordinary Englishman or to any class of Englishmen. It has no definite meaning in Hindustani because, though a Hindoo would recognize the first half of the word, he would be utterly at a loss to understand the meaning of the latter half. It would have no meaning to a Singalese, because, though he would give a meaning to the latter half he would see that the former half was wholly unconnected with his language or with Ceylon, and he could give no possible meaning to it. I believe that the word 'Mazawattee' has no meaning, therefore, in any known language." I entirely agree with that. I think that that conclusively shows, at any rate, this was a "fancy word" within the meaning of the Trade-Marks Act, 1883, and that it is not descriptive of the article, I think, is perfectly clear.

Then I come to the Act of 1888. That substitutes a new definition. Instead of "a fancy word or words not in common use," the Act of 1888 (section 10) has these words: "An invented word or invented words, or a word or words having no reference to the character or quality of the goods, and not being a geographical name." The effect of sub-sections (*d*) and (*e*) of that section of the Act is that it may be an invented word, but that that will not do, if it has any reference to the character or quality of the goods or is a geographical name.

Now, is this an invented word? I have already said that I agree with what was said by the learned judge of the court below in the passage I have just read from his judgment. If anything could show that this is an invented word I think that does—a word that does not exist in any language, and, as far as all the evidence goes, and as far one's own common sense goes, a word that had no previous existence before it was used for the purpose of the Trade-Marks Acts by the person who then had it registered. Then it is an invented word. But then, as I have said, that will not do, if it has reference to the character or quality of the goods. Has it? In my opinion, as I have said, it has no reference whatever to the character or quality of the goods. Then it is suggested—I hardly know what is suggested—that it means a luscious quality of tea. I cannot believe that that is intended in any way. Then it is suggested that it has some reference to locality. I cannot find that. It is said that it has reference to locality because it means tea coming from some pleasant garden in Ceylon. I cannot find that.

I come, therefore, to the conclusion that in no sense can it be said to be anything else but an invented word, and an invented word that has no reference to the quality or character of the tea, and is not a geographical description of the place from whence it comes.

I think the judgment of the learned judge below was absolutely correct, and I entirely agree with him.

KAY, L.J.—I agree, and I have nothing to add.

Appeal dismissed.

Solicitors, *Ernest Salaman, Fort, & Co.; Wynne-Baxter & Keeble.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — March 15, 18, 21, 22; April 5.

In re DEELEY'S PATENT. (*a*.)

Patent—Validity—Estoppel—Petition for revocation—Action for infringement—Patent declared invalid—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 26 (4).

In a petition for the revocation of a patent the patentee is not estopped from setting up the validity of the patent by the fact that, in an action for infringement in which the petitioner was the defendant, the patent had been declared invalid.

Appeal from Romer, J.

This was a petition for the revocation of a patent, No. 14,526 of 1884, for improvements in the mechanism for ejecting spent cartridges from guns, the patent having been taken out on the 3rd of November, 1894, by J. Deeley the younger.

In 1891 an action was brought for infringement of the patent. Kay, L.J., who tried the action, held that claim 1 had been anticipated by a prior patent of the defendant, and claims 3, 4, and 5 by a gun previously made by one Rigby. This decision was affirmed by the Court of Appeal upon the strength of the anticipations of claims 3, 4, 5, but they gave no decision upon claim 1.

The patentee subsequently, by leave, amended his patent by striking out claims 3, 4, and 5, and claiming only the special form, arrangement, and combination of the parts of the mechanism set forth in claims 1 and 2.

The defendant in the action for infringement, having obtained the authority of the Attorney-General, presented a petition for the revocation of the patent.

When the petition came on for hearing before Romer, J., the point was taken by the petitioner that the plaintiffs were estopped by the judgment of Kay, L.J., from setting up the validity of the patent. His

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

lordship held that the patent had not been substantially altered by the amended specification and ordered it to be revoked, but he expressed no opinion on the point taken as to estoppel.

The plaintiffs appealed.

Moulton, Q.C., and *Roger Wallace*, for the appellants.

Sir R. Webster, Q.C., and *T. Terrell*, for the petitioner.—Section 26 (4) of the Patents Act, 1883, has introduced a new procedure in cases of revocation. The petitioner is now a party, and consequently the ordinary rule of estoppel applies, that the same issue should not be tried again between the same parties: *In re Bank of Hindustan, China, and Japan, Ex parte Alison*, 22 W. R. 113, L. R. 9 Ch. App. 124; *Priestman* v. *Thomas*, 32 W. R. 842, 9 P. D. 70, 210.

Moulton, Q.C., in reply.—The petition for revocation is presented by one of the public, and it is immaterial that he happens to have been the defendant in a previous action for infringement.

Cur. adv. vult.

April 5.—The judgment of the COURT was delivered by

A. L. SMITH, L.J., who dealt with the facts of the case, and the conclusions upon them, and continued:—A point was taken by Sir Richard Webster that the finding of Kay, L.J., upon the fact that claim 1 of Deeley's specification had been anticipated, acted as an estoppel in this petition. In the view above taken of the facts it is unnecessary to decide this point, but as it is new and important and has been fully argued and considered, we will give our opinion upon it. We are of opinion that there is no estoppel. A petition to revoke a patent, by whomsoever presented, is a petition on behalf of the public, and is not personal to the petitioner, and in a legal point of view it is a mere accident that in this case the petitioner was a party to a former litigation.

Under the old procedure by *scire facias* it is plain that there would be no estoppel, and although the procedure is altered, the principle underlying it and the effect of it are the same, and, as in the case of a *scire facias*, so in this petition, there is no estoppel. For the reasons above we think that the appeal fails, and must be dismissed with costs, except so far as they may have been incurred by the issue raised upon claim 2 and the Rigby gun.

Appeal dismissed.

Solicitors for the appellants, *Stibbard, Gibson, & Co.*

Solicitors for the respondent, *Wakeford, May, & Woulfe.*

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — Jan. 25; Feb. 6.

MORLEY v. RENNOLDSON. (a.)

Will—Construction—Condition in restraint of marriage—Void gift.

R. by his will gave and bequeathed his residuary personal estate to his trustees upon trust for his daughter M. on attaining twenty-one or marrying, for her separate use for life, remainder for her children, and, in default of issue, over. By a codicil R. declared his will to be that his daughter should not marry, and, in case of her marriage or death, there was a gift over of his residuary estate to the persons who took under the gift over in his original will.

After R.'s death M. married and had children.

Held, that the true construction of the two instruments was that, on her death or marriage, whichever should first happen, or on her death without issue, the property should go over. An illegal condition (as Wigram, V.C., *decided*, 2 *Hare*, 570) *in general restraint of marriage having been imposed as to the life interest, it followed that the same condition was void as to the children's interest, and that, therefore, the children were entitled to the fund in court.*

This was an appeal from a decision of Kekewich, J.

William Rennoldson, by his will dated the 4th of November, 1834, gave and bequeathed his residuary personal estate to his trustees upon trust for his daughter, Margaret Rennoldson, on attaining twenty-one or marrying, for her separate use for life, and after her death in trust for all and every her child and children as therein mentioned, and in default of such issue upon trust for certain other persons.

By a codicil, dated the 30th of October, 1836, the testator declared that, in consequence of the continued nervous debility of his said daughter Margaret, his will was that she should not at any time contract matrimony, and in case of the marriage or death of his said daughter there was a gift over of his residuary estate to the persons taking under the gift over in his will.

Margaret Rennoldson survived her father, and in 1842 married Robert Linkson. Shortly afterwards a suit was instituted for the administration of the testator's estate, and Wigram, V.C., decided that the limitation over by the codicil, being in general restraint of marriage, was void as to the life interest of the daughter: see 2 Hare, 570. The question whether the interest in remainder bequeathed to the children of the daughter by the will was revoked by the codicil was expressly left open by the Vice-Chancellor.

Mrs. Linkson died on the 10th of June, 1894, having had ten children by her marriage, of whom six were still living. The testator's residuary estate was represented by a sum of £4,561 4s. 6d. New Consols paid into court to the credit of the action. The persons entitled under the gift over petitioned for the payment out of such sum to them. Kekewich, J., decided that the sum in court must be paid out to the six surviving children in equal shares after payment of the costs of all parties.

The petitioners appealed.

Haldane, Q.C., and *Hadley*, for the appellants.—The Vice-Chancellor intended the appellants, as the persons entitled under the gift over, to have the property on marriage or death, whichever first happened, and the testator gave it to them on his daughter's marriage or death — not necessarily whichever first happened. There is no suspension of the gift between marriage and death: the gift vested in the appellants on the marriage. The question of motive must be disregarded by the court in construing an executed instrument, there being nothing executory. The gift is good, however bad the motive may be, and there is nothing in the law of England to invalidate the gift: *Occleston v. Fullalove*, 22 W. R. 305, L. R. 9 Ch. App. 147; *Ayerst* v. *Jenkins*, 21 W. R. 878, L. R. 16 Eq. 275. There is no case in which a gift to A., going over to B. on the marriage of C., has been held to be bad: *Bellairs* v. *Bellairs*, 22 W. R. 942, L. R. 18 Eq. 510; *Scott* v. *Tyler*, 2 Dick. 712.

Renshaw, Q.C., and *Barnard Lailey*, for the respond-

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

ents, the children.—"Death" must mean without having been married: the testator excludes the idea of marriage altogether, having forbidden his daughter to marry. The whole codicil is on the footing of her marriage being forbidden. "Marriage or death" is not an alternative expression: the clear intention was that the gift should go over on marriage. [They were stopped by the court.]

Haldane, Q.C., in reply.—The gift became vested on the testator's death. The interest was suspended during the daughter's lifetime, and the possession accelerated on her death or marriage. The children never took any interest at all; it is not a case of the interest being divested. The interposition of the life interest does not suspend the vesting. The true effect is to remove the disposition in the will in favour of the children, and substitute by the codicil the disposition in favour of the appellants.

Lord HALSBURY.—I am of opinion that this appeal must be dismissed. Notwithstanding all that we have heard, the question turns on a very narrow point of construction. If we were reading this codicil as an original and independent document, Mr. Haldane's construction might be right, but we have to read the will and the codicil together. The testator tries to impose a condition that his daughter Margaret shall not marry. The true construction of the instruments is that on her death or marriage, whichever shall first happen, or on her death without issue, the property shall go over. She has not died without issue, and a condition was imposed to vest the property elsewhere on her marriage. That is an illegal condition; the law will not allow such a condition, and therefore the original gift to the children of Margaret takes effect.

LINDLEY, L.J.—I am of the same opinion, though I was much struck with the ingenuity of the reply. If you could throw the will into the fire, and treat the codicil as the original will, Mr. Haldane would no doubt be right; but we cannot do that; we must read the will and the codicil together. By his will the testator gives his residuary estate to his daughter Margaret for her life, with remainder over to her children, but by the codicil he says that for the reasons there stated his will was that she should not marry. Now his object was unmistakable; in case of marriage or death the estate was to go over; but it cannot go over in the event which has happened, and if not in that event, can it go over at all? I think not. If we could start from this codicil Mr. Haldane's contention would be right. We accept the Vice-Chancellor's decision and apply it to the will. It could not have been the testator's intention that the appellants should have the property in the events which have happened.

A. L. SMITH, L.J.—The Vice-Chancellor held that the condition imposed was a restraint on marriage in general, and could not be enforced, therefore the original will remained in force. The result is that the appellants never took at all, and the children of Margaret are now entitled.

Appeal dismissed, with costs.

Solicitors for the appellants, *A. W. Pearce*, for *Pearce & Keele*, Southampton.

Solicitors for the respondents, *Haynes & Claremont.*

High Court of Justice.

Chan. Div. Stirling, J. — April 5, 26.

WILMER v. MCNAMARA & CO. (LIMITED). (a.)

Company—Capital—Dividend—Depreciation of capital—Liability of company to make good same out of profits on year's working.

The articles of a company provided that the profits made during the financial year should be applicable to the payment of dividends on the shares of the company, and that no dividend should be payable except out of profits arising out of the business of the company.

At the end of a financial year the value of the assets of the company, including the goodwill, were less than the nominal capital of the company, but the profit and loss account showed a balance of profit after all proper and usual allowances had been made. No allowance was made for depreciation in the value of the goodwill.

On a motion to restrain the company from applying the said balance of profit in payment of dividends so long as the value of the company's assets was less than the nominal amount of its capital,

Held, that the word "profits" in the articles was intended to mean the excess of receipts over the expenditure properly attributable to the year; that the depreciation in the value of the goodwill was loss of fixed capital; that the company was not bound to make any allowance in respect of such depreciation, and was acting within its powers in applying the said balance of profit in payment of a dividend on its shares.

Motion.

This was a motion on behalf of the ordinary shareholders of the defendant company asking for an injunction to restrain the directors from acting upon a resolution passed at a general meeting of the company that a sum of £5,816 12s. 6d. should be applied in payment of a dividend to the preference shareholders, and also from declaring or paying any dividend for the year ending the 30th of June, 1894. The real object of the action, which was a friendly one, was to ascertain whether or not the dividend in question could be lawfully paid.

The company was formed in 1887 with the objects (1) of acquiring the business of carriers, theretofore carried on under the firm or style of Arthur McNamara & Co.; (2) of carrying on, developing, and extending the business thus to be acquired, and generally of carrying on the business of general carriers. The capital of the company was to be £120,000, divided into 12,000 shares of £10 each, of which 7,000 shares were to be preference shares, entitling the holders thereof to a fixed preferential cumulative dividend at the rate of 8 per cent. per annum on the capital paid up thereon, and the remaining 5,000 were to be ordinary shares, the holders whereof were to take all the surplus profits subject to the payment of the said preferential dividend and subject to the company's articles of association.

The material articles were:

116. Subject to the provisions of these presents the profits made during the financial year or other period comprised in the accounts submitted to each ordinary general meeting shall be applicable first to the payment of the fixed preferential dividend on the preference shares to the close of that year or other period, and the surplus shall be applicable to the payment of dividends on the ordinary shares.

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

117. No dividend shall be payable except out of profits arising out of the business of the company, and capital paid up in advance of calls shall not, whilst carrying interest, confer a right to a dividend.

118. The directors may, if they think fit, from time to time determine on and declare an *interim* dividend to be paid to the members.

119. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they may think proper as a reserve fund not exceeding 10 per cent. of such profits. Providing always that the action of the directors in setting aside such sum as a reserve fund be approved by the company at the ordinary general meeting held next after the same shall have been so set aside. This reserve fund shall be, at the discretion of the directors, applicable for meeting contingencies, for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining the works and for preserving in efficiency the stock and plant connected with the business of the company, or any part thereof, or shall, with the sanction of the company in general meeting, be as to the whole or in part applicable for equalizing dividends or for distribution by way of bonus among the members of the company for the time being on such terms and in such manner as the company in general meeting shall from time to time determine.

124. The directors shall cause true accounts to be kept—(*a*) of the stock-in-trade of the company; (*b*) of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place; and (*c*) of the assets and liabilities of the company.

126. The directors shall lay before the court in general meeting (commencing with the ordinary general meeting in the year 1888) a statement of the income and expenditure for the past year made up to the 30th day of June then last past. The statement so made shall show, under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment salaries and other like matter. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure, which may in fairness be distributed over several years, has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

127. A balance-sheet shall be made out in every year and laid before the company in general meeting (commencing with the ordinary general meeting in 1888), and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to Table A in the 1st Schedule to the Companies Act, 1862, or as near thereto as circumstances will admit.

By an agreement dated the 8th of July, 1887, the company agreed to purchase and take over as from the 1st of July, 1887, the aforesaid business of Arthur McNamara & Co., and the goodwill thereof, together with the leasehold hereditaments, plant, stock, &c., generally used in and belonging to the said business for the consideration of £54,000 in cash, and the allotment to the vendor or his nominees of 5,000 ordinary £10 shares in the capital of the company, which were to be deemed to be fully paid up. Certain stores and other property, not material to be here set out, were to be paid for at cost price to the persons who supplied the same. The whole of the 7,000 preference shares were subscribed for and issued and fully paid up in cash, and out of the £70,000 which thus came into the hands of the company £54,000 were paid to the vendor under the agreement of the 8th of July, 1887, and after certain other payments the balance was partly invested and partly placed on deposit. The 5,000 ordinary shares were allotted as fully paid up to the vendor or his nominees.

For the year ending the 30th of June, 1888, an allowance was made in the accounts for depreciation on leases, goodwill, and plant of £3,810, and in each of the years ending the 30th of June, 1889, 1890, and 1891 an allowance of £2,000 was made for the like purpose. In all those years (down to and including the year ending the 30th of June 1892) substantial charges were made against income for van maintenance, horse renewal, and repairs to buildings. In the spring of 1893 a valuation made by order of the directors showed the total value of the assets of the company (exclusive of the goodwill) to be in round figures £62,800. The goodwill was estimated at £20,000, whilst the liabilities to creditors amounted in round figures to £12,400, leaving a balance of £70,400 on the credit side.

In the year ending the 30th of June, 1894, the value of the assets (including goodwill estimated as before) was found to be £86,750, the liabilities to creditors £10,500, leaving a surplus of £76,250 in round figures. The receipts (after allowing for horse renewal £5,025, for van maintenance £3,753, and repairs to buildings £334) exceeded the expenditure by £6,582. After deducting a sum of £200 for depreciation on leases, a reserve for bad debts, &c., the profit and loss account showed a sum of £5,816 12s. 6d. to the credit of profit. At a meeting of the company held on the 11th of September, 1894, it was resolved that this sum be applied by the directors in paying a dividend to the preference shareholders.

The object of the motion was to restrain the directors of the company from acting on this resolution, on the ground that until the loss of capital had been made up no dividends ought to be paid. The company was solvent, and the subject in dispute affected the shareholders alone. A scheme had been prepared for the reduction of the capital of the company, but it had fallen through.

Graham Hastings, Q.C., and *S. O. Buckmaster*, for the motion.—The capital ought to be made up before any dividends are paid: *Lubbock* v. *The British Bank of South America*, 41 W. R. 103, [1892] 2 Ch. 1[illegible] The remarks of Kay, L.J., in *Verner* v. *The General and Commercial Investment Trust*, [1894] 2 Ch. 2[illegible] 268, support this view. True the company in the case was an investing company, and not a trading company, as is the case here, but his remarks apply nevertheless.

Buckley, Q.C., and *Howard Wright*, for the company.—*Lubbock* v. *The British Bank of South America* is not an authority for the proposition that depreciation in a company's capital ought to be debited in the profit and loss account: *Lee* v. *The Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. [illegible] and *Verner* v. *The General and Commercial Investment Trust*.

R. Burleigh Muir, for the preference shareholders.—We are entitled to this dividend. It is being paid out of profits, and not out of capital.

Hastings, Q.C., in reply.—*Lee* v. *Neuchatel Asphalte Co.* is not in point. In that case the assets of the

company were of a greater value at the time of the action than at the formation of the company.

Cur. adv. vult.

April 26.—STIRLING, J. (after stating the facts, continued:).—The question for me to decide is whether the proposed dividend can be lawfully paid. From an affidavit filed by the secretary of the company it appears that the horses and rolling stock of the company have been fully maintained out of income, and are now of greater value and in better condition than they were when the company was formed. Nothing is said in that affidavit as to the value of the leaseholds and goodwill, so it may fairly be inferred (as I think) that these are now of less value than when the company was formed. The nominal share capital amounts to £120,000, and the assets fall short of this by upwards of £43,000. Of this capital, however, the sum of £70,000 only was raised in cash; the balance of £50,000 was issued in payment to one vendor for the business, &c., purchased by the company. Under these circumstances the case of *Lee* v. *Neuchatel Asphalte Co.* applies to this extent, that it is a distinct authority that dividends may be paid although the assets are not sufficient to make up the share capital (see *per* Cotton, L.J., 41 Ch. D., at p. 15). Beyond this *Lee* v. *Neuchatel Co.* does not assist in point of decision, for there it was held, as a conclusion of fact, that the assets of the company were, at the period in question, of greater value than when it was first formed. I think, however, as has already been pointed out and acted upon in *Verner* v. *General Investment Trust*, that the Court of Appeal there laid down (see [1894] 2 Ch., p. 255) principles which go far beyond what was required for the decision of that particular case, and, among others, that, in determining whether a dividend may or may not be paid, regard is to be had to the constitution of the company and the articles of association. As it is put by Lindley, L.J., in the same case (see p. 265), "a company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished; or a company may contract with its creditors to keep its capital or assets up to a given value; but in the absence of some special article or contract there is no law to this effect." Later on he adds: "Even a sinking fund to replace lost capital by degrees is not required by law."

In the present case no contract with creditors has been brought to my notice. I have therefore only to consider the articles of association, which closely resemble those in Table A of the 1st schedule to the Companies Act, 1862. Now, article 117 says: "No dividends shall be payable except out of profits arising out of the business of the company." What are the profits referred to? On this point the following observations of Lindley, L.J., are to be borne in mind. [His lordship here read from the judgment of the Lord Justice, [1894] 2 Ch., at p. 266, beginning at the words, "It has been already said," and proceeded:—] Apart from the use of the word "profits" in article 117, I see nothing in these articles which could lead to the inference that their framers intended the capital of the company (or rather, assets of the value of those acquired by the company at its formation) to be kept up, and article 126 seems to me to show that what was contemplated as "profits" was the excess of receipts over all expenditure properly attributable to the year. This view appears to have been acted upon in *Bolton* v. *Natal Land and Colonization Co.*, [1892] 2 Ch. 124, 40 W. R. Dig. 37.

It is necessary, however, to consider whether the depreciation of goodwill and leases is to be treated as loss of "fixed" capital, or of "floating or circulating" capital. Depreciation of goodwill seems to me to be loss of "fixed" capital. It closely resembles the loss which a railway company might be said to suffer if it were found that the line which was made say ten years before at a certain cost could now be made for a much smaller amount. On this point I refer to what is said in *Lee* v. *Neuchatel Asphalte Co.* by Lindley, L.J., at pp. 22-3 (41 Ch. D.), and by Lopes, L.J., at pp. 26-7. I think, therefore, that the balance-sheet cannot be impeached by reason of its not charging anything against revenue in respect of depreciation of goodwill.

I confess that I have felt more doubt whether the sum actually charged for depreciation of leaseholds—viz., £200—is sufficient. The evidence filed on behalf of the plaintiff does not, however, in any way challenge the accuracy of the accounts rendered by the directors, nor was it suggested in argument that they were improperly framed. I must take it, therefore, that the amount thus charged is that which, in the judgment of the directors, honestly exercised, ought fairly to be charged against the year's income. Under these circumstances I think that a case has not been made such as would justify the grant of an injunction.

My attention was pointedly called to the opening sentences of the judgment delivered by Kay, L.J., in *Verner* v. *General and Commercial Investment Co.*, [1894] 2 Ch., at p. 268. The observations there found are certainly deserving of the utmost attention, and I have carefully considered them. They appear, however, to be mainly directed to the case of a company engaged in buying and selling, and one not treated by the Lord Justice himself as applicable to the case actually before him, where the business of the company consisted in making investments. In the present case the defendant company carries on the business of carriers; it does not buy and sell, and such loss as has occurred does not arise from the company having received a less price than it originally gave for a portion of its assets. I think that under these circumstances I ought not to apply the observations in question to the present case, any more than they were applied by Kay, L.J., in *Verner* v. *General Investment Co.* to the case before him. The result is that the motion must be refused, and I declare that the resolution of the 11th of September, 1894, was within the power of the company, and the motion being treated as the trial, I dismiss the action.

Motion refused.

Solicitors, *M. William C. Smelt*; *Freshfields & Williams.*

Chan. Div. Romer, J. — Dec. 1, 3.

BOLTON v. CURRE. (a.)

Trustee — Breach of trust — Request of beneficiary — Equity to have beneficiary's interest impounded as against subsequent assignee—Removal of restraint on anticipation—Trustee Act, 1888 (51 & 52 *Vict. c.* 59) *s.* 6—*Trustee Act,* 1893 (56 & 57 *Vict. c.* 53) *s.* 45.

Where a trustee has committed a breach of trust at the instigation of a beneficiary, his equity to have the beneficiary's interest impounded, even as against a subsequent assignee of that interest, is the same as before the Trustee Acts, 1888 *and* 1893. *Those Acts have not, in such a case, rendered the trustee's rights merely statutory, but*

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

have enlarged the discretion of the court. The refusal of a trustee, when committing a breach of trust, to take a mortgage of a beneficiary's interest as additional security for the improper investment does not constitute a waiver of his equity to have the beneficiary's interest impounded. The court will be loth to remove, in the exercise of its discretion, the restraint on anticipation of the interest of a married woman at whose request a trustee has committed a breach of trust, so as to enable such interest to be impounded to recoup the trustee. Such removal of restraint on anticipation was refused where the married woman did not know, and was not informed by the trustees, that the transaction was a breach of trust, and had participated in the benefit arising from the breach of trust.

Ricketts *v.* Ricketts, 64 *L. T. N. S.* 263, 39 W. R. Dig. 243, *explained.*

Trial of action.

On the 25th of July, 1877, a settlement was executed on the marriage of a Mr. and Mrs. Blood. The trustees of the settlement were W. E. C. Curre, H. R. Peake, G. T. L. Bolton, and J. Browning. By this settlement Mr. Blood settled £5,000, bearing interest at 5 per cent. per annum, and secured by a mortgage of certain Irish estates belonging to him, upon trust for himself for life, and after his death for his wife for life, and after the death of the survivor upon the usual trusts for the issue of the marriage.

Mrs. Blood settled, *inter alia*, a legacy of £5,000 to which she was entitled under her father's will, upon trust for herself for life, for her separate use without power of anticipation, and after her death for her husband for life or until forfeiture as therein mentioned, and thereafter upon the usual trusts for the issue of the marriage.

The legacy of £5,000 settled by Mrs. Blood was satisfied by the transfer to the trustees of the settlement of a sum of Consols. The trustees subsequently sold the Consols and invested the proceeds in the purchase in their names of £4,000 Great Western Railway 5 per Cent. Rent-Charge Stock.

In the year 1885 Mr. Blood, being in embarrassed circumstances, requested the trustees to sell the Great Western Stock above mentioned, and to advance to him the proceeds on the security of an equitable mortgage of his Irish estates, subject to the above-mentioned mortgage for £5,000 and some other charges. The trustees acceded to this request, and sold the said £4,000 Great Western Stock for £5,372 17s. 6d., which sum they advanced to Mr. Blood on the security of a mortgage of his said Irish estates dated the 23rd of March, 1885. The trustees at the time declined an offer made to them by Mr. Blood of a mortgage on his life interest in the £5,000 settled by him by way of additional security for the £5,372 17s. 6d. The written consent of Mrs. Blood to this change of investment was obtained, but the trustees did not inform her, nor was she aware of the fact, that the transaction constituted a breach of trust.

The Great Western Stock above mentioned was within the range of investments authorized by the settlement, but an investment on equitable or second mortgage was not so authorized.

In the month of August, 1893, Mr. Blood assigned to Catherine J. Studdert, one of the defendants, for valuable consideration his life interest in the £5,000 settled by him as aforesaid. The defendant Mrs. Studdert had notice of the mortgage of the 23rd of March, 1885, and also that the amount then advanced formed part of the funds settled by the said marriage settlement; and it was stated to her solicitors by the trustees that Mr. Blood's life interest was unincumbered except to the extent of £500, which sum was intended to be paid off.

J. Browning died insolvent; and G. T. L. Bolton, who survived him, died in May, 1893, the plaintiff being his legal personal representative. The other two trustees, the defendants Curre and Peake, gave notice to the plaintiff that the estate of Bolton was liable to make good the loss arising from the breach of trust above mentioned. This action was thereupon commenced by the plaintiff against Curre and Peake, Mr. and Mrs. Blood, E. M. Blood the only child of the marriage, and Mrs. Studdert the assignee of Mr. Blood's life interest, claiming that the sum of £4,000 Great Western Stock sold in breach of trust and advanced to Mr. Blood as above mentioned should be replaced, and that any moneys expended in replacing the same, with interest, should be recouped by or out of the property of the beneficiaries at whose request and for whose benefit the breach of trust was committed.

In June, 1894, under an order of the court, the plaintiff and the defendant trustees paid into court the sum of £5,372 17s. 6d., being the proceeds of sale of the £4,000 Great Western Stock above mentioned.

By his statement of claim the plaintiff claimed a declaration that he was entitled to a lien upon Mr. Blood's life interest under the settlement for the moneys expended in replacing the £4,000 Great Western Stock, and that in respect of such lien he was entitled to priority over the defendant Mrs. Studdert the assignee of Mr. Blood's life interest. He also claimed that Mrs. Blood's life interest under the settlement should be impounded by way of indemnity to himself and the defendant trustees against their liability to replace the stock.

Neville, Q.C., and *F. L. Wright*, for the plaintiff.—This action is to enforce the right of the trustees to be recouped out of Mr. and Mrs. Blood's life interest under the settlement, under the Trustee Act, 1893, s. 45, which is substantially a re-enactment of the Trustee Act, 1888, s. 6. The breach of trust was instigated by Mr. Blood, with his wife's concurrence, and the change of investment was consented to by both husband and wife, who have enjoyed the increase of income arising therefrom. [They referred to *Rob* v. *Ridehalgh*, 3 W. R. 344, 7 De G. M. & G. 104; *Doering* v. *Doering*, 37 W. R. 796, 42 Ch. D. 203; *In re Somerset*, 42 W. R. 145, [1894] 1 Ch. 231; *Griffi* v. *Hughes*, 40 W. R. 524, [1892] 3 Ch. 105.] The decision in *Ricketts* v. *Ricketts*, 64 L. T. N. S. 263, was on the special facts of that case and is not applicable to the present. Mrs. Studdert can stand in no better position than Mr. Blood, from whom she took the assignment.

J. R. Brooke, for the defendants Curre and Peake.

Bethell, for the defendant E. M. Blood, the only child of the marriage.

Butcher, for the defendants Mr. and Mrs. Blood.—Mr. Blood's life interest has been assigned to the defendant Mrs. Studdert. As to Mrs. Blood, she was restrained from anticipating, and the trustees ought to have protected her interest. Her consent to the change of investment was merely formal, and she had no knowledge that it constituted a breach of trust. The court will not under these circumstances impound her life interest: *Ricketts* v. *Ricketts*; *Sawyer* v. *Sawyer*, 33 W. R. 103, 28 Ch. D. 595.

Fellows, for the defendant Mrs. Studdert.—The rights of trustees to be indemnified by beneficiaries are not, since the passing of the Trustee Act, 1888, re-enacted by the Trustee Act, 1893, equitable, but statutory; and before such rights can attach an order of the court must be made impounding the interest of the beneficiaries. No order had been made

proceedings taken to impound Mr. Blood's life interest at the time when it was assigned to Mrs. Studdert, and no claim by the trustees can affect her title: *In re Somerset; In re Knapman*, 30 W. R. 395, 18 Ch. D. 300; *Priddy* v. *Rose*, 3 Mer. 86; *Woodyatt* v. *Gresley*, 8 Sim. 180. Mrs. Studdert is not a beneficiary within section 45 of the Trustee Act, 1893. Her solicitors were not, when the assignment was made, informed of all the circumstances. The trustees waived their equity against Mr. Blood when they refused his offer of his life interest by way of additional security, and they cannot now set up their equity against Mrs. Studdert, who took an assignment of the life interest for valuable consideration.

Neville, Q.C., replied.

ROMER, J.—First, as to the claim against the life interest of the defendant Mr. Blood, now assigned to Mrs. Studdert. He instigated the breach of trust and received the money advanced in pursuance of it, and became a debtor to the estate in respect of that money. The trustees would clearly have a right to have his life interest impounded under the circumstances if he still retained that interest. It is also, I think, clear that before the passing of the Trustee Act, 1888, the equity of the trustees and of the other beneficiaries against the life interest would affect it in the hands of Mrs. Studdert, who purchased it subsequently to the breach of trust. But it is now contended on her behalf that section 6 of the Trustee Act, 1888, substantially re-enacted by section 45 of the Trustee Act, 1893, has altered the law.

It is said that the law as to impounding interests is now contained in those sections, that the formerly existing law on the subject was put an end to by the Act of 1888, and that by section 6 of the Act of 1888, and section 45 of the Act of 1893, the impounding is now put absolutely in the discretion of the court; and that, consequently, the interest of a beneficiary is not affected by any equity in favour of the trustees until the court orders that interest to be impounded. The consequence of this would be that Mrs. Studdert would be entitled to hold her purchased interest free from any claim by the trustees. But I think this contention cannot be sustained. In my opinion, section 6 of the Act of 1888 was intended to enlarge the power of the court as to indemnifying trustees, and not to curtail the previously existing rights and remedies of trustees, or to alter the law except in the direction of giving greater power to the court. The discretion given to the court by that section as to impounding, is a judicial discretion; and if before the Act the court would in a proper case enforce the equity of the trustee by impounding the interest of a beneficiary in the hands of an assignee, the court ought to do the same in a similar case since the Act. It was also said on Mrs. Studdert's behalf that in some way the trustees' equity against Mr. Blood's life interest was waived or lost owing to their not having taken an express charge on his life interest as originally offered by him. But I do not think that the fact that they did not take an express charge could be treated as an abandonment of the right to enforce the equity; and I hold that there was no intention of abandoning and no abandonment of the equity. Nor do I see that the trustees have lost their rights because of any answers to the inquiries by Mrs. Studdert's solicitors in contemplation of her purchase. No untrue statement or unfair conduct on the part of the trustees is proved, and I do not think that the trustees are estopped by the correspondence at that time, from now raising their present claim. Moreover, Mrs. Studdert, when she bought the life interest, knew of the mortgage by Mr. Blood, and that he was a debtor in respect of the money borrowed; and she took subject to the equities which arose. For these reasons I hold that the trustees' right to have the interest of Mr. Blood impounded is established, and that the life interest must be impounded accordingly.

Next, as to the life interest of Mrs. Blood which she is restrained from anticipating. All that that lady has done in the matter of the breach of trust was to consent in writing to the change of investment. She did not instigate it, or in fact know that the new investment was a breach of trust. Under these circumstances, in the exercise of my judicial discretion, I shall not remove the restraint on anticipation in order that the trustees may impound her life interest.

I desire to say a word about my decision in the case of *Ricketts* v. *Ricketts*, which appears to have been misunderstood. No general rule was in that case laid down to the effect that a trustee who has knowingly committed a breach of trust can never have his beneficiary's interest impounded. But one of the facts to be borne in mind by the court in the exercise of its discretion is whether the breach of trust was committed by the trustee knowingly; and in that case, the trustee having acted knowingly, and having regard to the other circumstances of the case, I refused to remove the restraint on anticipation in favour of the trustees. I adhere to what I said then, and I do not think a trustee should be allowed deliberately to commit a breach of trust at the request or with the consent of a beneficiary restrained from anticipation, in the expectation that the court will afterwards remove the restraint on anticipation and give him a security for the breach of trust which at the time he had no right to look to. The restraint on anticipation would be practically rendered inoperative if such were the practice of the court. For these reasons I decline to allow the trustees to impound Mrs. Blood's life interest.

Solicitors, *Patersons, Snow, & Co.*, for *Wilson, Wright, & Wilsons*, Preston; *Booty & Bayliffe; Lattey & Hart; H. Wharton.*

Chan. Div.
Vaughan Williams, J. } Feb. 27; March 6, 13.

In re NEW ORIENTAL BANK CORPORATION (No. 2). (*a.*)

Company—Winding up—Lease—Bankruptcy—Proof—Claim by lessee—Future and contingent liability under lease—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

A limited company were lessees under a lease for a term of fourteen years at a quarterly rent determinable at the end of seven years, they paying the rent and performing and observing the covenants in the lease down to the date of the determination of the term. The company went into liquidation before the end of the seven years and was insolvent.

Held, that the lease was a subsisting lease; that Hardy *v.* Fothergill, 37 *W. R.* 177, 13 *App. Cas.* 351, *had no application, and that the principle of* In re Haytor Granite Co., 14 *W. R.* 186, *L. R.* 1 *Ch. App.* 77, *and* Horsey's Claim, 16 *W. R.* 577, *L. R.* 5 *Eq.* 561, *applied.*

Summons.

The above-named corporation were lessees under a lease, dated in October, 1890, for fourteen years, from the 1st of April, 1890, at a yearly rent. The lease contained covenants by the lessees to pay the rents and to keep the premises in repair, and

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

provided that the lessees might determine the lease at the end of the seventh year of the term by giving six months' notice in writing, they paying the rent and performing and observing the covenants by the lessees contained in the lease up to the date of the determination of the term.

The corporation entered into possession and paid rent down to May, 1892.

The corporation passed in June, 1892, a resolution for voluntary winding up, which on the 5th of July, 1892, was continued under supervision of the court. The corporation was insolvent.

The liquidator paid rent and remained in possession down to October, 1893, when he went out of possession.

The lessors took out the present summons to determine what amount they were entitled to prove for under the lease.

Buckley, Q.C., and *W. E. Capron*, for the lessors.—An insolvent company will not be allowed to distribute its assets without regard to a landlord's claim for future rent, and he is entitled to prove for future rent: *In re Haytor Granite Co.*, 14 W. R. 186, L. R. 1 Ch. App. 77; *Horsey's Claim*, 16 W. R. 577, L. R. 5 Eq. 561; *In re Gartness Iron Co.*, 18 W. R. 1103, L. R. 10 Eq. 412; *Elphinstone* v. *Monkland Iron and Coal Co.*, 35 W. R. 17, 11 App. Cas. 332.

R. J. Parker, for the liquidator.—The prior cases must be considered as overruled by *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, and section 10 of the Judicature Act, 1875. The amount cannot exceed what the lessor might reasonably take for a surrender. The question of the effect of the decision in *Hardy* v. *Fothergill* on the right of a lessor to have the assets of a limited company in liquidation impounded was left open by the Court of Appeal in *Craig's claim*, *ante*, p. 244, [1895] 1 Ch. 267.

He also cited *Ex parte Blake*, 27 W. R. 901, 11 Ch. D. 572.

Buckley, Q.C., replied.

VAUGHAN WILLIAMS, J., said that the matter must be dealt with on the footing that the lease was a subsisting lease, and that to such a case *Hardy* v. *Fothergill* had no application. Proof could only be allowed for breaches which had occurred up to the present time. If a company in liquidation remained in beneficial occupation of premises comprised in a lease the court ought to do its best to make them pay the rent in full. The principle of *In re Haytor Granite Co.* and *Horsey's claim* applied to the present case. The lessors could not be forced to accept a surrender, and could claim for the whole of the future rent.

Solicitors, *Trinder & Capron; Hollams, Sons, Coward, & Hawksley.*

Q. B. Div.
(Lord Russell of Killowen, C.J.) April 10.

BAYNES & CO. v. LLOYD AND ANOTHER. (a.)

Landlord and tenant—Lease under seal—Implied covenant for title—Implied covenant for quiet enjoyment—Expiration of lessor's term—Duration of covenants after such expiration.

A covenant for title sensu stricto *is not imported or implied by law from a lease under seal, nor from the relation of lessor and lessee; but a covenant for quiet enjoyment is so implied by law, though, where the lease has been granted by the lessor in good faith, such implied covenant for quiet enjoyment endures only during the continuance of the interest of the lessor, and determines with such interest.*

Action tried before Lord Russell of Killowen, C.J., in which the learned judge took time to consider his judgment, which he now delivered in writing. The facts and cases cited appear fully in the judgment.

English Harrison, for the plaintiffs.

Gully, Q.C., and *H. Sutton*, for the defendants.

Cur. adv. vult.

April 10.—Lord RUSSELL OF KILLOWEN, C.J., read the following judgment:—In this case the plaintiffs sued the defendants for damages for breach of an alleged covenant for title, and in the alternative for breach of a covenant for quiet enjoyment said to be implied in a lease under seal of the 31st of March, 1885, whereby the defendants let to the plaintiffs the basement of No. 21, Bush-lane for a term of ten and a half years less one day reckoning from the 25th of March, 1885, at a net yearly rental of £40, payable quarterly. The defendants' superior landlord commenced an action against, and recovered possession with costs from, the plaintiffs, whereby they lost the benefit of about two years of the term of ten and a half years, suffered damage, and were put to expense, for which they sued. The substantial defences were that there were no such implied covenants or covenants in law, and, further, that, if there were any such implied covenants or covenants in law, they endured only during the continuance of the defendants' (the lessors') estate.

The lease in question was, so far as material, in the following terms:

"1. The landlords agree to let and the tenants agree to take that part of the basement of No. 21, Bush-lane from the north end thereof to the fireproof room and partition now already erected across the said basement, together with the free right of access thereto by the door and passage now used therewith, for the term of ten and a half years less one day from the 25th day of March, 1885, and at a net yearly rental of £40 payable by equal quarterly payments on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in each year, the first payment to be made on the 24th day of June next, and the last payment to be made in advance one calendar month before the expiration of the term."

"2. The tenants to pay the said rent on the days and in the manner aforesaid and to pay the gas rate and to keep the inside of the premises (including fixtures) in good and sufficient repair and condition and properly painted and coloured during the term in conformity with the terms of the lease under which the said premises are held by the landlords."

It will thus be seen that the lease contained no express covenants on the points here in question. The draft of this lease was prepared by the defendants' solicitors in the ordinary course, and sent to the plaintiffs' solicitors for approval on the 7th of March, 1885, and was executed on the date, 31st of March, 1885, which it bears. As a matter of fact the premises demised were and ought to have been described as No. 22, Bush-lane instead of No. 21, Bush-lane. There was, however, no mistake as to the identity of the parcels, and both parties agreed to treat the insertion of the wrong number, 21, as a mere clerical error for No. 22.

It is important, however, to note that while the defendants' estate in the premises No. 22, which was

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

in fact intended to be demised, and were in fact occupied by the plaintiffs, expired on the 29th of September, 1893 (that is to say, about two years before the expiration of the term in the sub-lease to the plaintiffs), the defendants had in respect of the premises No. 21, Bush-lane an estate sufficient to enable them to grant the term of ten and a half years. I call attention to this in order to make it clear that there was in fact a *bonâ fide* mistake, and that there was no intention on the part of the defendants to mislead the plaintiffs, or to misrepresent the facts. In other words, this case must be dealt with on the assumption that there was, on the part of the defendants, no fraud or wilful misrepresentation, but, on the contrary, that they executed the lease in good faith.

The question which then arises is, Is there any implied covenant—or, more correctly, any covenant in law—either for title or for quiet enjoyment, and, if there be one or the other, does it endure beyond the continuance of such estate as the defendants, the lessors, in fact had?

It was contended for the plaintiffs that *Stranks* v. *St. John*, 15 W. R. 678, L. R. 2 C. P. 376, was an authority in support of their contention. In my opinion it is not. The headnote in the *Law Reports* does not, I think, accurately convey what was in fact decided in *Stranks' case*. There it appeared that the defendant purported to grant a lease for seven years by writing, not under seal, as required by the statute 8 & 9 Vict. c. 106, and the first question was whether the instrument, being void as a lease, could, nevertheless, be held to be operative as an executory agreement to grant a lease under the 4th section of the Statute of Frauds. The court, following the authorities, held that it might be so regarded as an agreement to grant a lease. The question arose on demurrer to the declaration, and the facts stated in the declaration were therefore admitted to be true. It was there alleged that the defendant never—not merely at the time of the agreement, but never—had any right or title to let the premises to the plaintiff. The court having decided the first point, that the instrument was good as an executory agreement to let—that is, to grant a lease—the next point was whether a person who admitted that he never had any right to make such an agreement was not liable for damages for breach of contract. The court held (and it is difficult to see how it could have held otherwise) that he was so liable. But has that case any bearing on this? I think it has not. That was an executory agreement to lease. This is an indenture under seal—a lease executed with all due legal formalities. Had the instrument in *Stranks' case* been sealed it would also have been perfectly valid as a lease; but in that case the authorities there cited would not have been relevant. The question then would have been, as it is here, What remedy, if any, has the plaintiff under the lease under seal as formally executed? and any preliminary contract to grant the lease would have no relevance to that question, for the plain reason that the parties are bound (except in circumstances of fraud or misrepresentation) by the final instrument validly executed. It is clear that under such an agreement as in *Stranks' case* the intending lessee was entitled, before he accepted a lease tendered under the agreement, to be satisfied that the intending lessor had a good title to grant it, and for this purpose he had a right (if he chose to insist upon it) to require full disclosure. As was said by Lord Mansfield in *Keech* v. *Hall*, 1 Doug. 22, "whoever wants to be secure when he takes a lease should inquire after and examine the title deeds." But it is an entirely different question what is the legal effect of a lease when perfected: *Gosling* v. *Woolf*, 41 W. R. 106, [1893] 1 Q. B. 39: see also *Clayton* v. *Leech*, 37 W. R. 663, 41 Ch. D. 103; *Bandy* v. *Cartwright*, 1 W. R. 415, 8 Ex. 913; *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737, 11 W. R. C. L. Dig. 86.

There being, then, in this case no express covenant in the lease, the next question is whether the law will annex any, and what, covenant or covenants. As I have pointed out, the plaintiffs allege an implied covenant or covenant in law for title, and alternatively for quiet enjoyment. The term "implied covenant" is often used in a twofold sense—first, as denoting a covenant, which is to be gathered from the four corners of the instrument, or from words or phrases not generally used in law to express a covenant, and in this sense an implied covenant is for all legal purposes the same as an express covenant; but, secondly, it is also used to denote a covenant in law, that is, a covenant attached by the law, apart from any expressed intention of the parties, to the use of some particular words, for example, "demise," or to a particular relation, for example, that of "landlord and tenant." It is with a covenant in this latter sense that we have to do in this case. Before considering whether the law does in the present case annex either a covenant for title or for quiet enjoyment, it is necessary to consider the difference between the two covenants. In an ordinary purchase deed there are usually five covenants, which may all be properly described as covenants for title—namely, that the vendor is seised in fee, that he has a good right to convey, for quiet enjoyment, that the property is free from incumbrances, and for further assurance. In the assignment of a leasehold there are also certain covenants for title, that the lease is valid, that the assignor has a good right to assign, for quiet enjoyment, that the property is free from incumbrances, and for further assurance.

Now all these covenants are equally covenants for title, but a covenant for title *sensu stricto*, as contrasted with a covenant for quiet enjoyment, signifies the right to convey, or to grant the lease, as the case may be. The distinction between the two is clearly pointed out by Lord Ellenborough in *Howell* v. *Richards*, 11 East, 633, at pp. 642, 643. A covenant for title *sensu stricto*, is broken if at any time, either *ab initio* or subsequently, the title is or becomes invalid, and covers, therefore, much more than a prudent lessor would often be willing to give and more than would be necessary for the protection of the lessee. A man may know that there is some defect, formal or otherwise, in his title, which he might, for that reason, be unable to force upon an unwilling purchaser, but which he is satisfied is a good holding title, and which would enable him to grant a lease with perfect security that his lessee would not be disturbed; and that is all that a lessee really requires, for a lease is nothing more than a contract to deliver up possession to another for a fixed term, and, provided that this is secured, the lessee seldom requires more. Hence it is that, except in certain cases, for example, building leases for long terms, the only usual covenant for title in leases is that for quiet enjoyment, and that generally a qualified covenant only. Will, then, the law annex to the lease in question a covenant for title *sensu stricto*? Are there any words or phrases in it having that effect? I think not. No doubt the law has long attached a special signification to certain words. Thus the word "demise" (which does not occur in the lease in question) imports a covenant for title and a covenant for quiet enjoyment: *Line* v. *Stephenson*, 5 Bing. N. C. 183, and this has been the law from early times as explained by Tindal, C.J., in *Williams* v. *Burrell*, 1 C. B. 402. It also attached peculiar significance to

other words—for example, to the word "give" in a feoffment (Co. Litt. 384*a*); also to the words "exchange" (Co. Litt. 51*b*) and "grant" (Co. Litt. 45*b*). In this day, however, except in the case of the word "demise," no special meaning any longer attaches to these words, the statute law having abrogated their effect. In this connection I wish to say, with great deference, that although I agree in the decision of *Mostyn* v. *The West Mostyn Coal and Iron Co.*, 24 W. R. 401, 1 C. P. D. 145, I venture to doubt the correctness of the view which would appear to have been there suggested (1 C. P. D., at p. 152)—that any words equivalent to "demise" would import a covenant for title *sensu stricto* however they might import a covenant for quiet enjoyment; nor do I think that the case of *Hart* v. *Windsor*, 12 M. & W. 68, at p. 85, if carefully examined, will be found to support that view. There being, then, no language in the present case to which any covenant for title is, in my judgment, annexed by law, it only remains to consider whether such a covenant for title is to be considered annexed to the relation of lessor and lessee or landlord and tenant. I think not: see *Bandy* v. *Cartwright*, 1 W. R. 415, 8 Ex. 913, decided in 1853, and since followed in 1862 in *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737. These were, no doubt, cases of parol demise, but that fact seems to me unimportant when considering whether the obligation is by law attached to the relation of landlord and tenant, of lessor and lessee. If it attaches by reason merely of that relation, it cannot matter whether that relation is created by parol or otherwise.

The next question is whether there is in this case any covenant in law for quiet enjoyment. In my opinion the law does import this covenant in all cases where the relation of landlord is established by instrument under seal and imports a contract to the same effect where the instrument is not under seal. In support of this view I again refer to the cases of *Bandy* v. *Cartwright* and *Hall* v. *The City of London Brewery Co.* (amongst others), and I think, as stated by Cockburn, C.J., in the latter case (at p. 741), that the law is founded in good sense and that a covenant for quiet enjoyment is imported *ex vi termini*. If the matter rested here the plaintiffs would be entitled to judgment, but it does not rest here.

The question remains, assuming such a covenant in law for quiet enjoyment to be imported into the lease, what is its duration? I have come to the conclusion, after careful consideration of the authorities, that such implied covenant, or covenant in law, determined with the interest of the lessor, or, in other words, endures only during the continuance of that interest. This was expressly decided sixty years ago in *Adams* v. *Gibney*, 6 Bing. 656, where all the authorities are collected, and the rule is there stated to have prevailed since the time of Elizabeth. The same point was again expressly decided in 1862 in *Penfold* v. *Abbott*, 11 W. R. 169, 32 L. J. Q. B. 67: see also the arguments in the case of *Williams* v. *Burrell*, 1 C. B. 402. For these reasons the plaintiffs must, I think, fail. The rule is too firmly and too long established to be now questioned.

Nor can I regard this case as one of special hardship. The plaintiffs had, in the draft lease sent to them for approval, and in the lease itself, express notice that the defendants were themselves lessees only, but they failed to inquire into the terms of their lessors' lease, although they were at the same time covenanting in the sub-lease in question to discharge some of its obligations. The courts, in my humble opinion, have too often sought, in order to avoid hardship, to import by implication protective provisions not to be found expressed in written contracts. It is not desirable to make further effort in this direction. I think it much better that contracting parties should be made clearly to understand that their duty is to put into the contracts into which they enter such express provisions as may be needed for their protection. I therefore give judgment for the defendants, with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Fishers.*

Q. B. Div. (Day and Wright, JJ.) April 23.

SHERRAS v. DE RUTZEN. (*a*.)

Licensing law—Supplying liquor to a police-constable on duty—Knowledge of licensed victualler—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 16, *sub-section* 2.

Section 16, *sub-section* 2, *of the Licensing Act of* 1872 *provides that "if any licensed person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable, he shall be liable to a penalty not exceeding, for the first offence, ten pounds."*

Held, that a licensed person who supplied liquor to a constable on duty under the bonâ fide *belief that he was not on duty had been guilty of no offence under the section.*

Case stated by Albert De Rutzen, Esq.

A public-house, which was situated close to a police-station, was frequented by the constables stationed there. The constables were in the habit of coming to the house to obtain refreshment when off duty without removing their uniforms, the only sign that they were not on duty being that the armlet was removed, and it was the custom of the licensed victualler and the attendants, on seeing that the armlet was absent, to serve them with liquor. A constable entered the public-house, in uniform but without his armlet, and asked for a drink. The licensed victualler's daughter, seeing that he had no armlet on, supposed him to be off duty, and, without making any further inquiries, served him with liquor. It appeared that the constable was, in fact, on duty at the time, and a conviction was obtained against the licensed victualler.

Poland, Q.C. (*Paul Taylor* with him), for the appellant.—To constitute an offence *mens rea* must be shown, or connivance on the part of the defendant by wilfully omitting to make proper inquiries: *Mullins* v. *Collins*, 22 W. R. 297, L. R. 9 Q. B. 292. It cannot be that the licensed victualler is responsible in every case, as, for instance, when a constable produces a forged permission to drink from his superior officer. There is not the same reason for deciding the prohibition involved in this section to be an absolute prohibition as there is with regard to section 13, which deals with the supply of liquor to drunken persons: *Cundy* v. *Le Cocq*, 32 W. R. 769, 13 Q. B. D. 207; for in the latter case, the presence or absence of *bona fides* being extremely difficult to prove, the Legislature has thought it best, in the public interest, to lay the whole responsibility of ascertaining whether or not the person served be drunk or sober upon the shoulders of the publican; but in the case of supplying liquor to a constable on duty it is perfectly possible to prove that the licensed victualler was

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

aware that he was on duty, and in this case there is a finding that the liquor was supplied under the *bonâ fide* belief that the constable was off duty.

Macmorran, for the respondent.—The sub-section imposes an absolute prohibition against supplying constables on duty with liquor; and the prohibition is irrespective of whether or not the licensed victualler was aware of the constable being on duty. The term "knowingly" is expressly omitted from the definition of the offence, in order to lay the whole responsibility on the licensed victualler, just as in section 13. It is just as much in the public interest that constables should not be served with liquor as that drunken persons should not. Where the Legislature intends that knowledge should be essential the word "knowingly" is inserted, as in section 14 and sub-section 1 of section 16.

DAY, J.—The conviction must be quashed. It is clear that the licensed victualler in this case had every reason to suppose that the constable was not on duty, and that in supplying him with liquor he acted under the *bonâ fide* belief that he was off duty. No offence, therefore, has been committed. The gist of an ordinary criminal offence is absent, namely, the intention to do something wrong. The contention that knowledge is no part of the offence is erroneous and without foundation. The absence of the word "knowingly" does not prevent knowledge from being necessary. The only difference the presence or absence of that word makes is, that knowledge must be proved by the prosecution in the one case, and need not be proved in the other. It is quite possible that, in the present instance, the word was omitted by inadvertence. At any rate, it is straining the criminal law too much to say that a person supplying liquor to a constable on duty under the *bonâ fide* belief that he was off duty, is guilty of any offence against the section, for which he is liable both to a penalty and to have his licence endorsed.

WRIGHT, J.—There have been many cases on this subject, and it is impossible to reconcile them all. You must have regard to both the subject-matter and the language of the Act: *Nicholls* v. *Hall*, 21 W. R. 579, L. R. 8 C. P. 322. The presumption is that *mens rea*—evil intention or knowledge of the wrongfulness of the act—is essential to guilt. That presumption may be displaced by the language of the statute or by the subject-matter. One most remarkable exception was in the case of bigamy. It was held by all the judges, on the statute 1 Jac. 1, c. 11, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: *Lolley's case*, Russ. & R. 237. Apart from isolated and extreme cases of this kind, the principal classes of exception may perhaps be reduced to three. One is the class of acts which, in the language of Lush, J., in *Davies* v. *Harvey*, 22 W. R. 733, L. R. 9 Q. B. 433, 440, are not criminal in any real sense, but are acts which, in the public interest, are prohibited under a penalty. Several such instances are to be found in the decisions on the revenue statutes—*e.g.*, *Attorney-General* v. *Lockwood*, 9 M. & W. 378, where the innocent possession of liquorice by a beer retailer was held an offence. Another class comprehends some—and perhaps all—public nuisances: *Reg.* v. *Stephens*, 14 W. R. 859, L. R. 1 Q. B. 702; where an employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right (see, for example, *per* Williams and Willes, JJ., in *Morden* v. *Porter*, 8 W. R. 262, 7 C. B. N. S. 641, as to unintentional trespass in pursuit of game). But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him generally, or in the particular matter, in order to constitute an offence. It is plain that, if otherwise, no possible care on the part of the licensed victualler could save him from a conviction under the section, for it would be just as easy for a constable to deny that he was on duty, or to produce a forged leave from his superior officer, as to remove his armlet.

Conviction quashed.

Solicitors for the appellant, *Maitland, Peckham, & Co.*

Solicitor for the respondent, *Duerdin Dutton.*

Q. B. Div.
(Cave and Wright, JJ.) April 1.

REDGRAVE (*Appellant*) v. LLOYD & CO. (*Respondents*). (*a*.)

Factory—Dangerous machinery—Fencing—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 5, *sub-section* 3—*Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 6, *sub-section* 2.

By section 5, *sub-section* 3, *of the Factory and Workshop Act*, 1878, *it is provided, with respect to the fencing of machinery in a factory, that "every part of the mill gearing" shall be securely fenced. The Factory and Workshop Act*, 1891, *s.* 6, *sub-section* 2, *amends the former section by inserting before the words "every part" the words "all dangerous parts of the machinery and."*

Held, that the section, as amended, was not confined to motive machinery, but applied also to machinery performing an industrial operation.

Special case stated by a metropolitan magistrate.

An information and complaint was preferred against the respondents, that they were the occupiers of a certain factory within the meaning of the Factory Acts, 1878 and 1891, wherein a person named Robson suffered bodily injury in consequence of the respondents having neglected to fence securely certain dangerous machinery required in pursuance of the said Acts to be securely fenced—to wit, a power press.

The respondents were tin box manufacturers, and Robson, a youth aged fourteen years, was employed in their factory to work a power press used for the purpose of shaping tin plates.

The press was worked by steam power. The operator threw the machine into gear by placing his foot upon a treadle, which caused the upper die to descend upon the lower die. The motion was communicated to the upper die, which worked up and down inside the fixed part of the machine by a fly-wheel at the side driven off the main shaft overhead. The lower part of the machine was a sort of table, in which the lower die was fixed. The piece of tin was placed upon the lower die, and the upper die came down with great force and stamped the tin as desired. In the event of a piece of tin adhering to the die the operator removed it by pushing it off with a piece of stick. It was the duty of Robson to work

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

this machine. While he was attempting to remove a piece of tin from the upper die his hand slipped under the die and the tip of one of his fingers was cut off.

The magistrate did not decide whether or not in point of fact the press was dangerous, but held that the words "dangerous parts of the machinery" in section 5 of the Act of 1878 (as amended by section 6 of the Act of 1891) referred to machinery *ejusdem generis* as that mentioned in the previous parts of the section, and in the definition of "mill gearing" in section 96 of the Act of 1878 and of "machinery" in section 37 of the Act of 1891. The magistrate, therefore, held that the part of the power press where the upper die came in contact with the lower die, and where the accident happened was not a part of dangerous machinery or any machinery which was required by the said Acts to be securely fenced. Upon this ground the magistrate dismissed the summons.

The machine was not constructed, or fenced, or protected in such a way as to prevent the hand of a person attempting to remove a piece of tin from the sides of the die from slipping under the upper die, which, when at its highest point, was about one inch from the lower die.

The Factory and Workshop Act, 1878, s. 5, sub-section 3, provides that, with respect to the fencing of machinery in a factory: Every part of the mill gearing shall either be securely fenced, or be in such a position or of such construction as to be equally safe to every person employed in the factory, as it would be if it were securely fenced.

The Factory and Workshop Act, 1891, s. 6, sub-section 2, provides that before the words, "every part," in section 5, sub-section 3, of the Act of 1878, there shall be inserted the words, "all dangerous parts of the machinery, and."

Sutton, for the appellant.—It is admitted that the part of the machine which caused this accident would not have come within section 5, sub-section 3, of the Act of 1878 as it originally stood; but the additional words, "all dangerous parts of the machinery," in the amending section clearly include machinery such as this, and the magistrate ought, therefore, to have found as a fact whether this machinery was dangerous or not. [He was stopped by the court.]

A. J. Walter, for the respondents.—The decision of the magistrate was right. The Act of 1878 drew a distinction between motive machinery and machinery performing an industrial operation. That distinction has not been done away with by the Act of 1891. Section 5 of the Act of 1878, as amended, does not apply to machinery such as this which is not motive machinery. Other dangerous machinery was originally dealt with by section 6 of the Act of 1878, which provided that the question as to whether or not the machinery was dangerous should be settled by arbitration. Section 6 of the Act of 1878 was repealed by the Act of 1891, and section 8 of that Act substituted for it, under which the matter is now dealt with by a certificate of a Secretary of State. If all dangerous machinery is within section 5 of the Act of 1878 as amended by section 6 of the Act of 1891, then section 8 of the Act of 1891 was not wanted. But the words, "all dangerous parts of the machinery," in section 6 of the Act of 1891 must be construed to refer only to machinery *ejusdem generis* as the machinery mentioned in section 5 of the Act of 1878, *i.e.*, motive machinery.

CAVE, J.—I am of opinion that the view taken by the magistrate was wrong, and that he ought to have gone on to inquire whether this machinery was dangerous. It is admitted that section 5 of the Act of 1878, as it originally stood, would not have applied to a case such as this. Then by section 6 of the Act of 1878 provision was made for the fencing of machinery of any kind if after notice by an inspector and arbitration it was decided to be dangerous. In 1891 an Act was passed which amended the earlier Act. It provided that in section 5, sub-section 3, of the Act of 1878 the words "all dangerous parts of the machinery" should be inserted. The new Act also repealed section 6 of the Act of 1878. It is obvious to my mind that the effect of these provisions is that the question, whether or not any kind of machinery is dangerous, is no longer to be decided by arbitration, but by a magistrate, subject to the right of appeal from his decision to quarter sessions or to this court. But then it is said that, as regards machinery other than motive machinery, section 8 of the Act of 1891 has been substituted for section 6 of the earlier Act. Looking at the nature of the provisions of section 8 and the course of procedure to be followed, I am inclined to think that that section does not apply to cases of this kind, but it is not necessary in this case to give any decision on that point. All that we now decide is, that under section 6 it was for the magistrate to say whether this machinery was dangerous or not. That construction of the Act appears to me to be more in accordance with the presumed intention of the Legislature than that contended for on behalf of the respondents. The case must, therefore, go back to the magistrate.

WRIGHT, J.—I agree. Mr. Walter in effect asks us to repeal the Act of 1891. But the language of section 6 is perfectly general, and this case is clearly within it. The manufacturer has the option of doing one of three things, he must either fence the machinery, or put it in such a position, or make it of such a construction that it becomes as safe as if it were fenced.

Appeal allowed; leave to appeal refused.

Solicitor for the appellant, *Solicitor to the Treasury.*

Solicitor for the respondents, *W. Hurd & Son.*

Q. B. Div.
Charles, J.) April 2.

MOWBRAY AND ANOTHER v. MERRYWEATHER. (a.)

Master and servant—Damages—Remoteness—Warranty by contractor to employer—Breach of warranty—Negligence of employer—Injury to workman of employer—Liability of contractor for injury to workman.

The plaintiffs undertook to discharge cargo from the defendant's ship, and the defendant undertook to supply them with all necessary cranes and chains. The defendant supplied a chain so defective that whilst it was being used it broke, and thereby a workman of the plaintiffs was injured. The injured workman thereupon brought an action against the plaintiffs, which they settled by paying the workman £125. It was admitted that the defendant was guilty of a breach of warranty to the plaintiffs in supplying a defective chain; that the plaintiffs were guilty of negligence inasmuch as they might by reasonable care, have discovered the defect, and have avoided the accident, and that they were therefore under a legal liability to their workman, and it was admitted that the payment to the workman was a reasonable one.

Held, that the injury to the plaintiffs' workman was a natural consequence of the breach of warranty by the

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

defendant, and that the defendant was therefore liable to pay to the plaintiffs the sum which the plaintiffs had paid to their workman, notwithstanding that the plaintiffs' own negligence was the immediate cause of the accident.

Action tried before Charles, J., at the last Leeds Assizes, in which he took time to consider his judgment, which he now delivered in favour of the plaintiffs.

The facts and cases cited appear in the written judgment of the learned judge.

Robson, Q.C., and *Meynell*, for the plaintiffs.

Tindal Atkinson, Q.C., and *H. Gawan Taylor*, for the defendant.

Cur. adv. vult.

April 2.—The following judgment was read by

CHARLES, J.—The facts of this case are very simple, and in all substantial particulars undisputed. The plaintiffs are stevedores at West Hartlepool, and the defendant is owner of the steamship *Wenby*. The plaintiffs, on the 16th of August, 1894, undertook to discharge a cargo of deals from the ship, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derrick cranes, chains, winches, and other gearing reasonably fit for the purpose of discharging the cargo. They failed to do so, and supplied a chain so defective that whilst it was being used in discharge of the cargo it broke, and thereby a workman of the plaintiffs was seriously injured. The injured workman thereupon brought an action against the plaintiffs under the provisions of the Employers' Liability Act, 1880, ss. 1, 2, basing his claim upon the defective condition of the chain, a defective condition which, he alleged, might have been discovered by the plaintiffs by the exercise of reasonable care. The plaintiffs did not contest the claim, and paid the workman £125, which they now sought to recover from the defendant. It was not suggested by the defendant that the settlement was an improper one, and it was admitted upon the trial before me at the last Leeds Assizes, by the defendant on the one hand that there had been a breach by him of the implied warranty that the derrick crane and chains should be reasonably fit for the purpose for which they were supplied, and by the plaintiffs on the other hand that they might, by the exercise of reasonable care, have avoided the defect in the chain. The defendant, however, contended that the damage sought to be recovered was too remote, and I reserved my decision on this point. The argument of the defendant was to the following effect. True it was, he said, that there was a breach of warranty, but the damages which the plaintiffs have had to pay resulted, not from that breach, but from a negligent act committed by the plaintiffs themselves. They were not responsible at common law merely for permitting the workmen to use a plant in fact defective and unfit for the purpose for which it was intended to be used. They were only liable under the Employers' Liability Act, 1880, which in this respect, however, seems declaratory simply, by reason of the defect being one which had not been discovered owing to their own negligence. The damage to the workman, therefore, was caused by their own want of care, and could not be imputed to the defendant as the natural consequence of his breach of warranty. The plaintiffs in reply contended that they had a right to rely on the defendant's warranty. As between him and them the cause of action was complete, and the negligence of which they had been guilty—the failure to carefully examine and test the chain—was really due to the reliance they placed on the defendant's warranty. The workman, it was further argued, could himself have recovered damages against the defendant, and, according to the most limited construction which can be placed on the judgment of the Court of Appeal in *Heaven* v. *Pender*, 11 Q. B. D. 503, this argument, at all events, is well founded.

The case of *Smith* v. *The London and St. Katharine Docks Co.*, 16 W. R. 728, L. R. 3 C. P. 326, is an authority to the same effect. The amount paid by the plaintiffs being admitted to be reasonable, the only question I have to determine is whether the damage done to the workman, which he could only recover from the plaintiffs by showing want of care in them, may nevertheless be regarded as the natural consequence of the defendant's breach of contract; in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties. And the defendant cannot have supposed that the plaintiffs meant themselves to unload the ship. He must be taken to have known that the plaintiffs would employ others to do so, and, in my opinion, injury to a person so employed is a natural consequence of a breach of warranty. Does it make any difference that the personal liability of the plaintiffs to their workmen is based on the circumstance that they were themselves guilty of want of care? I cannot think so. The breach of the warranty on which the plaintiffs relied, and, as far as the defendant is concerned, had a right to rely, remains, and is the efficient cause of the subsequent mischief. As regards the workman the plaintiffs may have been guilty of negligence in not themselves testing the efficiency of the chain; but I do not see how their failure in their duty towards him exonerates the defendant from his failure to perform his contract with them. His breach of contract created a dangerous state of things which has brought about an accident, and for that accident he must, in may opinion, be held responsible, even though the plaintiffs' negligence was the immediate cause of it. There does not appear to be any very direct authority on the subject, but the reasoning of Martin, B., in *Burrows* v. *The March Gas and Coke Co.*, 18 W. R. 348, 20 W. R. 493, L. R. 5 Ex. 67, L. R. 7 Ex. 96, entirely covers the case. There the defendants, a gas company, contracted to supply the plaintiff with a proper service-pipe from a main outside to a meter inside his premises and gas escaped from a defect in the pipe. A servant of a gasfitter incautiously went into the room with a lighted candle and the escaped gas exploded. The defendants were held liable for all the damage done, and Martin, B., expressly states that the liability of the defendants would have been the same even if the gasfitter's servant had been the plaintiff's own. The other judges in the Court of Exchequer and the Exchequer Chamber base their decision upon the principle that the breach of contract was the primary and substantial cause of the explosion, and that so it remained, notwithstanding the negligence of the gasfitter. The defendants, the court considered, must be held to have contemplated the possibility of careless persons bringing light into contact with escaping gas.

On behalf of the defendant three cases were cited: *Wrightup* v. *Chamberlain*, 7 Scott, 598; *Kiddle & Son* v. *Lovett*, 34 W. R. 518, 16 Q. B. D. 605; and *Ovington* v. *McVicar*, 2 Court of Sess. Cas., 3rd series, 1066, a decision in 1864 of the Court of Session. In *Wrightup* v. *Chamberlain* the plaintiff had bought a horse of the defendant with a warranty of soundness. The horse having been delivered he resold it with a similar warranty. It was, in fact, unsound, and the purchaser from the plaintiff sued him for the breach of warranty. He defended the action unsuccessfully,

and sought to recover from the defendant the costs of the defence. The jury found that he might, before he defended the action, have found out, by examining the horse, that it was unsound, and upon this finding it was held that he could not recover the costs of what was a rash and improvident defence. It is obvious that this decision has little or no bearing on the present case. In *Kiddle & Son* v. *Lovett*, however, the facts were in many respects very similar to those proved or admitted here. A suspended platform was put up for the plaintiffs by the defendant, under a contract that he would fix it safely, to enable the plaintiffs to paint a house. The platform fell owing to the defective manner in which it was suspended, and hurt one of the painters in the plaintiffs' employment. The injured man brought an action under the Employers' Liability Act, 1880, against the plaintiffs, which they settled by paying him £125. They then sued the defendant for breach of his contract. The case was tried before Denman, J., who found as a fact that the plaintiffs had been guilty of no negligence, and that they had settled the action under a mistaken belief in their own liability. That being so, the learned judge thought that they had no right to fix the defendant with the amount they had paid as damage naturally or necessarily flowing from the defendant's breach of contract. The payment was one which need not have been made at all. The question, therefore, which is now before me did not arise, and it is only referred to by the learned judge at the close of his judgment with the observation that it was unnecessary to give any opinion upon it. "The point," he says, "is discussed in the 3rd edition of Messrs Roberts and Wallace's valuable work on the Liability of Employers, p. 471, and a Scotch case of *Ovington* v. *McVicar* is cited in the note as supporting the view that the damages in such a case would be too remote." But upon reference to that case I find that the judges all thought that the master who had extrajudicially settled a workman's claim was not under any legal liability to the workman. In that respect the case is exactly similar to *Kiddle & Son* v. *Lovett*, but the Lord Justice Clerk and the other judges of the court do express an opinion that even if the master had been legally liable to the workman he could not have made the defendant responsible. With all respect I am unable to agree with them, and the case, having been admittedly decided upon the ground that no liability for latent defect in machinery, against which no care could have effectually guarded, existed in the master, does not constitute an authority for the present defendant. My judgment must be for the plaintiffs for £125, with costs.

Judgment for plaintiffs.

Solicitor for the plaintiffs, *Higson Simpson*, West Hartlepool.

Solicitors for the defendant, *Turnbull & Tilley*, West Hartlepool.

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — May 16, 17.

In re AN ARBITRATION BETWEEN JAMIESON AND THE NEWCASTLE STEAMSHIP FREIGHT INSURANCE ASSOCIATION. (*a*.)

Insurance — Marine insurance — Policy on freight — Exception for cancelling of charter — Delay caused by perils insured against — Termination of adventure.

In a policy of insurance on freight it was provided that no claim arising from the cancelling of any charter should be allowed. The ship, while proceeding to the port of loading under a charter-party, which did not contain any cancellation clause, was damaged by reason of perils insured against, and in consequence of the delay caused thereby the adventure came necessarily to an end. The shipowner made a claim on the underwriters in respect of his loss of freight.

Held that the claim was not a claim arising from the cancelling of a charter, and that the underwriters were liable.

Appeal from the judgment of a divisional court on a special case stated by an arbitrator.

The claim in respect of which the dispute arose was a claim by G. Jamieson, who was owner of the steamship *Abrota*, against the Newcastle Steamship Freight Insurance Association for £762 16s. 11d., alleged to be due under a marine policy of insurance for £800 upon the freight of *The Abrota*, which policy was dated the 23rd of February, 1893, and executed by the association.

It was a time policy, the insurance being from the 20th of February, 1893, to the 20th of February, 1894, and the rules of the association formed part of the policy. The risks insured against included perils of the sea, and by rule 8 it was provided that "no claim arising from the cancelling of any charter, nor for loss of time under a time charter" should be allowed.

On the 10th of October, 1893, while the policy was in force, a charter-party was entered into between Jamieson and a French firm, by which *The Abrota* was chartered to proceed to Kotka, a port in Finland, and there load a cargo and proceed therewith to Honfleur. There was no cancelling date in the charter-party.

On the 14th of October *The Abrota* left St. Petersburg for Kotka, and on the same day stranded on Leskar Island.

On the 15th of October she was got off, and next day was taken to Helsingfors, where it was found she had sustained considerable damage. Before she could be repaired the port of Kotka became closed for the winter by ice.

On the 26th of October the charterers sent a telegram to Jamieson, inquiring whether *The Abrota* would load at once or whether he would cancel the charter-party.

On the 27th of October Jamieson wrote to his brokers, Finzi & Co., asking them to reply to the charterers' telegram and stating as follows: "The position is, if we cancel the charter we void our insurance. Now it is for the cargo-owners to act, that is to say, charter another steamer and bring the cargo away, giving us notice of their intention of doing so, and for them to run the risk of cancelling the charter, as we cannot take the responsibility

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

our own shoulders." Finzi & Co. wrote to the charterers accordingly, and on the 31st of October the charterers sent Jamieson a telegram, of which the following is a translation: "Your agents have declared *The Abrota* is unable to fulfil the charter, inviting us to charter another ship. The charter of *The Abrota* is therefore annulled." On the same day Jamieson replied by telegram: "*Abrota*. Cannot agree cancel charter. If you forward by another steamer you must take all responsibility."

The charterers, being unwilling to wait for *The Abrota*, refused to load her under the charter-party, and forwarded their cargo by another steamer. Jamieson then made a claim under his policy of insurance, which the association disputed. The matter was referred, under the arbitration clauses contained in the policy, to the arbitration of Mr. Joseph Walton, Q.C., who found as a fact that on October 14, 1893, the vessel was damaged by perils of the sea, and that the time necessary for repairing such damage was so long that the voyage contemplated in the charter-party became, in a commercial sense, impossible. He also found that on October 31 there was no probability that the vessel could be loaded at Kotka within a reasonable time, and that the charterers were therefore entitled then and there to give, and did give, notice to the shipowners that they would not load the vessel under the charter-party; and that there was, under these circumstances, a loss of freight by perils insured against, in respect of which Jamieson would be entitled to recover £762 16s. 11d. from the assurance company, if his claim were not a claim arising from the cancelling of the charter-party within the meaning of the 8th rule of the association. He found that, construing the words of the rule in the sense in which they would ordinarily be understood by men of business, the charter-party, under the circumstances, was cancelled within the meaning of the rule, and therefore he found that Jamieson's claim was a claim arising from the cancelling of a charter-party, and so he was not entitled to recover against the association; but he stated this case for the opinion of the court.

The Divisional Court (Charles and Kennedy, JJ.) were of opinion that the arbitrator had rightly held that the claim was a claim arising from the cancelling of a charter-party, and they accordingly gave judgment for the association.

Jamieson appealed.

Bigham, Q.C., and *Maurice Hill* (*Hugh Boyd* with them), for the appellant.

Finlay, Q.C., and *Scrutton*, for the respondents.

The following cases were cited:—*Jackson* v. *Union Marine Insurance Co.*, 23 W. R. 169, L. R. 10 C. P. 125; *Mercantile Steamship Co.* v. *Tyser*, 29 W. R. 790, 7 Q. B. D. 73; *The Bedouin*, 42 W. R. 299, [1894] P. 1.

Lord Esher, M.R.—In this case the plaintiff has brought an action against an insurance company on a policy on chartered freight. The question is, whether under the particular circumstances of the case the plaintiff is entitled to recover. He chartered his ship by a charter-party which was in the ordinary form, but it did not contain the cancellation clause, which is now inserted in many charter-parties, though not in all. The ordinary cancellation clause provides that, if the ship does not arrive at the port of loading by a specified date, it shall be in the power of the charterer to cancel the charter-party. But, as I have said, this charter-party did not contain that clause.

The ship sailed, and on the same day she was stranded, and she sustained such injuries that it was a long time before she could be repaired. The arbitrator has found as a fact that the delay was so great that the adventure must be taken to have come absolutely to an end. It became impossible for either the charterer to load the ship or the shipowner to carry the goods under that adventure. And the adventure came to an end by reason of perils of the sea. We have, therefore, here a clear loss of freight caused by perils insured against, and the plaintiff is entitled to claim under his policy, unless there is some stipulation in the policy which relieves the underwriters from liability. The underwriters rely on a clause in the policy which says that they are not to be liable for any claim arising from the cancelling of a charter-party. They maintain that this charter-party was cancelled. The rule of construction for such a document as this, is that the words are to be construed according to their ordinary business sense. The phrase "cancelling of a charter" is an ordinary phrase, which is well understood in business. If there is no special stipulation, how can a charter be cancelled? In the same way in which any other contract can be cancelled. As a general rule, neither of the two parties to a contract can by himself cancel the contract; it can only be cancelled by the mutual assent of both the parties. But, as is well known, many charter-parties contain the cancellation clause to which I have referred, and which enables the charterer in a particular case to cancel the charter. In such a case, of course, both parties have agreed beforehand that this shall be a part of the contract between them; but the business sense of the effect of the clause is that, if the ship does not arrive at the port of loading by the specified date, then the charterer may cancel the charter-party, although the shipowner is not willing that he should do so. Whether the delay be caused by perils of the sea or otherwise, the charterer may, if he chooses, cancel; but he is not bound to do so. Therefore in such a case the cancelling of the charter-party by the charterer is an act of his own will. But in the present case, even supposing there had been a cancellation clause, had the charterers any choice in the matter? It is clear that they had no choice; for, by reason of the delay, the adventure was at an end, and the charterers were not in a position to cancel. The charter-party was gone, not by cancellation, but by the adventure having terminated. I am, therefore, of opinion that judgment ought to have been for the plaintiff, and that the appeal must be allowed.

A. L. Smith, L.J.—This is an action on a time policy on chartered freight, and a loss has occurred by reason of a peril covered by the policy. The defendants rely on the rule which relieves them from liability where a charter is cancelled, and they say that in this case there has been a cancellation. Do they make that out? In my opinion they do not. If a document contains a clause which plainly can only bear one interpretation, the court ought to give it that interpretation without looking to see what the result will be. But here I think we may look to see what would be the result of interpreting this clause as the defendants ask us to do. If this ship, instead of merely stranding, had gone to the bottom, the underwriters would certainly have had to pay, and I cannot see the difference between that case and this. Here the ship was so damaged that she could not continue her voyage. It seems to me that there was no cancelling of this charter within the meaning of the rule, which, I think, means a cancelling by mutual assent. I am fortified in my opinion by the next words "nor for loss of time under a time charter," which seem to refer to a bargain between

the parties. I therefore think that the plaintiff is entitled to judgment.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitors for the appellant, *Botterell & Roche.*

Solicitors for the respondents, *T. Cooper & Co.*

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) May 1.

DODDS, *Appellant.*

ASSESSMENT COMMITTEE OF THE SOUTH SHIELDS UNION, *Respondents.* (*a.*)

Poor law—Rateable value—Public-house—Evidence as to takings in house—Admissibility.

On an appeal against an assessment for the relief of the poor, of a licensed public-house in a town, the quarter sessions rejected evidence as to the amount of the takings of the tenant in the public-house, and reduced the rateable value.

Held, that, as there were other licensed houses in the town which could form a standard of comparison for the purpose of ascertaining the rateable value, the evidence as to the takings was not required for that purpose, and was therefore properly rejected.

Appeal from the judgment of the Queen's Bench Division (Wills and Wright, JJ.) on a special case stated by the Quarter Sessions for the county of Durham, on an appeal against a rate or assessment made for the relief of the poor for the parish of Westoe in the county of Durham.

The appellant was rated as occupier of a public-house in the parish as tenant from year to year at an annual rent of £315 10s., and was assessed at £500 for gross estimated rental and £416 10s. for rateable value. The ground of the appeal was that the appellant was overrated. At the hearing of the appeal the respondents' counsel proposed by cross-examination of the appellant's witnesses and by examination in chief of the respondent's witnesses to give evidence of the amount of the average weekly takings of the appellant in the public-house. The appellant's counsel objected to the reception of evidence of that kind, and the Court of Quarter Sessions rejected the evidence and allowed the appeal, reducing the gross and rateable values. The question was whether the evidence had been rightly rejected.

The Divisional Court affirmed the decision of quarter sessions. The assessment committee appealed.

Balfour Browne, Q.C., and *R. Cunningham Glen*, for the assessment committee.—A public-house is among the exceptional cases in which the takings or profits must be looked at to find out what rent a tenant will give for it. The rent of a public-house is frequently no criterion of the annual value. The rent which a tenant will pay depends upon the takings of the house. It is the fund out of which he can afford to pay the rent. In public-houses there can be no comparison with similar properties. A public-house is in a similar position to docks: *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, 22 W. R. 184, L. R. 9 Q. B. 84; or to a race-course: *Reg.* v. *Verrall*, 24 W. R. 139, 1 Q. B. D. 9; or to refreshment-rooms at a railway station: *Clark* v. *Overseers of Fisherton-Angar*, 29 W. R. 334, 6 Q. B. D. 139; in all of which cases evidence of the profits made was admitted in order to ascertain the rateable value. The evidence, therefore, in this case was wrongly rejected. *Reg.* v. *Guardians of North Ayleesford*, 37 J. P. 148, 20 W. R. C. L. Dig. 67, was also referred to.

J. Lawson Walton, Q.C., and *Strachan*, for Dodd.—Where the standard which is applicable to most properties—namely, the higgling of the market—can be applied, the question of profits is immaterial. This was the view of Blackburn, J., in *Mersey Docks and Harbour Board* v. *Overseers of Liverpool.* The question of profits can only be looked at where the ordinary standard cannot be applied. Valuers can state the rent which a public-house will fetch in the market. There are other public-houses in the town with which this one can be compared. The evidence of the takings was therefore rightly rejected. *Reg.* v. *London and North-Western Railway Co.*, 22 W. R. 263, L. R. 9 Q. B. 134, was also referred to.

Lord ESHER, M.R.—I am of opinion that the decision of the Divisional Court is right. The question is as to the rateable value of a public-house at Westoe. The rateable value is to be ascertained by the rent which an ordinary tenant from year to year would give for the premises. The question is not what rent a tenant could afford to give, but what he would be likely to give for the premises. The question is not what the tenant would give for the business carried on upon the premises, but what he would give as rent for the premises. There is a well-established mode of determining that question. It has been found by experience and reason that a tenant would pay rent according to the nature of the premises, their size, and situation. The actual rent which a tenant pays for the particular premises is not conclusive, as the tenant may be paying too much or too little, but it is an element in the consideration of the case. It is obvious that one person using the premises for business purposes might make a large profit, while another person carrying on an exactly similar business on the same premises might lose by it. The profits of the business cannot be the test as to what rent an ordinary tenant would give for the premises. Therefore, an inquiry into the takings of the business carried on upon the premises is an improper and irrelevant inquiry. The test is what rent ordinary tenants would give for similar premises in a similar situation. This is indeed admitted as regards inhabited houses, or ordinary business or shop premises. The rent which such premises would fetch in the house market is the ordinary mode of ascertaining their rateable value. That is the general rule where such a rule can be applied, and evidence as to the takings or profits of a business carried on upon the premises ought to be rejected. No doubt the amount of takings or profits might be material if the question was what a tenant could afford to give. That, however, is not the test as a general rule, the question being what a tenant would be likely to give.

It is said, however, that the present is one of the exceptional cases in which the question of the takings or profits of the business must be gone into. The leading case upon the point is *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, where Blackburn, J., said that as a general rule the profits earned in business are immaterial, and he gave instances of a shop in Cheapside and chambers in the Temple. But he said that there were exceptional cases, one being the case of the Liverpool docks then before the court. There being no other docks with which the docks could be compared, it could not be ascertained what rent a tenant would give for them

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

if they were put in the market. That is an exceptional case, and, therefore, to find out what rent a tenant would give for them it must be ascertained what rent a tenant could afford to give. In such a case one is driven to this unfortunate mode of ascertaining what rent a tenant would give. That exceptional mode was subsequently applied in *Reg.* v. *Verrall*, to a racecourse; and the same rule was adopted in the case of refreshment rooms at a railway station in *Clark* v. *Overseers of Fisherton-Angar*. It was admitted on behalf of the assessment committee that unless the case could be brought within the class of exceptional cases, the evidence as to the takings in the public-house ought to be rejected. In my opinion there is nothing exceptional in the case of a public-house in a large town where there are other public-houses. I do not mean to decide that an isolated public-house in the country may not be within the exceptional class of cases. I say nothing about that. But if evidence can be given as to the rent in the market of a public-house of a similar character in a similar situation, the ordinary rule must be applied. In this case there are other licensed houses in the place, and the ordinary rule can be applied. Whether the licensed house is a tied house or not makes no difference. I will only add this, that if the remarks of Field, J., which I do not quite understand, in *Clark* v. *Overseers of Fisherton-Angar* are inconsistent with the decision in *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, they ought not to be followed.

A. L. SMITH, L.J.—I am of the same opinion. It is obvious that the assessment committee are endeavouring to establish the rateable value of this public-house by showing what are the takings in the house. I understand the law as to ascertaining the rateable value to be this, that when there is a tenement—and the same rule applies whether the house is licensed or not—and there are other similar tenements with which a comparison can be made, the rateable value is the rent which a tenant from year to year would give for the premises in the market. The position of the house, whether it is in a good street or not, and other considerations must be taken into account. Expert valuers know what the letting value of a public-house in a town is, and can tell what is the annual value of this public-house. The question as to what profits are made in the house is *nihil ad rem*. It was pointed out in *Mersey Docks and Harbour Board* v. *Overseers of Liverpool* that where there is a market value whereby a comparison can be made, the question of profits has nothing to do with the matter. That proposition is not disputed where there is a market. But it is contended that this is an exceptional case and that the takings or profits of the public-house can be given in evidence. I cannot see that this is an exceptional case. In exceptional cases, such as the *Liverpool Docks case*, the racecourse case, and the railway refreshment-rooms case, the ordinary rule cannot be applied. The rating authorities must do their best, and therefore they must ascertain what profits a tenant would make, and from that they must find out what a tenant would be likely to give for the premises. The present is not an exceptional case, and the evidence of the takings was rightly rejected. The appeal must therefore be dismissed.

RIGBY, L.J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Godden, Son, & Holme*, for *Mabane & Graham*, South Shields.

Solicitors for the respondents, *Rowcliffe, Rawle, & Co.*, for *Newlands & Newlands*, Newcastle-upon-Tyne.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) — March 13.

BROWN, JANSON, & CO. v. A. HUTCHINSON & CO. (*a*.)

Partnership—Separate liability of one partner—Judgment against such partner—Foreign firm—Branch office in England—Receiver of debtor's interests in partnership assets—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.

Where a partnership business is carried on partly in England and partly abroad, section 23 *of the Partnership Act*, 1890, *applies, by which a receiver of a partner's interest in the assets of the partnership business can be appointed at the suit of a judgment creditor.*

Appeal from an order of Day, J., in Chambers.

The plaintiffs brought an action against the defendant firm and J. A. Hutchinson under the following circumstances:—

On the 24th of August, 1894, J. A. Hutchinson drew a bill of exchange for £3,000 on the defendant firm, which was accepted by the firm. The bill was duly presented for payment and dishonoured, and notice of such dishonour was given to the defendants. The plaintiffs, who were holders for value, recovered judgment under order 14 against the defendant J. A. Hutchinson, for £3,034 17s., the firm having obtained leave to defend the action.

The plaintiffs applied by summons under section 23 of the Partnership Act, 1890, for the appointment of a receiver of the defendant's interest in the partnership business, and that his interest should stand charged with the amount of the judgment debt, there being no property of his which could be taken under a writ of *fi. fa.* or *elegit*.

The firm of A. Hutchinson & Co. was constituted a *société en commandite* under the law of France, having its registered office in Paris, with a branch office in London for the sale of its manufactured goods, and the defendant J. A. Hutchinson was formerly manager of the London office.

Day, J., made the order asked for.

The defendant firm, A. Hutchinson & Co., appealed.

Bigham, Q.C., and *H. Tindal Atkinson*, for the appellants.—The Partnership Act, 1890, has no application to this case. Section 23 can only apply to an English firm, under the jurisdiction of the English courts. No order could be made here directing an account, because the books are in France, and the defendant J. A. Hutchinson's interest can only be ascertained in France, where the assets actually are.

Witt, Q.C., and *Bartley Denniss*, for the plaintiffs.—The defendants are really two separate firms, one in England and one in France, and the Act applies to the English firm.

(They were stopped by the court).

LINDLEY, L.J., stated the facts, and continued:—The judgment creditor proceeds to enforce his judgment under section 23 of the Partnership Act, 1890. That section is new, and displaces the very cumbrous procedure which was in use before the Act. [His lordship explained that procedure, and continued:—] The 2nd sub-section recasts the whole proceedings. By it, on the application of any judgment creditor of a partner, the court may make an order charging that partner's interest in the partnership property and profits, with payment of the debt and interest,

(*a*.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

and may appoint a receiver of that partner's share of profits. That has no immediate effect on the co-partners at all. The interest of their co-partner is charged just as if he had given an equitable charge over his interest. In order to enforce that charge a receiver is appointed. This would operate as an injunction to prevent the debtor receiving anything from the firm. That does not produce the money, and therefore the section proceeds to enact that all accounts and inquiries may be directed as if the charge had been made in favour of the judgment creditor by the partner, or as the circumstances of the case may require. The meaning of this is that an order may be made for an account of what is due to the debtor from his co-partners. This enables the co-partners to dissolve partnership if they like. This is intended to supersede the old practice: wherever a firm is carrying on business in this country with assets which the sheriff could have seized under the old law, the machinery of the new Act comes into practice.

I think there is ample jurisdiction to make this order, and I do not think it will prejudice the foreign partners at all, unless they came over here and insisted upon handing over to the judgment debtor the money which they ought to hand over to the receiver. It does not authorize the receiver to receive partnership assets. All he can do is to give notice to the other partners about payments to the judgment debtor. But for the judgment debtor the appointment of a receiver is extremely important, because he can be ordered to hand over anything he may have received from his co-partners.

I am of opinion that there is jurisdiction to make this order, that the order is right, and that the appeal must be dismissed, with costs.

A. L. SMITH, L.J.—It is said that Day, J., had no jurisdiction to make this order, because the firm is a foreign firm and not an English one, and that section 23 of the Partnership Act, 1890, applies only to an English or Irish firm. But on the materials before us, in my opinion that allegation is displaced.

If this is not a partnership within section 23, then the sheriff could have entered and seized all the goods in the London office under the old law. But that is impossible. In my judgment, where there is as here a partnership carrying on business partly here and partly in a foreign country, that is a partnership within the purview of the section. Therefore I think that Day, J., was right in the order which he has made. The receiver can only receive the money which otherwise would be paid over to the judgment debtor. The appeal ought to be dismissed, with costs.

Appeal dismissed, with costs.

Solicitor for the appellants, *H. Montagu.*

Solicitors for the respondents, *Hays, Schmettan, & Ancrum.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — April 23.

In re BURDEKIN. (*a.*)

Solicitor — Costs — Taxation — Purchase under Public Health Act—Sale by voluntary agreement—Scale fee — Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 82—*Solicitors' Remuneration Act,* 1881 (44 & 45 *Vict. c.* 44)—*General Order under the Act, Schedule I., Part I., rule* 11.

Under a voluntary agreement, which provided that all costs and expenses of the sale and purchase should be paid by the purchasers, land was sold to a local board who acquired it for the purpose of establishing sewage works under the Public Health Act, 1875.

Held, that the sale was a sale under the Lands Clauses Consolidation Act, and that, therefore, by virtue of rule 11 *of Part I. of Schedule I. to the General Order made in pursuance of the Solicitors' Remuneration Act,* 1881, *the scale of charges contained in Schedule I., Part I., did not apply.*

The decision of Kekewich, J., *affirmed.*

Appeal from the decision of Kekewich, J.

By an agreement, dated the 1st of March, 1893, Mrs. Emma Winder agreed to sell to the Handsworth Local Board a certain piece of freehold land in the parish of Handsworth, in the county of York. The land was acquired by the local board for the purpose of establishing sewage works under the Public Health Act, 1875, an Act which incorporated the Lands Clauses Consolidation Act, 1845.

The agreement, by clause 7, made the following provision as to costs:—

"All costs and expenses, as well of the vendor as of the purchasers, incurred or to be incurred in or about the preparation and execution of the agreement and the negotiations preparatory thereto, and in or about the preparation of the abstract and the deducing and verifying of the title, and in or about the preparation and execution of the conveyance and the duplicate thereof, and of all other documents relating to the assurance of the said premises and all other costs and expenses (if any) of and incidental to the said sale and purchase, shall be borne and paid by the purchasers, it being one of the terms of this agreement that the vendor shall be put to no expense whatsoever in the matters aforesaid."

The agreement was duly carried out and the property conveyed to the local board.

The vendor's solicitors, Messrs. Burdekin & Co., delivered their bill of costs. The taxing master, on taxing the bill, allowed only costs according to the scale in Part 1 of Schedule 1 to the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. The solicitors carried in objections to the taxation, contending that the scale of charges contained in Part 1 of Schedule 1 did not apply, and relying on rule 11 of Part 1 of Schedule 1, which provides that "in case of sale under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply."

The taxing master was of opinion that rule 11 did not apply and overruled the objections.

Upon a summons to review the taxation, Kekewich, J., allowed the application, and held that the taxing master must tax the costs according to Schedule 2, and otherwise than according to scale.

From this decision the local board, by leave, appealed.

Upjohn, for the appellants.—This is not a case of a sale under the Lands Clauses Consolidation Act, 1845, within rule 11. Where there is an agreement standing by itself, and not incorporating the statute, then the scale does apply. In the present case the compulsory powers of the Lands Clauses Consolidation Act, 1845, have never been invoked, and this is not, therefore, a sale under that Act at all. The agreement provides for a wider indemnity than that given by the Lands Clauses Consolidation Act, and is inconsistent with the respondents' contention,

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

[KAY, L.J.—Can you contract yourself out of the Act, and, if so, does this clause amount to a contract to that effect?] As to that question there is the authority of *Wombwell* v. *Corporation of Barnsley*, 36 L. T. N. S. 708, 25 W. R. Dig. 141. Before Kekewich, J., I cited *Re Stewart*, 37 W. R. 484, 41 Ch. D. 494, but his lordship did not think the case was in point.

Wurtzburg, for the respondents.—This is a sale under the Lands Clauses Consolidation Act, and therefore rule 11 applies. The powers of the local board to purchase land are derived from the Lands Clauses Consolidated Act, which is incorporated in the Public Health Act, 1875.

Upjohn replied.

LINDLEY, L.J.—This is an appeal from an order made by Kekewich, J. The substance of the appeal is whether a particular clause in an agreement to which I will refer presently, does or does not entitle the urban authority here to have certain costs taxed according to scale. Now the agreement is an agreement between a Mrs. Winder of the one part, and the local board of Handsworth of the other part, and it is an agreement for the sale to the local board of certain land which they wanted, I am told, for sewage purposes. The 7th clause is this. [His lordship read the clause.] The object of that is plain enough. In the first place, be it observed, this is not an agreement between Mrs. Winder and her solicitors. They had nothing to do with it. It is an agreement between her and the local board. An agreement between the purchasers and the vendor to the effect that the purchasers are to pay all the costs of and incidental to this purchase. That is the substance of it. Now it is necessary to see who the purchasers are, and what powers they have. The purchasers are the local board for the parish of Handsworth. They wanted this land, it is said, for the purposes of sewage, and under the Public Health Act, 1875, ss. 27 (2), 175, they have power to buy land for the purposes of the Act, and it is only under the powers of that Act that they are entitled to buy this land at all. They had no other right to buy it for any purpose. Section 176 of the Public Health Act, 1875, incorporates, amongst other things, the Lands Clauses Consolidation Act, but as regards the compulsory clauses in it, there is a special provision that the local authority, before putting in force any of the powers of that Act with respect to the purchase and taking of land otherwise than by agreement, shall give certain notices, and so on, and serve a copy of any order, and then there is a provision about a provisional order and an Act of Parliament conferring it.

Now, that being the position of affairs, and the conveyance having been executed, the question arises how the costs are to be taxed; and reference is made to the General Order under the Solicitors' Remuneration Act, 1881, which I need not read. It is only necessary to state shortly that under that Act of Parliament power is given to charge according to scale, and the scale is introduced, and the scale is made applicable to certain cases of sales. Then rule 11 in Schedule 1 of the rules runs thus: [His lordship read the rule.] Now in this particular case the solicitors for the vendor do not desire to be paid according to the scale. The amount of purchase-money was small—£500—and I suppose it was a troublesome business, and that they preferred to be paid apart from the scale. Of course, we all know when the purchase-money is not small the scale is very favourable to the solicitors. The urban authority contend that these costs are costs to which the scale does apply, notwithstanding the language of the 11th rule; and they put their case in various ways. They first of all say that this is not a case of a sale under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser. Of course, if they are right in that, the provision in clause 11 will not apply at all. Now, are they right in that? Is this a sale in any sense under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser? In order to answer that question we must look and see what is the power that is given to the vendor to sell and to the purchaser to buy. The vendor here is seized in fee, and has ample power to sell; whereupon Mr. Upjohn says that it is not a case of a sale under the Lands Clauses Consolidation Act, although it may possibly be a purchase under that Act; but inasmuch as only the word "sale" is used, and not "purchase," he asks us to interpret that provision in rule 11 as confined to sales under the Lands Clauses Consolidation Act, or other Acts similar to it, by incapacitated persons. He says, there are persons who are empowered to sell under the Lands Clauses Consolidation Act, and sales by those persons, and sales by those only, are the sales referred to in clause 11. It appears to me, I confess, that that would be putting a very narrow construction upon this rule, and one which would, to my mind, defeat the object of it. It is true there is the word "sale" only, and not "purchase," but on the other hand you cannot have a sale without a purchase; and the word "sale" is put in simply as a compendious term to include the transaction of purchase and sale. In this particular case the vendor appears to be seized in fee, and does not want the Lands Clauses Consolidation Act to convey, yet the purchasers do want that Act to buy; and the purchase is a sale within clause 11.

The next point is whether, upon the true construction of the Public Health Act, 1875, this is a sale under the Lands Clauses Consolidation Act or any other private or public Act under which the vendor's charges are paid by the purchaser. At first I felt a little difficulty about that, but on looking into the Public Health Act it is obvious, I think, that the local board had no power to buy at all except under the Public Health Act, and that the Public Health Act incorporates the Lands Clauses Consolidation Act, and that the joint effect of the two is that the vendor's charges are to be paid under those Acts by the purchaser. It appears to me, therefore, that the learned judge was right in saying that the last words of rule 11 are applicable to this case—that is to say, that it is a case of "a sale under the Lands Clauses Consolication Act or 'any other private or public Act under which the vendor's charges are paid by the purchaser." Then, if he is right in that, which I think he is, what is the effect of it? Does that rule say that the scale is not to apply? Upon that point my opinion is clear, when I come to think about it, that that interpretation of that rule is right, and that that interpretation of the Act of Parliament is correct. But then, Mr. Upjohn says, if you look at the agreement it is inconsistent with that view. The agreement applies to all sorts of costs which are not provided for under the Lands Clauses Consolidation Act, which is incorporated into the Public Health Act. What you have to get at in order to deal with this argument of inconsistency is this: that there shall be something in the agreement to the effect that the scale shall apply. Can you get that out of the rule? The rule as interpreted, and as properly interpreted, says that the scale is not to apply. What is there in the agreement which justifies the inference

that the scale is to apply? Nothing at all. It appears to me, therefore, that the appeal ought to be dismissed, and that the view taken by Kekewich, J., is the right one.

LOPES, L.J.—I am of the same opinion. The question is whether these costs are to be taxed according to the scale. It is contended by the appellants that they are to be so taxed. That question depends upon the words at the latter end of rule 11, to which allusion has been made. Now with regard to the first part of that rule, "In case of sales under the Lands Clauses Consolidation Act or any other private or public Act," it appears to me that, having regard to section 175 of the Public Health Act, 1875, and subject to a point I will allude to presently, this is a sale under "a private or public Act." There can be no question about that. But then the words follow "under which the vendor's charges are paid by the purchaser." For a long time I felt some difficulty about that, but it seems to me that that objection is answered by section 176 of the Public Health Act, 1875, because that section incorporates the Lands Clauses Consolidation Act, and it seems to me that, taking the two sections together, it amounts to this, that we must read the Public Health Act as if the Lands Clauses Consolidation Act was set out at full length in that Act, and if it had been set out at full length in that Act, it appears to me that nobody could have any doubt that then the words "under the Lands Clauses Consolidation Act or any private or public Act under which the vendor's charges are paid by the purchaser" would be complied with; because, according to the 82nd section of the Lands Clauses Consolidation Act, provision is made with regard to costs.

But then a point was taken, that a portion of the agreement—namely, clause 7—is inconsistent with that view. No doubt that portion of the agreement covers more than would be covered by the statute, but I am unable to see that there is anything in that inconsistent with the exclusion of the scale. I do not doubt for one moment that words might have been introduced which would have been sufficient to meet the view which has been suggested with regard to contracting out of the Act, but I can find nothing of that kind in this clause.

Then it is said that the word "sale" used in rule 11 does not include "purchase." That, I think, would be a great deal too narrow a construction to put upon it. Then it was said that it only refers to cases where the vendor was a limited owner only. That again, I think, would be too narrow a construction to put upon it. I read the words, "in case of sales," as if the words had been "In cases of transactions under the Land Clauses Consolidation Act or any other private or public Act." The view I take of rule 11 is this, that it was the intention of the rule that where the costs were provided for by any statute, then the scale should not apply. I therefore think that the learned judge was right in the view which he took.

KAY, L.J.—I have come to the same conclusion. The question is one of some little complexity, and one has to consider carefully the Act of Parliament and this rule. Rule 11 provides that the scale shall not apply in the case of a sale under the Lands Clauses Consolidation Act or any other public or private Act under which the vendor's charges are paid by the purchaser. Now, the question, first of all, is whether this is a sale under the Lands Clauses Consolidation Act or any other such public or private Act as is here referred to? So far as the purchasers are concerned they are a corporation who undoubtedly, admittedly, are buying this land under the powers conferred upon them by the Public Health Act; therefore, at any rate, it is a purchase under the Public Health Act, and that Act incorporates the Lands Clauses Act, and therefore incorporates section 82, which does provide for the payment of costs by the purchaser of such land. So far it seems very clear indeed that these words excluding the scale apply to this particular case. But then it is argued that that only applies, in terms, to the case of a sale under the Act, and not to the case of a purchase under the Act, I confess I am not able to agree with that argument. It would be a very limited construction indeed of this rule if it were held, as it was argued it should be held, that it only applied to the case of a limited owner who obtained power to sell under such public Act or under the Lands Clauses Consolidation Act. Take the case of an agreement between a railway company and an owner in fee simple. I have no doubt whatever that section 82 of the Lands Clauses Consolidation Act applies to the case of an agreement of that kind where the agreement is entirely silent as to costs, otherwise you must come to this conclusion (which certainly seems to me inconsistent with the scope and spirit of the Lands Clauses Consolidation Act), that in such a case, if the agreement were silent as to costs, each party must pay his own costs, and I cannot think that was the meaning of the Act.

I therefore think that in this case the word "sale," as used in this rule, includes "purchase" as well as "sale," and means, as Lopes, L.J., has said, the whole transaction of buying and selling as between the vendor and the purchaser; and where the costs of that transaction are provided for by any public or private Act under which the sale takes place, then the scale is not to apply.

So far, it seems to me, the case is quite plainly made out. But then Mr. Upjohn says that clause 7 of this agreement is so entirely inconsistent with the provisions of the Lands Clauses Consolidation Act as to costs that it amounts to an exclusion of that Act, and a contract between the parties to pay costs entirely independently of the provisions of that Act of Parliament. Now, in the first place, the answer to that is, that in this clause 7 there is not a word of exclusion; there is nothing in this clause to say that the provisions of the Act as to costs are not to apply. In truth, the object of the clause is entirely different. It is merely to provide, as between the vendor and the purchaser, what costs the purchaser is to pay, and undoubtedly it goes very much beyond the provisions of the Lands Clauses Consolidation Act; because, in point of fact, it provides that all the costs relating to the transaction as between solicitor and client are to be paid by the purchasers, which is more than they would have to pay under the provisions of the Lands Clauses Consolidation Act. But why is that to be treated as so entirely inconsistent with those provisions as to exclude them? I confess I cannot see that it comes to more than this: besides the costs which the purchasers otherwise would have to pay, we agree that the purchasers shall, in this case, pay other costs; in fact, the costs which the vendor would have to pay to her own solicitor, so as to completely indemnify the vendor. There is not such an inconsistency in a clause of that kind as to enable us to say that the provisions of the Lands Clauses Consolidation Act are excluded, consequently I think the decision of the learned judge was quite right, and the appeal must be dismissed, with costs.

Solicitors, *Crowders & Visard*, for *N. Creswick*, Sheffield; *Torr, Gribble, Oddie, & Sinclair*, for *Burdekin & Co.*, Sheffield.

High Court of Justice.

Chan. Div. Chitty, J. } May 15.

TURNER v. GREEN. (a.)

Specific performance—Discretion of court—Agreement to compromise action—Material fact—Non-disclosure by party to agreement.

In the absence of a duty on the part of the plaintiff to disclose material facts within his knowledge, mere non-disclosure of a material fact to the defendant, who has entered into an agreement with the plaintiff in ignorance of such fact, is not of itself a good defence to an action for specific performance of the agreement.

So held, in the case of an agreement for the compromise of an action.

Ellard v. Llandaff, 1 *Ball & Beat.* 241, 12 *Rev. Rep.* 221, *considered.*

Summons.

The above-named action was commenced in November, 1894, by the plaintiff against his alleged manager for an account of all sums which had been received and expended by the defendant as manager of the plaintiff's business of hotel-keeper, and a declaration that the defendant was not entitled to exercise a certain option of purchase. Immediately after the appearance had been entered to the writ the plaintiff took out a summons for an account under the provisions of R. S. C., ord. 15. That summons was adjourned from time to time for the purpose of evidence being filed in support of and in opposition thereto, the defendant alleging that there was a preliminary question to be tried.

The summons for an account at length came on, on the 11th of January, 1895, and the chief clerk, after going fully into the evidence, in the presence of representatives of both the plaintiff's solicitors and the London agents of the defendant's solicitors, was of opinion that the summons ought to be dismissed, with costs. The summons was then adjourned to the judge at the instance of the plaintiff.

On the same day Fowler, a member of the plaintiff's solicitors' firm, went to Portsmouth to see the defendant and his solicitor there, and, at the meeting between them which took place at 3.15 p.m., came to an agreement with the defendant and his solicitor for settlement of the action. It appeared that, when the agreement was made, the result of the proceedings before the chief clerk was known to Fowler, but was not known either to the defendant or his solicitor.

This summons was taken out on behalf of the plaintiff for a stay of proceedings in the action on the terms of settlement agreed to on the 11th of January, 1895, and was agreed to be treated, if and so far as necessary, as though it were an action for specific performance of the agreement with a counterclaim for rescission.

C. Macnaghten, for the plaintiff.—The defendant refuses to perform his agreement, and the burden is on him of showing why it should not be enforced by specific performance.

Butcher, for the defendant.—The defendant would not have accepted the terms if the result of the proceedings in chambers on the 11th of January had been known to him and his solicitors. The silence of the other party to the agreement, who had knowledge of that result, constitutes such unfairness as to stay the hand of the court, see Fry on Specific Performance, 3rd ed., p. 333, paragraph 717, referring to *Ellard* v. *Llandaff*, 1 Ball & B. 241, at p. 251, 12 R. R. 22, at p. 27. There, equity will not enforce a contract plainly made under a mistake, Kerr on Fraud and Mistake, 2nd ed., p. 342. It would be against conscience for a man to take advantage of another's mistake: *Manser* v. *Back*, 6 Hare 443, at p. 448. I ask the court on all these grounds to exercise its discretion by refusing specific performance here.

C. Macnaghten, for the plaintiff.—The chief clerk only gave his opinion, it was not a judgment on the point. The case was at any rate not one of what your lordship called aggravated silence. Moreover there was no duty of disclosure: *Walters* v. *Morgan*, 3 D. F. & J. 718, 10 W. R. Ch. Dig. 80; *Brownlie* v. *Campbell*, 5 App. Cas. 925, per Lord Blackburn at p. 950, 29 W. R. Dig. 232; *Smith* v. *Hughes*, 19 W. R. 1,059, L. R. 6 Q. B. 597, per Cockburn, C.J., citing Story at p. 604. The defendant can only succeed if he makes out a case of fraud. In *Strickland* v. *Turner*, 7 Ex. 208, the contract was for an existing thing, and the thing was gone altogether. The law laid down in *Ellard* v. *Llandaff* is not correct and is inconsistent with the before-mentioned cases. There is in sum, no duty to make full disclosure on a party to a compromise, and therefore the plaintiff ought to succeed in this application.

Butcher, in reply.—The cases cited are not in point. I do not rely on fraud, but on the court not lending its countenance to sharp practice, see *Ellard* v. *Llandaff*, 1 B. & B. 250, 12 R. R. 27, where the argument for the plaintiff seemed to be the same as the argument for the plaintiff here. The rules for a sale of an estate or chattel do not apply to a case of compromise like this. [CHITTY, J., referred to *Gilbert* v. *Endean*, 27 W. R. 252, 9 Ch. D. 259.]

CHITTY, J., after stating the facts and reviewing the evidence, continued as follows:—The proceedings before the chief clerk amounted to an opinion by him adverse to the plaintiff, after argument, and an adjournment to the judge at the plaintiff's instance. There was obviously, therefore, no decision, but a mere opinion of the chief clerk, binding nobody. The defendant says if he had known of this, he would not have entered into the agreement.

It is a strong thing to say this opinion of the chief clerk's constitutes a material fact, but, treating it as such in favour of the defendant, ought the court to decline to enforce the agreement, because Fowler, being aware of the circumstance, did not disclose it when the agreement was entered into? The question raised is not one of fraud, but one of the doctrine of the court in exercising its jurisdiction in respect of specific performance. The court has a discretion, but that discretion is a judicial discretion to be exercised on settled principles. I take the proposition in Fry's Specific Performance, 3rd ed., not as an authority, but as a generally accepted statement of the law, where the learned editor says, "The suggestion of what is false is a ground for refusing specific performance, and also in certain cases for rescinding contracts: the same results flow from the non-disclosure of a fact which is material, and which it is the duty of one party to the contract to disclose to the other, or from the active suppression and concealment of a fact which is material, and which the other party would have come to know, but for such suppression and concealment. But mere silence as regards a material fact, which the one party is not under an obligation to disclose to the other, cannot be a ground for rescission or a defence to specific performance": Paragraph 705, p. 325.

It was not contended that there was a duty on

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Fowler's part to make the disclosure, and it was therefore only said that it was shabby of Fowler to keep the circumstance to himself, and not consistent with the usual practice of solicitors of high standing in their dealings with one another, who would ordinarily have disclosed any such circumstance. Therefore, it is argued, specific performance ought to be refused, not because of a breach of any principle of law or equity, but because of a departure from the usual practice of solicitors of high standing. I cannot act on that. If there had been any overreaching or misleading conversation in reference to the proceedings in the action in London at the time the agreement was entered into, that would have been a different case, and there might in such a case have arisen an obligation binding Fowler in law or equity to make disclosure of what he knew; but the evidence is silent as to anything of this kind.

The distinction between suppression where there is a duty to disclose and mere silence is a very old one. It is thus expressed by Cicero, "Aliud est celare, aliud tacere: neque enim id est celare quicquid reticeas," De Off. lib. iii. c. 13; and this passage is cited in Fry on Specific Performance, 3rd ed., para. 713, p. 329.

In *Walters* v. *Morgan*, where specific performance of an agreement for a lease was sought, Campbell, L.C., said, "There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement," 3 D. F. & J. 723, 4. That proposition appears to me to be true, and not confined to the sale of lands or goods, but of general application, except in the case of contracts requiring *uberrima fides*, which involves a duty to make full disclosure. So far the defendant has not made out his case.

But Mr. Butcher cites the authority of *Ellard* v. *Llandaff*, which is in point. Specific performances was there asked of an agreement for a lease in consideration of the surrender of an old lease depending upon a single life. The life was known to the plaintiff, but not to the defendant, to be on the point of expiring, and Manners, L.C., refused the application. He certainly made this circumstance of non-disclosure that the life was *in extremis*, a distinct ground of his decision, but there was another ground as to which there could be no question that it was sufficient to support the decision, in that the lease would have been a fraud on the power under which it was to be made. As to the first ground Manners, L.C.—after quoting from Lord Hardwicke in *Buxton* v. *Lyster*, 3 Atk. 383: "That nothing is more established in this court, than that every agreement of this kind ought to be certain, fair, and just in all its parts; if any of those ingredients are wanting in the case this court will not decree a specific performance"—is reported to proceed thus: "All the material facts must be known to both parties"; that is too broad; and the report continues, "and is it not against all principles of equity, that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?" (1 B. & B. 250, 251, 12 R. R. 27.) Lord Manners must have had in his mind cases where there was a duty to disclose. If the life in that case had actually dropped, there would have been no contract on the principle of *Strickland* v. *Turner*, and, having regard to the later authorities, I think that, where there is an obligation to disclose, non-disclosure is a good defence, see Fry on Specific Performance (3rd ed., p. 325).

There is no special mention disapproving of *Ellard* v. *Llandaff* in the authorities, but the editor of Fry on Specific Performance (3rd ed.) apparently questions that case, saying, "It is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the court. The case of *Ellard* v. *Llandaff*, if it is to be supported on the ground of the silence of the lessee as to the fact, that one of the lives in the surrendered lease was, at the time of signing the contract, *in extremis*, rests upon this principle, and was so put by Lord Manners in deciding it," paragraph 717, p. 333. The case in its very special circumstances may stand on the grounds suggested. But this case falls far short of *Ellard* v. *Llandaff* in its circumstances, and Fowler's silence is not a sufficient defence. There must be an order for specific performance.

Application allowed.

Solicitors for the plaintiff, *Mear & Fowler*.

Solicitors for the defendant, *Emanuel, Round, & Nathan*, for *Irens & Phelps*, Portsmouth.

Chan. Div. }
Romer, J. } May 11.

In re EYRE.
MCANDREW *v.* NORRIS. (*a.*)

Frauds, Statute of—Agreement in consideration of marriage—Statement of consideration.

An agreement in consideration of marriage, to satisfy the Statute of Frauds, requires the consideration to be clearly stated that a person of ordinary intelligence may infer from the perusal of it that such and no other, is the consideration upon which the undertaking was given.

Trial of action.

This was an action to obtain the payment of the sum of £3,377 10s., with interest at four per cent. from the executors of the estate of John J. Eyre, deceased, on an agreement made in consideration of marriage.

The plaintiffs were James John McAndrew and his wife, Teresa, daughter of the said John J. Eyre, and the defendants were the executors under the will of the said J. J. Eyre.

The facts of the case were as follows: In the early part of the year 1875 the plaintiff James J. McAndrew in the course of the negotiations for his marriage applied to the said J. J. Eyre to know what provision he was willing to make for his daughter in the event of the marriage taking place, and Mr. Eyre wrote to him the following letter.

May 17, 1875.

To James McAndrew.

Dear Sir,

I agree to give my daughter Teresa £100 a year to commence on the 1st day of June and £3,000 at my death, perhaps at my death circumstances may enable me to do more. JOHN J. EYRE.

After the marriage the annuity was, for a time, regularly paid, but subsequently fell into arrears. After the death of Mr. Eyre the plaintiffs applied

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

the defendants for payment of the sums owing in respect of the annuity and of the £3,000 due under the alleged contract. The defendants refused to admit the claim and the plaintiffs thereupon commenced the present action. In their defence the defendants *inter alia* relied on the Statute of Frauds.

Hopkinson, Q.C., and *J. Simmonds*, for the plaintiffs.—The language used in the letter of the 17th of May, 1876, must clearly refer to marriage. It is always the rule of the court to enforce agreements made in consideration of marriage. There is no such case in which a promise signed by a party to be bound is not enforced: *Hammersley* v. *De Biel*, 12 Beav. 1, 12 Cl. & F. 45; *Coverdale* v. *Eastwood*, 21 W. R. 216, L. R. 15 Eq. 121; *Laver* v. *Fielder*, 11 W. R. 245. [ROMER, J.—It is clear that the contract must state the consideration.] Yes, but we say that it is sufficiently stated. No meaning can be put on the document except that it is an agreement in consideration of marriage.

Neville, Q.C., and *Mulligan*, for the defendants.—The document that is put in shows no consideration, and marriage is not a part performance. For the court to enforce the contract, would be to repeal the Statute of Frauds.

Hopkinson, Q.C., replied.

ROMER, J.—This is a case in which, although I may sympathize with the plaintiffs, I cannot help myself from deciding against them. A contract in consideration of marriage must be in writing, and the consideration must appear on the face of the contract. A marriage following will not be part performance so as to take the case out of the Statute of Frauds. Now, is it possible to say from this letter what was the consideration for the contract? As Lord Chief Justice Tindal says in *Hawes* v. *Armstrong*, 1 Scott, p. 661, at p. 668, "It is not, however, necessary that such consideration should appear in express terms, it would undoubtedly be sufficient in any case if the memorandum were so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. It is that a mere conjecture, however plausible, that the consideration stated in the declaration was the consideration intended by the memorandum would be insufficient to satisfy the statute; but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum that the consideration stated in the declaration and no other was the consideration upon which the undertaking was given." Now, following that *dictum*, there must be a well-grounded inference from this document that marriage was the only consideration; but I cannot infer from this document that such was the case. I may think so; but it is not a well-grounded inference to be collected from the document itself. The document does not mean that the person to whom the father writes is going to provide his daughter with board and lodging. There is nothing to show certainly, that marriage was intended. For this reason the document fails to satisfy the Statutes of Frauds, and consequently the plaintiffs' case fails, and their action must be dismissed with costs.

Solicitors, *G. J. Marsh; Norris & Norris.*

Chan. Div.
Romer, J. } Nov. 19, 20; Dec. 3.

SMITH v. WALLACE. (a.)

*Vendor and purchaser—Power of rescission by vendor if requisition not withdrawn—*Bona fides *in exercise of such power—Wilful delay in rescinding pending negotiations with another person—Specific performance—Return of deposit.*

Where, by a contract for sale, power is given to a vendor to rescind if a requisition which he is unable or unwilling to comply with is not withdrawn, such power must be exercised bonâ fide. *A vendor's decision as to exercising it or not, may not be delayed, e.g., pending the result of negotiations to sell the property, behind the purchaser's back, to a third person. Such delay deprives a vendor of his right to affirm the contract or obtain specific performance of it; and it will, on the purchaser's suit, be treated as rescinded, and his deposit ordered to be returned.*

Trial of action.

On the 19th of January, 1894, an agreement in writing was entered into between the defendant, J. M. Wallace, and the plaintiff, W. S. Smith, for the sale by Wallace to Smith for £13,500 of certain leasehold cement works at Dartford, and certain fixed plant and machinery, chattels, and effects. The agreement provided for immediate payment of £1,350 by way of deposit, and that the balance of the purchase-money should be paid and the purchase completed on the 24th of March, 1894. The agreement also provided for delivery of requisitions within fourteen days after delivery of the abstract, and that if the purchaser should make any objection or requisition which the vendor should be unable or unwilling to remove or comply with, and should not withdraw the same within seven days after being required to do so, the vendor might, by notice in writing, and notwithstanding any intermediate representation, negotiation, or litigation, rescind the agreement, whereupon the purchaser should return all abstracts and papers, and should not make any claim on the vendor for costs or otherwise. There was also a provision that compensation should be paid to the purchaser, if any of the plant or machinery should turn out not to pass as fixtures.

The deposit of £1,350 was duly paid on the execution of the agreement, and an abstract delivered in due course. Requisitions were made by the purchaser, especially with regard to the trade machinery, as notice had been given to him that it belonged to the legal personal representative of one East, who intended to bring an action to recover it. The purchaser claimed from the vendor an indemnity in respect of this machinery, and on the 7th of March, 1894, the vendor's solicitors wrote to the purchaser's solicitors regretting that the latter should press for an indemnity, and giving notice that the vendor was unable to remove or comply with, and calling on the purchaser to withdraw, certain requisitions and objections, including such as related to the trade machinery.

On the 9th of March, 1894, the purchaser's solicitors replied, declining to withdraw the requisitions and objections referred to. In the meantime negotiations had been going on without the knowledge of the purchaser or his solicitors, for the sale of the property by the vendor to a client of Messrs. Emanuel & Simmonds, solicitors, and on the same 9th of March Messrs. Emanuel & Simmonds wrote to

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

the vendor's solicitors asking for a draft contract on terms which had been arranged. On the 15th of March the vendor's solicitors sent Messrs. Emanuel & Simmonds a draft contract for sale to their client, stating that the vendor, if he was entitled to determine the existing contract with the purchaser, would be willing to sell the property to their client. On the same 15th of March the purchaser's solicitors wrote to the vendor's solicitors, referring to their letter of the 7th of March, and asking whether, in consequence of the non-withdrawal of the requisitions and objections, their client, the vendor, intended to rescind the contract, and if not, asking the vendor's solicitors to arrange with them for compensation under the provision in that behalf, so that they, the purchaser's solicitors, might proceed to get ready for completion.

On the same day, the 15th of March, the vendor's solicitors answered this letter, requiring to consider the matter a little more fully before writing definitely, which, however, they stated that they hoped to do before the end of the week.

On the 17th of March the purchaser's solicitors wrote to the vendor's solicitors that they relied upon hearing definitely from them "on or before to-morrow as promised," and that, failing compliance with their requirements, the purchaser would promptly take action in the matter. On the same day the vendor's solicitors wrote to the purchaser's solicitors regretting that they could not write definitely on the matter till the following Monday or Tuesday, and also wrote a letter to Messrs. Emanuel & Simmonds to the effect that owing to certain circumstances it was desirable that the contract with their client should be completed by the following Monday or Tuesday.

On the Monday, which was the 19th of March, the purchaser's solicitors wrote to the vendor's solicitors that, not having heard definitely as promised, the purchaser regarded the contract as at an end, and had made other arrangements, and requiring the return of the deposit. On the 21st of March they wrote again requiring the return of the deposit by the following day, failing which they stated that their instructions were to issue a writ.

The new contract with Messrs. Emanuel & Simmonds' client was not arranged, and further letters expressing regret and asking for delay were written by the vendor's solicitors to the purchaser's solicitors on the 21st, 22nd, and 27th of March.

On the 29th of March the purchaser, Smith, issued the writ in this action for the return of the deposit. On the 30th of March the vendor's solicitors, having been served with the writ, wrote to the purchaser's solicitors suggesting an arrangement on the footing of the agreement being still binding; but the purchaser continued his action, and by his statement of claim added a claim for payment of his expenses of investigating the title. The vendor by way of defence denied that he had determined the agreement, and put in a counter-claim for specific performance.

Neville, Q.C., and *R. F. Norton*, for the plaintiff.—The power to rescind must be exercised *bonâ fide* and promptly, and cannot be used with such an ulterior object as in the present case. The plaintiff rightly treated the contract as rescinded; if not rescinded the defendant had no right to offer the property to some one else.

Hopkinson, Q.C., and *Sargant*, for the defendant.—The agreement could only be rescinded by the defendant, and he did not rescind it, though he put himself in a position to do so. On the correspondence both parties clearly considered the contract as subsisting after the seven days from the letter of the 7th of March. No definite contract was entered into for the sale of the property by the vendor to another person. No injury was done to the plaintiff by the negotiations with Messrs. Emanuel & Simmonds' client.

Neville, Q.C., replied.

ROMER, J.—In this case I think the plaintiff is entitled to relief, having regard to the conduct of the defendant in relation to the contract. That conduct, in my opinion, was not proper or fair, and entitled the plaintiff to treat the contract as rescinded and to a return of the deposit.

At the beginning of the correspondence to which I shall refer, the plaintiff, as purchaser, had made certain requisitions on title, and the time fixed for completion (the 24th of March) was fast approaching. On the 7th of March the defendant's solicitors wrote to the plaintiff's solicitors giving formal notice that the vendor was unwilling to remove or comply with and calling upon the plaintiff to withdraw, the requisitions in question. On the 9th of March a reply is sent, in substance refusing to withdraw the requisitions; and at the expiration of the seven days mentioned in the agreement the vendor could, by giving formal notice, determine the contract. The purchaser naturally supposed that such a notice would be promptly sent and the vendor's power to rescind be speedily exercised. The vendor was bound to determine promptly whether he would exercise the power or not, and was not entitled to take advantage of his position, leaving the purchaser in ignorance as to whether the contract was to be treated as rescinded or not, or to delay his decision for his own purposes in trying to effect another and more beneficial contract for the sale of the property to a third person. If the vendor might play fast and loose with the purchaser in such a matter the purchaser would not know whether he was to get ready for completion or not, or whether his requisitions would be further answered, or how they were to be dealt with, or what step he should take, and all this at a time when the day fixed for completion was close at hand and he might be held liable under the contract to pay interest on his purchase money if the contract was not completed on the day fixed.

As to what the vendor did, the correspondence speaks for itself. Of course in speaking of the vendor I am referring to what he did by the solicitor who attended to this matter on behalf of the firm, Messrs. Paine & Co., the defendant's solicitors. What the vendor did was intentionally to delay informing the purchaser whether the contract was to go on or not, and to use that delay to try and effect a more equally, beneficial contract for the sale of the property to another person. It was apparently intended on behalf of the vendor that if he could effect a new contract he should exercise his power and rescind the contract with the plaintiff. And I fear that it was also intended on his behalf, if a new contract could not be finally made, to turn round and say to the plaintiff that the vendor always contemplated carrying out the contract, and that it was still binding. In fact he tried to play fast and loose with the plaintiff. The plaintiff, fortunately for himself, notwithstanding the concealment which was practised upon him, apparently could see he was being trifled with, and the seven days having expired he on the 18th of March wrote a very proper letter asking whether the vendor was going to rescind the contract or not, and if he was not, then to proceed to deal with the plaintiff's requisitions. Now even before the expiration of the seven days—namely, as early as the 9th of March—a gentleman acting for the vendor had been negotiating

with Messrs. Emanuel & Simmonds for a sale of the property to their client; and on the 15th he had sent to Emanuel & Simmonds a draft form of contract with their client, saying that on certain terms the vendor would be willing to sell the property in the event of his being entitled to determine the existing contract—an event which of course happened at the end of the seven days. And on the same day as the negotiations were still proceeding with Emanuel & Simmonds, the gentleman I have referred to replied to the letter of the purchaser's solicitors of the 9th of March by asking for a delay to the end of the week, as if for the purpose of further considering the purchaser's requisitions, but in reality (as I conclude) for the purpose of arranging a binding contract with Messrs. Emanuel & Simmonds' client. The purchaser's solicitors wrote again on the 16th of March, pointing out the embarrassing position in which their client was placed, and stating that they relied on hearing from the vendor's solicitors definitely by the following day as promised. On the 17th of March the vendor's solicitors urged Emanuel & Simmonds to complete the agreement with their client on the following Monday or Tuesday, and on the same day wrote to the purchaser's solicitors, asking for time and stating they would write finally on the following Monday or Tuesday whether the contract was to go on or not. This letter was clearly written for the purpose of obtaining time to arrange with Messrs. Emanuel & Simmonds. On the 19th of March the purchaser's solicitors, determined on being no longer trifled with, wrote to rescind the contract and demand back the deposit. The vendor still delayed giving a decision; and on the 21st the purchaser's solicitors wrote again, saying that as they had not heard finally from the vendor as promised they must issue a writ. Still only dilatory letters were sent to the purchaser by the vendor's solicitors; and the day fixed for completion passed without the vendor having written definitely, or being ready to complete. On the 29th the writ was issued, and on the 30th, as the vendor had not secured a binding contract with Messrs. Emanuel & Simmonds' client, the vendor's solicitors wrote suggesting an arrangement with the purchaser on the footing of the contract being still in force. This position the purchaser naturally refused to accept. Under these circumstances the defendant was not, in my judgment, at the date of the writ entitled to treat his contract with the plaintiff as still in force; and to allow him to do so would be to lend the sanction of the court to tricky dealing on his part. He cannot, as I think, be heard to say that he regarded his contract with the plaintiff as binding at the very time when he was endeavouring behind the plaintiff's back to sell the property to another person. Moreover, I think a vendor must act in good faith and with due diligence to carry out the contract so far as he is concerned on the day fixed for completion. And if he has shown, as this vendor has shown, want of good faith and of due diligence, he cannot properly say that on the day fixed for completion he was able, ready, and willing to carry out his part of the contract.

I think that in this case the plaintiff was entitled, if he thought proper, when the defendant refused or neglected to say whether he would determine the contract or go on with it, either to wait a reasonable time and then say that the contract could not be rescinded, or promptly to say, as in effect he did say, that the defendant could not on his side play fast and loose with the contract, and yet hold the plaintiff bound on his part; in other words, that the contract was no longer binding on him, and that the deposit must be returned.

In my judgment therefore, the deposit must be returned, and the counter-claim dismissed, and the defendant must pay the costs of the action and counter-claim. But I do not think the defendant ought to be put in a worse position than if he had sent the notice to rescind, and therefore he must only pay interest on the deposit at 4 per cent. as from the date of the writ; and I make no further order in favour of the plaintiff as to payment of his expenses or as to a lien on the property. The plaintiff must return to the defendant all abstracts and papers.

Solicitors, *Wilkinson, Howlett, & Wilkinson: Paines, Blyth, & Huxtable.*

Q. B. Div.
(Grantham and Charles, JJ.) } May 23.

LAMBTON v. KERR. (a.)

Inland Revenue—Inhabited house duty—Training stables—"Belonging to and occupied with" a dwelling-house—48 Geo. 3, c. 55, Schedule B, rule 2—14 & 15 Vict. c. 36, Schedule—Customs and Inland Revenue Act (41 Vict. c. 55), s. 13, sub-section 2.

Schedule B, rule 2, of 48 Geo. 3, c. 55, provides that, for the purpose of charging the inhabited house duty, every coachhouse or stable "belonging to and occupied with" any dwelling-house shall, in charging the said duty, be valued with such dwelling-house. The appellant was assessed to the inhabited house duty upon premises occupied by him in his business as a trainer of racehorses. The premises consisted of a lodge, in which a head stable lad of the appellant resided, and three ranges of stables, over a part of which were rooms used as sleeping quarters by the appellant's stable-boys.

Held, that the stables belonged to and were occupied with the dwelling-house, and that the premises were rightly charged with the duty.

Special case stated by Commissioners of Inland Revenue under 43 & 44 Vict. c. 19, s. 59.

The appellant Lambton, who was a trainer of racehorses, appealed against an assessment made upon in the sum of £13 13s. 9d., being the inhabited house duty at 9d. in the £ upon £365, the annual value of premises occupied by him in the parish of Newmarket All Saints.

The premises consisted of (1) a ten-roomed dwelling-house called Park Lodge, occupied by a servant of the appellant, whose duties were those of "head lad" in the appellant's stables; (2) domestic offices and garden (about one rood) attached to the house; (3) about half an acre of ground on the east side of the dwelling-house used entirely as a training and exercising yard, and which communicated with the dwelling-house by two gateways; (4) stables and saddlerooms in three ranges on three sides of the yard capable of providing accomodation for about thirty-nine horses.

Over the stables and saddlerooms on one side of the yard there were four rooms in which sleeping accomodation was provided for stable lads employed by the appellant.

The estimated annual value of the premises, apart from the three ranges of stables and saddlerooms was £100.

The commissioners, being of opinion that the premises were correctly charged to inhabited house duty, confirmed the assessment, subject to this case.

14 & 15 Vict. c. 36, enacts that the duties set forth

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

in the schedule to the Act shall be paid upon an inhabited dwelling-house.

The schedule provides that for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged is and shall be worth the rent of £20 or upwards by the year, there shall be charged (except in certain specified cases) for every 20s. of such annual value thereof the sum of 9d.

Section 2 enacts that the rules contained in Schedule B. of 48 Geo. 3, c. 55, shall apply to the said duties.

48 Geo. 3, c. 55, Schedule B., Rule 2, is as follows: "Every coach-house, stable, . . . and all other offices and all yards, courts, and curtilages and gardens and pleasure grounds belonging to and occupied with any dwelling-house shall, in charging the said duties, be valued together with such dwelling-house. . . ."

The Customs and Inland Revenue Act, 1878, s. 13, provides, with respect to the duties on inhabited houses, that: "(2) Every house or tenement which is occupied solely for the purposes of any trade or business . . . shall be exempted from the duties, . . . and this exemption shall take effect, although a servant or other person may dwell in such house or tenement for the protection thereof.

Finlay, Q.C., and *Scott Fox*, for the appellant.—These premises do not come within the taxing Act, for the stables do not "belong to" and are not "occupied with" a dwelling house within the meaning of the second rule of Schedule B. That rule only applies to the ordinary case of a stable which is accessory to a dwelling house; here, the stables are the chief buildings in the premises, which are used for the purpose of carrying on the business of a trainer, and the dwelling house occupied by the head lad is accessory to the stables: *Inland Revenue* v. *Douglas*, 17 Sc. L. R. 119; *Cheape* v. *Inland Revenue Commissioners*, 26 Sc. L. R. 103. Secondly, the premises are occupied solely for the purpose of a business, and are therefore within the exemption in section 13 (2) of the Act of 1878.

Danckwerts (with him *Sir R. T. Reid, A.G.*, and *Sir F. Lockwood, S.G.*), for the respondent.—The commissioners rightly held that these stables ought to be charged with the inhabited house duty. The argument for the appellant requires the insertion of the words "accessory to" in rule 2 of Schedule B., but that cannot be done, for the rule as it stands is capable of construction. This case is on all fours with *Cheape* v. *Inland Revenue Commissioners*. The stables are not used solely for business, for they contain the boys' sleeping quarters, and the schedule to 14 & 15 Vict. c. 36 was intended to include premises occupied partly as a dwelling-house and partly for business, otherwise there would have been no necessity for section 3 which exempts market gardens.

He referred to *Russell's case*, 1 TAX. CAS. 135; *Banks* v. *Glasgow and South-Western Railway Co.*, *Ibid.* 325; *Weguelin* v. *Wyatt*, 33 W. R. 566, 14 Q. B. D. 838.

GRANTHAM, J.—In my opinion our judgment in this case must be for the respondent. The case has been argued, with considerable ability, as if the only question were whether these stables are or are not accessory to the dwelling house; but in my judgment the whole premises must be looked at in order to see what these stables are. Now, we find that in addition to the lodge there are not only the stables but also rooms over them, amounting practically to a dwelling house, for the stable lads. The case, therefore, in my opinion comes within the principle of *Cheape* v. *Inland Revenue Commissioners*, a case in which it was held that for the purpose of charging this duty, pens, kennels, and other buildings used as dwelling-houses must all go together. In this case all the buildings must be taken together and treated as a dwelling-house with stables, and are liable to be charged with the duty unless they can be brought within the exemption in section 13 of the Act of 1878. That section, however, only applies to business premises where no one lives except a caretaker; and as the stable boys, who are not caretakers, do live in these stables, the case does not come within the exemption.

CHARLES, J.—I am of the same opinion. The first question is whether the case comes within Schedule B, rule 2 of 48 Geo. 3, c. 55. No doubt that rule requires that the stables should belong to, and be occupied with, the dwelling house; and I was at first struck with the view that the dwelling house must be the principal building and the stable accessory to it. I do not think however that the Act should receive such a strict construction. The case finds here that these stables and this dwelling house, which is of the annual value of £100, are being used by certain persons for a common purpose—viz., that of a training stable—and whereas the dwelling house does belong to the stable, the stable equally belongs to, and is occupied with, the dwelling house. That is my view of the case quite apart from authority; but there is in the case of *Cheape* v. *Inland Revenue Commissioners* a decision entirely in accordance with the view which we are taking. Therefore I come to the conclusion that the case falls within the rule referred to. As to the other point, this case is excluded from the exemption contained in section 13 of the Act of 1878 because there is the occupation of the stables by the appellant's servants.

Appeal dismissed.

Solicitors for the appellant, *Ruston, Clark, Ruston*, for *Ruston*, Newmarket.

Solicitor for the respondent, *The Solicitor to the Inland Revenue.*

Q. B. Div.
(Cave and Lawrance, JJ.) April

DOLCINI v. DOLCINI; CETTA, *Claimant.* (a.)

Bill of sale—Validity—Address of grantor—Club address given in bill of sale—True address in affidavit—Form in schedule—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

In a bill of sale the grantor gave as his address a club where he did not reside, but of which he had been a member for many years, where he was well known, where letters addressed to him would certainly reach him, and where information could be given about him at all times. In the affidavit filed on registering the bill of sale the true address and description of the grantor were given, and there was no intention to mislead, and no one was in fact misled by the omission of the grantor's correct address in the bill of sale. Upon an objection that the bill of sale was void as not containing the address of the grantor,

Held, that the bill of sale was not void by reason of the omission of the grantor's true address therein, as it was in accordance with the form in the schedule to the Bills of Sale Act, 1882, *and was valid.*

Appeal from His Honour Judge LUMLEY [illegible]

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Q.C., sitting at the Westminster County Court, in an interpleader issue between an execution creditor, who seized certain goods, and the claimant, who claimed the goods under a bill of sale given by the execution debtor.

The question at the trial was whether the bill of sale was good.

The grantor of the bill of sale was a member of a club of foreign restaurant employés, which met at 28, Gerrard-street, Soho, where letters might be sent to and received by him. His place of business was at another address, and his residence at a third.

In the bill of sale the grantor was described as of "28, Gerrard-street, Soho, in the County of London"; whereas in the affidavit made a few days afterwards and filed on registering the bill of sale, it was stated that the grantor "resides at 37, Greek-street, Soho, in the County of London, and at 3, Panton-street, Haymarket, in the County of London, and is a restaurant keeper."

The execution creditor contended that the bill of sale was void as not containing the true address of the grantor.

The learned county court judge found that the addresses in the affidavit were correct, that the address given in the bill of sale was that of a club where the grantor did not reside, but of which he had been a member for many years, and president during two years, where he was well known, where letters reached him, and where there was a porter who could have given any information about him; that the statement in the bill of sale was not untrue and was not intended to or likely to mislead, and that any person interested could get the grantor's residence from the affidavit and the bill of sale. The learned judge, therefore, overruled the contention of the execution creditor and gave judgment for the claimant.

The execution creditor appealed.

Macaskie, for the execution creditor.—This bill of sale is void as it is not in the form in the schedule to the Bills of Sale Act, 1882, as required by section 9 of that Act. The correct address of the grantor is not given in the bill of sale, and it clearly was intended that the correct address should be given. An address of the grantor which is neither his residence nor his place of business cannot be sufficient. In *Parsons* v. *Brand*, 38 W. R. 388, 25 Q. B. D. 110, it was held by the Court of Appeal that a bill of sale is void unless both the address and description of the attesting witness appear in the attestation clause, and they also held that the defect was not cured by the fact that such address and description appeared in the affidavit. That had reference to the attesting witness; much more so, ought it to apply to the case of the grantor himself, and according to that case the defect cannot be cured in the affidavit made afterwards. It may be, as the judge has found, that a person could get the grantor's address from the affidavit, but the address given in the affidavit is the address at the time the affidavit is made, and is not necessarily the same address as in the bill of sale.

He also referred to the cases of *Button* v. *O'Neill*, 27 W. R. 592, 4 C. P. D. 354; and *Hewer* v. *Cox*, 9 W. R. 143, 30 L. J Q. B. 73.

Duke and *Kerly*, for the claimant, were not called upon.

CAVE, J.—I am of opinion that this appeal should be dismissed. The point taken for the appellant is that the bill of sale was invalid as it does not contain a statement of the residence and occupation of the grantor. To establish that objection it is necessary to show some statutory provision that a bill of sale must have these two things as essentials. The only statutory provision is that in section 9 of the Bills of Sale Act, 1882, namely, that a bill of sale is void unless made in accordance with the form in the schedule to the Act. On looking at that form we see that it expressly declares that the attesting witness must add his name, address and description, but there is no such direction with regard to the grantor. The form merely says: "This indenture made the day of , between A. B. of of the one part, and C. D. of of the other part, &c." It is impossible to contend that this means that a man's residence and description must be set out. Obviously something was intended to be set out, and in this case something has been set out, namely, the words "28, Gerrard-street, Soho," and the county court judge has found that this was a place where letters sent to the grantor of the bill of sale would certainly be received by him and that the statement was not intended to mislead and did not mislead. It might be different if this statement had been inserted with the intention of misleading any one, or if any one had been misled. Considering also that by section 10 of the Bills of Sale Act, 1878, an affidavit is required which is to contain a description of the residence and occupation of the grantor and that this affidavit actually does give this information, it is impossible to say that this bill of sale is void as not being in the form in the schedule. It is an accordance with the form, and therefore the judgment of the learned county court judge must be affirmed.

LAWRANCE, J.—I agree.

Appeal dismissed.

Solicitors for execution creditor, *Morris & Rickards.*

Solicitors for claimant, *Francis Miller & Co.*

Q. B. Div.
(Cave and Lawrance, JJ.) April 3.

STUDHAM v. STANBRIDGE.
STANBRIDGE, *Claimant.* (a.)

County court—Costs — Practice — Interpleader issue— "Subject-matter"—County Court Rules, 1889, *ord.* 50a, *r.* 12—*Higher scale of costs, Column C.*

The "subject-matter" of an interpleader issue in a county court is not the amount paid into court, but is the value of the goods seized, as found by the judge, together with the damages, if any. Therefore where the claimant in an interpleader issue paid £36 into court, and the judge found the value of the goods to be £51 and awarded £10 damages,

Held, that the claimant was entitled to costs on the higher scale, Column C, which applies to cases "where the subject-matter or sum recovered exceeds £50."

Appeal from an order of the judge of the Croydon County Court.

In an action in the county court, judgment was recovered against the defendant, the judgment debt and costs amounting to £31. Execution was issued for this amount, and the high bailiff seized goods upon the judgment debtor's premises. The goods were claimed by the defendant's father and an interpleader issue was directed to be tried, in which the claimant claimed, as against the execution creditor, the value of the goods seized and damages. The claimant paid £36 into court as being a sufficient sum to satisfy the

(a.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

judgment debt and all costs. The bailiff thereupon withdrew from possession. On the trial of the interpleader issue the county court judge held that the claimant had made out his claim to all the goods seized, the value of which the judge decided to be £51, and the judge further awarded to the claimant £10 damages and costs.

The judge ordered that the claimant's costs should be taxed on the higher scale, Column C (*i.e.*, where the subject-matter or the sum recovered exceeds £50), in force under the County Court Act, 1888, and the County Court Rules, 1889.

From that order the execution creditor appealed.

County Court Rules, 1889, ord. 50a, r. 12: "The 'subject-matter' in an interpleader proceeding shall mean . . . (2) in the case of an execution creditor the amount of the value of the goods seized, plus the amount of the damages (if any) claimed.

Horne Payne, Q.C., for the execution creditor, referred to *Brown* v. *Lilley*, 7 Times L. R. 427; *White & Co.* v. *Milne*, 58 L. T. N. S. 225, 36 W. R. Dig. 57.

Colam, for the claimant.

CAVE, J.—I am of opinion that this appeal must be dismissed. The sole question is as to the meaning of ord. 50a, r. 12, of the County Court Rules, 1889.

The higher scale of costs in county courts is threefold—viz., where the subject-matter or the sum recovered (*a*) exceeds £10 and does not exceed £20; (*b*) exceeds £20 and does not exceed £50; (*c*) where it exceeds £50. The question is whether this case comes under column C. [His lordship read ord. 50a, r. 12.] Now the value of the goods is found by the learned county court judge to be £51, and the damages £10. That makes £61, and therefore the case comes under head C., because the subject-matter exceeds £50. The case is so clear that it is difficult to see how any doubt could have arisen on the matter; but the execution creditor relies on the case of *Brown* v. *Lilley*. That case is to my mind an excellent illustration of the evils of indiscriminate reporting. It is distinguishable from this case, but it is not necessary to distinguish it, because it is no authority on rule 12. The observations of Mathew, J., were mere *obiter dicta*, and it does not appear that the point now under consideration was even argued in that case, nor was the rule cited.

It has been contended that the "subject-matter" in this interpleader proceeding was the £36 paid into court. That is not so in my opinion, for the claimant could not stop when he had established his claim to goods of the value of £36, he was obliged to go on and show that all the goods belonged to him, otherwise the balance would have gone to the execution creditor.

I therefore am of opinion that the county court judge was right in the order which he made, and this appeal must be dismissed.

LAWRANCE, J., concurred.

Solicitor for the appellant, *J. S. Streeter*, Croydon.

Solicitor for the respondent, *S. G. Edridge*, Croydon.

C. C. R.
(Lord Russell of Killowen, C.J., Pollock, B., and Wills, Charles, and Lawrance, JJ.) — Feb. 2.

REG. v. TOMLINSON. (*a*.)

Criminal law—Demand of money with menaces—Threat of accusation of immoral conduct not amounting to crime—Larceny Act, 1861 (24 & 25 *Vict.* c. 96), s. 44.

A person may be convicted under section 44 of the Larceny Act, 1861, of the offence of sending a letter demanding money with menaces, although the threats contained in the letter are of misconduct not amounting to a crime, and are not threats of injury to person or property.

Case stated by Lawrance, J., as follows:—

William Beswick Tomlinson was tried before me at the assizes, at Carnarvon, on the 26th day of October, 1894, on an indictment charging him under the 44th section of 24 & 25 Vict. c. 96 with sending a letter to one Thomas Morgan, demanding money with menaces, and in a second count of the said indictment with uttering the said letter.

It was proved at the trial that the prisoner, who was in the employment of the prosecutor, was discovered by the prosecutor and his wife in the act of connection with a woman named Kate Youde in the prosecutor's stable, in consequence of which the prosecutor discharged the prisoner from his service.

On the 25th of June the prosecutor received the following letter in the handwriting of the prisoner by post:—

"18, Penrallt-street, Carnarvon.

"On the rocks, only had a day and a half work since leaving Wrexham i want you to let me have 10s. so that i can get a Can and Brush and if i do not get it on or before Tuesday morning i shall let Mrs. Morgan and your friends know of your doings with Kate Youde you must understand i am not going to suffer to hide you i have had enough of it. You are at liberty to show this to your lawyer or any one else if you like but i shall certainly do it.

"Yours, W. B. TOMLINSON."

At the close of the case for the prosecution it was contended by the counsel for the prisoner that the menaces contained in the letter were not menaces within the meaning of section 44 of 24 & 25 Vict. c. 96, but that such menaces must be of injury or violence to the person or property, or of accusation as contained in sections 46 and 47 of the said statute. I overruled the objection and left the case to the jury, who found the prisoner guilty, and I released the prisoner on his own recognizances until the determination of this case. The question for the opinion of the court is whether I was right in holding that the threats contained in the letter above set out are such threats as are contemplated by section 44 of the above mentioned statute.

No counsel appeared on either side.

Lord RUSSELL of Killowen, C.J., after reading the case above set out, said:—This point is not altogether free from difficulty. The question turns on the construction of section 44 of the Larceny Act, 1861. It is necessary in order to determine the true construction of that section to look at some of the other sections of the same Act which deal with cognate offences. Section 44 provides that "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

menaces and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony," &c. Section 45 is as follows: "Whosoever shall, with menaces or by force, demand any property, money, chattel, valuable security, or other valuable thing of any person, with intent to steal the same shall be guilty of felony," &c. And section 46 provides that "whosoever shall send &c., any letter or writing accusing or threatening to accuse any person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined with a view or intent in any of such cases to extort or gain by means of such letter or writing, any property, &c., from any person, shall be guilty of felony," &c.

It is to be observed that the enumeration in section 46 is an enumeration of crimes. The only other section to which I wish to refer is section 49, which enacts that "it shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person."

Now the point here is whether the letter, of the writing and sending of which the prisoner has been found guilty, is evidence of a demanding with menaces any property, money, &c. The point taken on behalf of the prisoner was that the word "menaces" in the 44th section means menaces importing injury to the person or property. It is to be noticed that the next section draws a distinction between demanding by menaces and demanding by force; so that it would seem that there was contemplated under the word menaces in section 44, not only threats involving injury to person or property, but threats of injury not confined to the person or property. Now the letter in the present case was undoubtedly a threat to expose to the prosecutor's wife conduct of gross indecency on the part of the prosecutor, and this was a threat much more serious than many threats of injury to his person or property would have been. It would be unfortunate if we were obliged to hold that an act of that description is excluded from the purview of the criminal law. It was suggested that the effect of section 49 is to limit the menaces mentioned in the previous sections to menaces of violence or injury to the person or property or of an accusation in the sense intended by section 46—that is, accusation of crime. I have come to the conclusion though not without some hesitation, that the term "menaces" in section 44 has a wider application and includes threats of injury to be brought about by the making of an accusation of misconduct not amounting to a crime. There is some authority for this view in the meaning assigned to the word "menace" in the dictionaries. In some, as in Johnson's Dictionary, it is described simply as a "threat"; but in Webster's Dictionary, one definition is "the indication of a probable evil or catastrophe to come." There being no definition in the statute itself, we must give to the word its ordinary natural meaning unless that is displaced by the context, or by the statute generally. I do not think there is anything in this statute to give the word a limited and restricted meaning. Authority upon the question is not very strong. In *Reg* v. *Smith*, 1 Den. C. C. 510, a letter of a very extraordinary kind was written threatening great evil to a bank, which was to be avoided if £250 was deposited in a place indicated; the question was whether this came within 7 & 8 Geo. 4, c. 29, s. 8, the provisions of which are reproduced by the 24 & 25 Vict. c. 96 and the court held without any hesitation that it did. In another case, *Reg* v. *Walton*, L. & C. 288, the court pointed out the character of the menace which must be used before it could come within the meaning of the statute. The prisoner had threatened to execute a distress warrant which he had no authority to do; and the conviction was quashed on the ground that it was not for the judge to do more than lay down the principle on which the jury should proceed in considering whether the menace was a menace within the meaning of the statute; that it was not for him to say, as a matter of law, that the prisoner's conduct constituted a menace within the statute, and that he ought to have told the jury that the question was whether the threat used was such as would naturally and reasonably operate on the mind of a reasonable man; in other words whether it would have such an effect as to deprive him of his free volition and put a compulsion on him to act as he would not otherwise act. In the present case no question arises as to the ruling of the learned judge; the jury have come to the conclusion that the threat was a threat of that description; and the only point for us is whether it is a menace within the statute. For the reasons I have given, I think the conviction was right.

POLLOCK, B.—I am of the same opinion and have nothing to add.

WILLS, J.—I am of the same opinion. I think that the case comes within section 49, although it is not necessary that it should do so; the words "injury" and "accusation" ought to receive a liberal interpretation, and not be confined to any specific class of injuries or accusations; that which will do a person harm comes, in my opinion, within the meaning of "injury." I do not think that the word "accusation" is confined to cases coming within section 46, which deals with accusations of offences of a peculiarly bad character, nor do I think that it applies only to accusations of criminal offences; it must have the meaning which it bears in ordinary language. With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or firm mind, I desire to say that that doctrine ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness of mind; but I quite appreciate the fact that the threat must not be one that ought to influence nobody.

CHARLES, J.—I am of the same opinion. I can see nothing in the other sections of the statute which places any restriction on the meaning of the word "menace" in section 44.

LAWRANCE, J., concurred.

Conviction affirmed.

Court of Appeal.

From Q. B. Div. (Lopes and Rigby, L JJ.) — May 11, 27.

BROWN, JANSON, & CO. v. A. HUTCHINSON & CO. (No. 2). (a.)

Partnership—Judgment against one partner—Judgment creditor—Execution—Order charging debtor's interest—Right to account against other partners—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *ss.* 23, 31.

Under section 23 *of the Partnership Act,* 1890, *there is jurisdiction to order accounts and inquiries against a*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

partnership firm on the application of a judgment creditor of one of the partners; but such jurisdiction ought to be exercised only in special circumstances.

Appeal from an order of Day, J., at chambers.

The action was brought by the plaintiffs, as holders of a bill of exchange for £3,000, against J. A. Hutchinson as drawer and the firm of A. Hutchinson & Co., of which he was a member, as acceptors. The plaintiffs obtained judgment under order 14 against J. A. Hutchinson, leave being given to the firm to defend the action.

The firm of A. Hutchinson & Co. was a French firm consisting of three members who carried on business as manufacturers and sellers of indiarubber goods. Their registered office was in Paris, but they had a branch office in London, and J. A. Hutchinson had formerly been the manager of the London branch business.

The plaintiffs obtained from Day, J., an order under section 23 of the Partnership Act, 1890, charging the interest of J. A. Hutchinson in the partnership property and profits with the amount of the judgment debt, and appointing a receiver of his interest; and this order was affirmed by the Court of Appeal (see *ante*, p. 533).

The plaintiffs then made a further application, and obtained from Day, J., a second order that the defendants A. Hutchinson & Co. should deliver to the plaintiffs an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants A. Hutchinson & Co., whether already declared or accruing, and of any other money which might be coming to him in respect of the said partnership, and that the said defendants should forthwith pay the profits and moneys found to be due to the said J. A. Hutchinson to the receiver appointed by the former order.

The firm of A. Hutchinson & Co. appealed against this second order.

Section 23 of the Partnership Act, 1890, enacts as follows:—"(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm. (2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may, by the same or a subsequent order, appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require."

Section 31 is as follows:—"(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

By section 33, sub-section 2, "A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt."

McCall, Q.C., and *Tindal Atkinson*, for the partners other than J. A. Hutchinson.—The order appealed from was wrongly made. The judgment creditor of one partner is not entitled under the Act to have an order for accounts as against the other partners. The Act does not place him in a better position than an assignee. His only right is to receive the debtor's share of the profits on an account agreed upon by the other partners.

Witt, Q.C., and *Bartley Denniss*, for the plaintiff.—The other side do not give effect to the last words of sub-section 2 of section 23, "or which the circumstances of the case may require." The section must mean that accounts and inquiries may be ordered against the other partners; for accounts and inquiries might be ordered against the judgment debtor quite independently of this statute.

Cur. adv. vult.

May 27.—LOPES, L.J., read the following judgment:—The facts of the case are as follows:—The plaintiffs brought an action against J. A. Hutchinson and the firm of A. Hutchinson & Co., of which he was a member, upon a bill of exchange for £3,000 drawn by J. A Hutchinson upon and accepted by the firm, and they obtained judgment against J. A. Hutchinson under order 14 for £3,034 17s., leave being granted to the firm to defend the action. The plaintiffs then applied by summons under section 23 of the Partnership Act, 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the judgment debt, and for the appointment of a receiver of his said partnership interest. This order was made and was affirmed by the Court of Appeal (see the report, *ante*, p. 533). Subsequently the learned judge at chambers ordered the defendants, A. Hutchinson & Co., to deliver to the plaintiffs an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants Hutchinson & Co. This is the order now appealed against.

It is said that there was no jurisdiction to make this order. The question depends on the latter part of sub-section 2 of section 23 of the Partnership Act, 1890. The object of this section is to get rid of the cumbrous and inconvenient mode by which partnership property was taken in execution for a partner's separate debt. A *fi fa* founded on a judgment obtained against one partner can no longer be executed against the goods of the firm, but a separate judgment creditor of a partner can obtain an order charging his interest in the partnership assets with the payment of the judgment debt, and the charge can be enforced by a sale or the appointment of a receiver. At the end of the section are these words:—"And direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require." Having regard to the words "or which the circumstances of the case may require," I am of opinion there is a jurisdiction to direct accounts, a jurisdiction

to be exercised at the discretion of the judge, but a jurisdiction which ought never to be exercised except in special circumstances, as, for instance, with a view to a dissolution rendered necessary either by the conduct of the parties or at their request. I find no such special circumstances in this case. The appeal must be allowed with costs.

RIGBY, L.J.—I am of the same opinion. I think that section 23 of the Partnership Act, if we read it in connection with section 31, does not entitle the plaintiffs to interfere with the defendant firm in the way allowed by this order. The Legislature intended that in ordinary circumstances the analogy of an assignment by a partner should be adhered to. Section 23 lays that down as the general rule. The words at the end of sub-section 2 no doubt give the judge a large discretionary power in special circumstances to depart from that rule. But in my opinion it is not to be departed from without a reason. And I think that there are no circumstances in this case to take it out of the ordinary rule. I therefore think that the order of the learned judge must be reversed.

Appeal allowed.

Solicitor for the appellants, *H. Montague.*

Solicitors for the respondents, *Hays, Schmettau, & Ancrum.*

High Court of Justice.

Chan. Div. } Feb. 19, 20; April 25, 26;
Chitty, J. } May 21.

In re GREER, NAPPER *v.* FANSHAWE. (*a.*)

Attachment of debt—Garnishee—Money in hands of sheriff—Judgment for payment of money into court—Modes of enforcing—Fraudulent breach of trust—Debt or liability incurred—Costs—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 30, *sub-section* 1—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11, *sub-section* 2—*R. S. C.,* 1883, *ord.* 42, *rr.* 3, 4; *ord.* 45, *r.* 1.

Garnishee proceedings will not lie upon an order for payment of money into court. Where garnishee proceedings are available, money in the hands of the sheriff, the proceeds of an execution levied by him, may be attached subject to the rights of the debtor's trustee in bankruptcy under the Bankruptcy Act, 1890, *s.* 11, *sub-section* 2.

Costs incurred in an action relating to a fraudulent breach of trust, and ordered to be paid by the trustee, are not "a debt or liability incurred by means of any fraudulent breach of trust" within the meaning of the Bankruptcy Act, 1883, *s.* 30, *sub-section* 1, *and will therefore be released by the trustee's discharge in bankruptcy, or by any composition equivalent thereto.*

Application to make a garnishee order *nisi* absolute.

The order *nisi* attached money in the hands of the sheriff, the proceeds of an execution levied by him on behalf of the defendant, such money being attached to answer,

(1) A sum of money which the defendant had been ordered to pay into court in respect of a fraudulent breach of trust; (2) a sum of £119 which he had been ordered to pay to the applicant for taxed costs incurred in the action relating to such breach of trust.

The order *nisi* was made within fourteen days of the completed execution—*i.e.*, while the proceeds were still liable to be claimed by a possible trustee in bankruptcy of the debtor under section 11, sub-section (2) of the Bankruptcy Act, 1890.

In April, 1891, the defendant was adjudicated bankrupt, and in February, 1894, an order was made approving of a composition and annulling the bankruptcy. The following questions, therefore, arose on the application:—

(1) Whether a garnishee order could be founded on the order for payment into court;

(2) Whether money in the hands of the sheriff could be garnished;

(3) Whether the principal sum and the sum of £119 costs constituted "a debt or liability incurred by means of the fraudulent breach of trust" so as not to be released by the composition under sections 23 and 30 of the Bankruptcy Act, 1883.

E. Cooper Willis, Q.C., for the applicant.—A judgment for payment of money into court is a judgment for the recovery of money within ord. 45, r. 1, and can be enforced by garnishee proceedings. The sheriff can be made a garnishee. An action for debt, or for money had and received lies against him: *Cockram* v. *Welbye,* 2 Shower's Rep. K. B. 79; *Speake* v. *Richards, ib.* 289; *Morland* v. *Pellatt,* 8 B. & C. 722; and therefore money may be attached in his hands: *Murray* v. *Simpson,* 8 Ir. C. L. R. (Appx.) 45. The sheriff's position as garnishee was also recognized in *Ex parte Adams, Dallow* v. *Garrold,* 33 W. R. 123, 219, 13 Q. B. D. 543, 14 *ib.* 543, though the point was not argued. Money may be attached in the hands of other officers of the court—*e.g.*, a receiver: *In re Cowans' Estate, Rapier* v. *Wright,* 28 W. R. 827, 14 Ch. D. 638. See also *Chatterton* v. *Watney,* 29 W. R. 373, 573, 16 Ch. D. 378, 383, 17 *ib.* 259. Again, both the principal sum and the costs constituted a debt or liability incurred by means of the fraudulent breach of trust, and were, therefore, not released by the composition which, by virtue of section 13, sub-section (8), and section 23 of the Bankruptcy Act, 1883, operates in the same way as a discharge under section 30, sub-section (1): *Flint* v. *Barnard,* 37 W. R. 185, 22 Q. B. D. 90; *Ramskill* v. *Edwards,* 34 W. R. 96, 31 Ch. D. 100.

Byrne, Q.C., and *T. Willes Chitty,* for the defendant.—A judgment for payment of money into court can be enforced by writ of sequestration or personal attachment under ord. 42, r. 4; and, of course, by equitable execution, but not by garnishee proceedings. Judgments for payment of money to a person, on the other hand, are enforced in the ways provided by ord. 42, r. 3. The distinction is recognized in *De La Pole* v. *Dick,* 33 W. R. 585, 29 Ch. D. 351. As to the second point, as a general proposition money in the hands of the sheriff is a debt due from him. But it does not become a debt till the fourteen days grace allowed by the Bankruptcy Act, 1890, s. 11, sub-section (2), have expired. It is not even a "debt accruing" within ord. 45, r. 1. There must be an absolute unconditional debt, not a bare possibility of a debt. *Webb* v. *Stenton,* 11 Q. B. D. 518, 31 W. R. Dig. 8; *Howell* v. *Metropolitan District Railway Co.,* 30 W. R. 100, 19 Ch. D. 508. This money might never have become a debt at all. [CHITTY, J.—Is it not a present debt payable at the end of fourteen days unless something happens in the meantime?] It is not a debt until that something happens. As to the third point, the costs at any rate were not incurred "by means of"

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

any fraudulent breach of trust. "By means of" is not equivalent to "in consequence of."

E. Cooper Willis, in reply.—The Bankruptcy Act, 1890, s. 11, sub-section (2), only gives the trustee the power of intercepting the debt within fourteen days. If the garnishee paid it *bonâ fide* he would be discharged, but the trustee could follow the money: *In re Smith, Ex parte Brown*, 36 W. R. 403, 20 Q. B. D. 321, 330. In *Webb* v. *Stenton*, and *Howell* v. *Metropolitan Railway District Co.* there was no money in hand, so those cases are not analogous.

Cur. adv. vult.

May 21.—CHITTY, J.—Very many points were argued on the hearing of this application to make the garnishee order absolute. But on consideration, it appears to me that the case falls to be decided on a few comparatively simple grounds.

The order *nisi* attached money in the hands of the sheriff to answer, first, a sum of money which the defendant had been ordered to pay into court; and, secondly, a sum which he had been ordered to pay to the applicant for costs which have been taxed at £119.

The first question is whether a garnishee order can be made attaching a debt to answer a sum of money ordered to be paid into court. This depends on orders 42 and 45 of the Rules of Court. By rule 4 of order 42 a judgment, which includes an order for the payment of money into court, may be enforced by writ of sequestration, or, in cases in which attachment is authorized by law, by attachment; attachment here means attachment of the person. By rule 3 a judgment for the recovery by or payment to any person of money, may be enforced by any of the means by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof. A judgment or order for payment of money into court is thus clearly distinguished from a judgment or order for the recovery by, or payment to, a person of any money, and different modes of enforcing payment are provided. The distinction is maintained by the Court of Appeal in *De La Pole* v. *Dick*. Judgments for recovery of money are final, and orders for payment of money are generally final, but judgments or orders for payment into court are generally not final. The money paid in may be paid for security only or for safety of the fund and the person ordered to pay in not unfrequently is entitled to have some part of the money afterwards paid out to him. Ordinary writs of execution are, therefore, not made applicable to orders for payment into court.

I now turn to order 45, the order which relates to the attachment of debts. Rule 1 of that order provides that the court or a judge may upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money, order that the debts owing or accruing from the garnishee shall be attached to answer the judgment or order. Thus far no distinction appears to be made between a judgment or order to pay to a person, and a judgment or order to pay into court. But the rule goes on to provide that it may be ordered that the garnishee shall appear to show cause "why he should not pay to the person who has obtained such judgment or order" the debt due from him or so much thereof as may be sufficient to satisfy the judgment or order. This latter part of the rule governs the previous part and shows unmistakeably that judgments or orders for payment into court are not within the rule. Payment to the person who has obtained a judgment or order for payment to himself would be a satisfaction or part satisfaction as the case might be of such a judgment or order; payment to him would not only not be a satisfaction of a judgment or order to pay into court but would be inconsistent with the judgment or order. Take the case of a tenant for life of a trust fund obtaining an order against a trustee for payment of the fund into court; payment by the garnishee to the tenant for life would be in contravention of the order. Many other similar illustrations might readily be given. Other rules in order 45 point in the same direction as the first rule of the order. The result, in my opinion, is that garnishee proceedings will not lie upon an order for payment of money into court. Such proceedings have now been in operation since the Common Law Procedure Act, 1854, and the applicant's counsel was not able to produce any authority for a garnishee order being founded on an order for payment into court.

The first part of the application therefore fails. The objection which I have sustained does not apply to the sum ordered to be paid to the applicant for the taxed costs.

The second question is whether money in the hands of the sheriff can be attached by a garnishee order. It is practically admitted by the defendant that apart from the Bankruptcy Act, 1890, s. 11, sub-section (2), it is capable of being attached. The result of the authorities, apart from that enactment, is that the sheriff holds the money to the use of the execution creditor and is liable to be sued for it in an action for money had and received. It is sufficient to cite the judgment in *Morland* v. *Pellatt*, 8 B. & C. 722, 726, 727. By the enactment referred to the sheriff is directed to retain the money for fourteen days, and in the event of bankruptcy supervening the execution creditor loses his right to the money. The effect is to place a temporary embargo or stop on the money. If more technical language is requisite, I hold that the execution creditor's right to the money is vested, but liable to be divested. His right to the money is not a contingent but a vested right. In this case no bankruptcy has supervened.

The remaining question, however, is whether the defendant has been released from the payment of the £119 by the composition. The effect of the composition under section 23 of the Bankruptcy Act, 1883, is that the debts in respect of which the composition is binding under the section include all debts and liabilities which would be released by an order of discharge in bankruptcy: *Flint* v. *Barnard*. It was argued on behalf of the applicant that the sum ordered to be paid into court was a debt or liability incurred by means of a fraudulent breach of trust of the defendant and therefore within section 30, sub-section (1) of the same Act, and further, that the sum of £119 ordered to be paid for costs incurred in the action relating to the breach of trust was also a debt or liability of a similar character. But the words of the section are plain—viz., "debt or liability incurred by means of any fraudulent breach of trust." Assuming that the money ordered to be paid into court did fall within that enactment, it appears to me that the costs, though incurred as consequential upon a breach of trust, are not within it. They are not a debt of liability incurred by means of the fraudulent breach of trust. I may refer, although the language of the enactment is different to section 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and state that an attachment never goes in respect of costs, but only in respect of the principal sum involved in the breach of trust. The practice of the court upon this point is completely settled: *Middleton* v. *Chichester*, 19 W.

369, L. R. 6 Ch. App. 152. The result, therefore, is that I can make no order on this application.

Solicitors, *C. T. Nicholls; H. H. Fanshawe.*

Chan. Div. } Chitty, J. } May 15, 16.

In re CLAYTON AND BARCLAY'S CONTRACT. (*a.*)

Bankruptcy—Undischarged bankrupt—After-acquired property—Leaseholds—Transactions before intervention of trustee—Disclaimer—Vendor and purchaser—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 55, 168.

The general rule in Cohen *v.* Mitchell, 38 *W. R.* 551, 25 *Q. B. D.* 262, *applies to leaseholds, so that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him* bonâ fide *and for value in respect of his after-acquired leasehold property, whether with or without knowledge of the bankruptcy, are valid against the trustee.*

In re New Land Development Association and Gray, 40 *W. R.* 295, 551, [1892] 2 *Ch.* 138, *discussed.*

Quære, *whether the Bankruptcy Act*, 1883, *s.* 55 (*Disclaimer of Onerous Property*), *applies to the case of after-acquired leaseholds.*

Vendor and purchaser summons.

In 1891 leases with onerous covenants were granted to an undischarged bankrupt. In 1892 the bankrupt mortgaged the property to the vendors. In 1894 the vendors took possession of the property as mortgagees, and shortly after—viz., on the 4th of May, 1894, they contracted to sell the property to the purchasers. The trustee in bankruptcy had not intervened or claimed the property. The purchasers having discovered that the bankruptcy was still subsisting, objected that no good title was shown.

F. Cooper Willis, for the vendors.—The vendors got their mortgage before the trustee intervened, and can, therefore, make a title without his concurrence, according to the general rule in *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262; *Ex parte Dewhurst*, 20 W. R. 172, L. R. 7 Ch. App. 185; *In re Clarke, Ex parte Beardmore*, [1894] 2 Q. B. 393, 38 SOLICITORS' JOURNAL, 492. The exception to the rule made by *In re New Land Development Association and Gray*, 40 W. R. 295, 551, [1892] 2 Ch. 138, is confined to real estate. Otherwise a bankrupt could saddle the trustee with after-acquired, onerous leaseholds, to which the disclaimer section (Bankruptcy Act, 1883, s. 55) does not apply. The trustee might become personally liable: *Ex parte Dressler, In re Solomon*, 27 W. R. 144; 9 Ch. D. 252. The trustee will join and admit that he claims no interest.

Carson, for the purchasers.—The reasons given for the decision of *In re New Land Development Association and Gray*, apply with equal force to leaseholds. After-acquired leasehold property can be disclaimed under section 55, but where there is a mortgage, only with the leave of the Bankruptcy Court: Bankruptcy Rules, 1886, r. 320. Leave would not be given to disclaim a valuable interest like this: *Ex parte East and West India Docks Co., In re Clarke*, 30 W. R. 22, 17 Ch. D. 759, and for the trustee to join as proposed, without any consideration, would be a direct breach of trust. In any case the title is too doubtful to be forced on the purchasers.

CHITTY, J.—It is contended by the purchasers that by virtue of section 44 of the Bankruptcy Act, 1883, read in connection with sections 54 and 168, the interest in the term granted to the bankrupt passed upon the bankruptcy, *eo instanti* to his trustee in bankruptcy. On the other hand it is argued by the vendors that the decision of the Court of Appeal in *Cohen* v. *Mitchell* applies, and that the property does not vest in the trustee till he intervenes. In *Cohen* v. *Mitchell* the Court of Appeal, after deliberation, laid down the law respecting the after-acquired property of a bankrupt in these words, "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." I had to consider in the case of *In re New Land Development Association and Gray*, the question whether the Court of Appeal intended to apply this proposition to real estate, and for reasons that I then gave I held that real estate was not within the view of the Court of Appeal when it laid down that proposition. It seems that what I thus held has met with the approval of the Court of Appeal, when brought before it in the same case of *In re New Land Development Association and Gray*.

The present case, however, is not a case of a freehold interest in land. It is a case of a chattel interest subject to onerous covenants. If the purchasers are right, mortgages by the bankrupt even if made the day after he got the leases would have conferred no title on the mortgagees. If, on the other hand, the proposition of the Court of Appeal applies, it being clear that the trustee has not intervened, nor does he desire now to intervene, the question is whether I ought to read in another exception to the proposition of the Court of Appeal—viz., an exception of a chattel interest in land. Possibly some of the reasons I have given in *In Re New Land Development Association and Gray* may apply with somewhat diminished force to the case of a chattel interest. But I have to consider whether any such reasons will justify me in introducing a further limitation to the general proposition laid down by the Court of Appeal. It appears to me that I ought not to introduce any such further limitation. The language of the Court of Appeal is large enough to include all property. It is certainly large enough to include chattel interests in land, and I consider that I ought to apply it to such interests.

I can see various inconveniences which may arise if I hold that the proposition does not apply. I will not go into them, but will merely say that it is not at all clear that the disclaimer section—*i.e.*, section 55 of the Bankruptcy Act, 1883, applies at all to the case of after-acquired leaseholds. It is clear that some of its provisions do not apply, such for instance as the limitation of the power of disclaimer to a period of three months after the trustee's first appointment. It would be a strange thing if after-acquired leasehold property vested *eo instanti*, without intervention, according to the purchaser's argument that the trustee should have no power given him under section 55 to disclaim such property. I merely mention the point without expressing any opinion. The result is that as the trustee had not intervened when the mortgage was made the mortgagees acquired a good title as against the trustee. The trustee has not only not intervened but is ready to join to show he consents to the sale. This will put an end to any possible question in regard to the fact of non-intervention. The deed of assignment may properly contain some words to that effect if the purchasers desire it. Then the purchasers say the title is too doubtful to be forced on them. But this is not a question of the construc-

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

tion of a private document or a doubtful statute. The Court of Appeal has already had the question before them and decided it, and this court does not consider a title doubtful when the Court of Appeal has given an opinion in its favour.

No costs.

Solicitors, *Beaumont & Son; Irvine, Hodges, & Borrowman.*

Chan. Div. North, J. } May 24.

NICHOLSON *v.* HARPER. (*a.*)

Sale of goods—Lien—Delivery—Sale of Goods Act, 1893 (56 & 57 *Vict.* c. 71), s. 25.

Where goods have been warehoused, and the owner has sold them, although the purchaser has not taken possession of the goods, a subsequent document purporting to give the warehousers a lien for sums due to them by the vendor, is not binding upon the purchaser.

Motion.

Messrs. Gammage & Hollingum, on the 3rd of September, 1891, wrote to Mr. Goldsmith: "We accept your offer of £120 per annum for three years for bin room in our cellars to hold a quantity of 6,500 bottles or half bottles; should this quantity be increased rent to be charged at the rate of one penny for six dozen bottles or half bottles a week extra."

Mr. Goldsmith, on the 25th of September, 1893, wrote to Messrs. Gamage & Hollingum: "I agree to take from you cellar room in your London-street cellars for not more than 4,500 dozen wines and spirits at a rental of £120 per annum for five years from the date of expiration of present existing agreement. Should the quantity of wine, &c., at any time exceed 450 dozens I agree to pay you an additional rent to be mutually agreed."

On the 15th of January, 1894, the plaintiffs, Messrs. Nicholson & Co., bought from Mr. Goldsmith 248 dozen of old port, subject to an agreement that they might leave the wine in cellars to be provided by Mr. Goldsmith for twelve months, rent free.

On the 16th of January, 1894, Mr. Goldsmith's clerk wrote to Messrs. Nicholson: "I beg to send invoice and delivery order for the port. If you require to take delivery please arrange with Messrs. Gammage & Co., as their cellar is not always open."

Messrs. Nicholson received the invoice and paid for the wine, but did not receive the delivery order. Messrs. Gammage & Co. did not receive any notice of the sale of the wine.

On the 31st of May, 1894, Mr. Goldsmith wrote to Messrs. Gammage & Co.: "In consideration of your having advanced to me this day the sum of £1,500 as a loan for twelve months at 7 per cent. per annum interest, I hereby give you, as collateral security, a lien on all the wines and spirits now lying in your cellars"; and on the 7th of November, 1894, he wrote to them: "In consideration of your accepting for my accommodation the two drafts enclosed—viz.,

£149 17s. due 7th February, 1895,
£200 due 11th February, 1895,

I give you as security for these and any similar drafts you may hereafter accept for me, all my stock of wines and spirits held by you over and above those you retain as security for your loan to me of the 31st of May last."

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

In March, 1895, Mr. Goldsmith became bankrupt. He then owed £2,391 to Messrs. Gammage & Co. of which £1,900 was secured upon wine other than that now in question.

The defendant Harper was the trustee of the bankrupt's estate, and he arranged with Messrs. Gammage & Co. for the sale by auction of the wine, subject to their charge, to ascertain for what amount they should be allowed to prove. On the sale being advertised the plaintiffs commenced this action, and applied for an injunction to restrain the sale. The hearing of the motion was treated as the trial of the action.

Swinfen Eady, Q.C. and *Eve*, for the plaintiffs.—We purchased the goods, and no lien could be given by the vendor after he had sold to us.

Vernon Smith, Q.C. and *Rowdon*, for the defendants.—The letters of the 31st of May, 1894, and the 7th of November, 1894, amount to a transfer of documents of title, and our lien is binding on the plaintiffs. We rely upon the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71 s. 25)

NORTH, J.—I think that the plaintiffs have made out their case. On looking at sections 17 and 18 of the Sale of Goods Act, 1893, it seems clear that the purchasers were entitled to the property in the goods. At the date of the purchase they did not wish to have possession of the goods, which were accordingly left with the vendor. On the 16th of January, 1894, the purchasers received a letter which informed them that the goods were in the possession of Messrs. Gammage & Co. In the spring of 1895 the plaintiffs became aware that the defendants intended to sell the goods, and applied to the court to restrain the sale. The question to be decided is whether the goods belong to the plaintiffs free from any claim by Messrs. Gammage & Co. The goods were left by Goldsmith in Messrs. Gammage & Co.'s warehouse, and it was agreed that Goldsmith was to have cellar-room for five years for a certain payment. After this Goldsmith became bankrupt. Messrs. Gammage & Co., say that they have a valid charge upon the wine created by the two documents of the 31st of May, 1894, and 7th of November, 1894. The question is, was Goldsmith in a position to give them a valid charge? There were cases before the Sale of Goods Act, 1893, but I need not now deal with them. It is clear that Goldsmith could not give any charge upon goods unless they were really his. What is necessary to establish title is that a person should make an actual delivery of the goods, or a transfer of the documents of title to some person without notice. Either delivery or transfer is necessary. Messrs. Gammage & Co. were in possession before the sale and have continued in possession. The words of section 25 mean by "documents of title," certain well-known mercantile documents. There has been no delivery of the goods to Messrs. Gammage & Co. since the sale, nor has there been any transfer of documents of title. It is said that there was a transfer of some interest in the goods, but unless the requirements of the Act are observed the Act furnishes no protection. Messrs. Gammage & Co. were in possession before the sale and have continued in possession ever since, but there has been no delivery since the sale. Messrs. Gammage & Co. have not shown that they are entitled to keep the goods of the plaintiffs', and they ought to deliver them up to the plaintiffs who have made out their title to the goods, but the plaintiffs must pay any warehouse charges for which Messrs. Gammage & Co. have a common law right of lien.

Solicitors for the plaintiffs, *Nash, Field & Co.*

Solicitors for the defendants, *Park, Nelson & Co.*

Chan. Div.
Romer, J. } May 30, 31, 1894.

GWYNNE v. DREWITT. (a.)

Highway — Turnpike road — Statute — Closing public rights of way—Effect of repeal as to rights of way closed thereunder.

A local Act was passed in 1819, *to continue in force for twenty-one years, enacting that a new turnpike road should be made, and a certain public bridleway across a farm closed to prevent the evasion of tolls, and vesting in the owner of the farm the freehold of the bridleway in exchange for land of his taken for the purposes of the turnpike road, and imposing penalties on any person using the bridleway in future. The Act was, by subsequent Acts, continued in force till* 1856, *and then repealed.*

Held, that the public right of bridleway was not revived by the repeal.

Trial of action.

The plaintiff, Gwynne, was owner in possession of a farm, known as Wootton Farm, in the parishes of Folkington and Jevington, Sussex. The defendants, W. J. Drewitt and J. Drewitt, alleged that there was a public right of way across the farm between two points indicated.

A bridleway in the direction indicated had formerly existed, but had been discontinued by a local Turnpike Act passed in the year 1819 (59 Geo. 3, c. x.). By section 1 of that Act, after reciting certain previous Turnpike Acts, and that it would be more advantageous for the public that a road therein referred to, being circuitous and inconvenient, should be abandoned and a new turnpike road made, it was enacted that from the 25th of March, 1819, the recited Acts should be repealed, and the Act now being stated should take effect for the purpose of making and keeping in repair the proposed new road.

Section 51 enacted that immediately after the new turnpike road should be opened for traffic and certified "the several highways following shall be stopped up, and the same are hereby declared to be stopped up and discontinued." One of these highways was the bridleway across Wootton Farm above mentioned. It was further enacted by the same section, *inter alia*, that the bridleway should be and was thereby declared to be vested in Gwynne's then predecessor in title "in exchange for his lands which are to be taken and used for the purposes of this Act." And it was further declared that after the bridleway had been stopped up and discontinued it should not be lawful for any person or persons (except as therein mentioned) "to use or claim the use of the same . . . bridleway . . . as a . . . bridleway or footway," any person unlawfully passing over the same on foot or otherwise being made liable to a penalty of 40s.

By section 92 it was enacted that the Act should commence on the 25th of March, 1819, and continue for twenty-one years and thereafter to the end of the then next session of Parliament.

The new turnpike road was in due course opened in compliance with the Act, and the bridleway stopped up and discontinued.

By the Lewes, Eastbourne, and Hailsham Turnpike Act, 1856 (19 & 20 Vict. c. xcvi.), it was enacted that the Act 59 Geo. 3, c. x., which had been continued from time to time by different Acts of Parliament, and would expire on the 1st of November, 1856, should, from and after that date be repealed, and that the Act now being stated should from that date commence and be put in execution during a term of twenty-one years and to the end of the next following session of Parliament, for the purpose of maintaining, improving, and keeping in repair the turnpike road therein mentioned.

Under the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), the turnpike road became a "main road."

This action was brought by Gwynne against W. J. Drewitt and J. Drewitt to restrain them and each of them, from wrongfully entering on or crossing over any part of Wootton Farm in assertion of any alleged right of way or otherwise.

Neville, Q.C., and *Ingle Joyce*, for the plaintiff.—What had been done under the Act of 1819 did not become inoperative by its repeal. The bridleway was closed and the freehold therein vested in the plaintiff's predecessor in title before the repeal, which could not revive the right of way. Its dedication as a highway before 1856 would have been a breach of the Act of 1819.

They referred to *Surtees* v. *Ellison*, 9 B. & C. 750; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38; Hardcastle on the Construction of Statute Law, 2nd ed., p. 392.

Hopkinson, Q.C., and *Dale Hart*, for the defendants.—The Act of 1819 provided for the making and maintaining of a turnpike road and for the closing of certain other roads and ways to insure the payment of tolls, which cannot now be levied: *Cessante ratione legis, cessat ipsa lex.* The repeal of the Act of 1819, which was only a temporary Act, operated to revive the public rights over the roads and ways which had been closed.

They referred to *Simpson* v. *Ready*, 11 M. & W. 344.

ROMER, J.—The Act of 1856 which repealed the Act of 1819 did not, in my judgment, revive the old ways which had been stopped up and discontinued. The old ways referred to in section 51 of the Act of 1819 were stopped up and discontinued, and the soil of those ways in my judgment vested for ever in the persons referred to. The Act of 1819 contained a variety of provisions which had to be continued from time to time, and accordingly the Act was continued only for a term under section 92; but the provision in section 51 was something which was done once for all, and was not intended to be undone at the expiration of the term.

When the Act of 1819 was repealed by the Act of 1856 I cannot think that it was the intention of the Legislature or the effect of the latter Act to undo what had been already done during the continuance of the former Act or to revive these ways, which had been once for all discontinued and put an end to as public ways.

I must therefore hear the evidence on both sides to see whether there has been a re-dedication since 1856. [On the evidence his lordship decided that there had been no re-dedication, and declared that there was no public right of way, and granted an injunction accordingly, and ordered the defendants to pay the costs of the action.]

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Raper & Ellman*, Battle; *F. Hatton*, for *F. Lawson Lewis*, Eastbourne.

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

Chan. Div.
Romer, J. } May 17.

NORTH METROPOLITAN TRAMWAY CO. v. LONDON COUNTY COUNCIL. (a.)

Tramway — Local authority — Purchase of part of tramway—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.

Under section 43 *of the Tramways Act,* 1870, *a local authority has the right to purchase a tramway within its district within twenty-one years from the special Act or order authorizing its construction, although such tramway has been incorporated by subsequent Acts in a common undertaking with other tramways as to which the right of purchase has not arisen, or which may not be in the district of the authority claiming to purchase, and although the effect of such purchase may be to disconnect the general system of the owners of the tramway. In section* 43 *of the Tramways Act,* 1870, *the word "undertaking" is limited by reference to the tramway previously mentioned in the section.*

This was in form an action for trespass, and the statement of claim stated that the plaintiffs were on the 30th of July, and still are, owners and occupiers of premises known as the Kingsland-road Granary, in the county of Middlesex, "and that the defendants, by their agent, on the 30th of July, 1894, wrongfully broke and entered the said premises and trespassed thereon, and threatened, by their agent, to continue such trespass."

The defendants denied the trespass, and asserted that "in pursuance of the Tramways Act, 1870," they had duly served notice on the plaintiffs, requiring them to sell so much of the tramway work and undertaking of the plaintiffs as were within the county of London and as were authorized by the North Metropolitan Tramways Act, 1871.

The facts of the case were as follows:—

Section 43 of the Tramways General Act, 1870, empowers the local authority in any district, within twenty-one years from the time when the promoters were empowered to construct such tramway with the approval of the Board of Trade, by notice in writing to require "such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district."

The plaintiffs were incorporated by a special Act in 1869. In 1870, on the day after the passing of the Tramway General Act, they obtained another special Act, which did not incorporate the general Act, but put in a section similar to section 43, but limiting the period of purchase to twenty-eight instead of to twenty-one years.

Other special Acts authorising the extension of the plaintiff's lines were passed between the years 1871 and 1892.

In the plaintiffs' special Act of 1871 it was laid down that the expression "the tramways" should mean the tramways and walks by this Act authorized, or any part thereof; and the expression "the undertaking" should mean the undertaking of the company as authorized by the Acts, 1869, 1870, and this Act.

In a similar way the later special Acts referred to the newer tram-lines as part of the undertaking. At the present time the whole undertaking of the plaintiffs covered about forty-nine miles, and the tramways to which the defendants' notice applied, about nineteen. It appeared that if the purchase took place some part of the plaintiffs' system would be disconnected. The plaintiffs maintained that the whole system now formed one undertaking, and that the defendants' right to purchase did not arise until twenty-one years from the date of the last special Act.

Sir R. Webster, Q.C., Cripps, Q.C., Carrington, and *F. Richardson,* for the plaintiffs. — As fresh powers are given to the North Metropolitan Tramways Co., the Parliamentary contract is brought forward, and the date from which the defendants are entitled to purchase the undertaking is only from the expiration of the twenty-one years from the making of the last authorized piece. Further, Parliament cannot have intended a local authority to pick and choose the portion of an amalgamated undertaking which they would take, leaving upon the promoters useless ends of line.

Finlay, Q.C., Neville, Q.C., G. M. Freeman, for the defendants.—Section 43 shows by its very terms that the contention of the plaintiffs cannot be supported. The section says the promoters shall sell the undertaking, or so much of it as is within their district—that manifestly contemplates that a part of the line can be out of the district, and necessarily that the line will be split up, owing to the fact that only a part of it is in the district of the local authority—upon terms of "paying the then value of the tramway." That tramway can only be such tramway as is mentioned in the earlier part of the section. The period within which the power to purchase arises is twenty-one years from the time they were authorized to construct the tramway, and the terms of purchase are that the local authority is to pay the then value of the tramway; that is of the particular tramway authorized by the particular Act. It cannot be a different tramway by reason of subsequent extensions or previous constructions. If the plaintiffs' contention was sound, the effect of the Act of 1871 would have been supposing no fresh lines were made to have enabled the defendants to purchase the undertaking authorized by the Act of 1870 at the expiration of twenty-one years after 1871. The word undertaking was only used in the Act to cover the business and goodwill, as well as the tram lines and plant of the company.

ROMER, J.—On the main question the London County Council are in my judgment clearly right in their contention. In construing section 43 of the General Act of 1870 it appears to me clear that the word "undertaking" is limited by reference to the tramway previously mentioned in the section, that is, the special tramway which the promoters are empowered to construct by any Act or provisional order. The word "undertaking" was no doubt used instead of the word "tramway" in order to make it clear that the local authority was to be entitled to acquire the business of the tramway company so far as it related to the special tramway.

This being in my opinion the true construction of the section, I cannot see that there is any real difficulty when the section has to be applied in the case before me. By the special Act of 1871 the expression "the tramways" as used in that Act was defined to mean the tramways and works by the Act authorized and which the defendants are now requiring the plaintiffs to sell and are hereinafter referred to as the 1871 tramways, while the expression the "undertaking" was very naturally defined to be the undertaking of the company as authorized by its special Acts of 1869, 1870, and 1871. The general Act of 1870 was incorporated, and under the powers of section 43 the London County Council are now entitled (the Board of Trade approving) to require the plaintiffs to sell their 1871 tramways and their undertaking so far as it relates to them

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

tramways. I do not see that this section is rendered inoperative or affected by the fact that the plaintiffs have other tramways, some of which were authorized by the prior special Acts of 1869 and 1870 respectively, and others which have been authorized by later special Acts, or by the fact that their general undertaking relates to these other tramways or to the 1871 tramways, and has from time to time as further tramways have been authorized, been recognized and defined by the various special Acts as extending to and including the further tramways.

The contention of the plaintiffs, if adopted, would lead to a great difficulty. By their special Act of 1870 a Parliamentary bargain was made under peculiar circumstances which fixed the time at the expiration of which the local authority could compel the plaintiffs to sell their 1867-70 tramways at twenty-eight years from the passing of the Act, instead of twenty-one years the period fixed by the general Act of 1870. Would not the plaintiffs have been justly entitled to complain if no special Act had been passed after the 1871 Act, and the London County Council had, at the end of twenty-one years from that Act, claimed to buy not only the 1871 tramways, but also the 1869 and 1870 tramways. And yet if the plaintiffs' present contention was correct that would have been the effect of the 1871 Act. With regard to the argument founded on the inconvenience of the plaintiffs being obliged to sell their 1871 tramways only, leaving on their hands their other tramways, some of which could not be worked efficiently or profitably by themselves, I do not think that this is of much weight for the following reasons. Any purchase by the local authority has to be subject to the approval of the Board of Trade, who could, no doubt, refuse their approval in a proper case. The plaintiffs, when they took powers to construct small pieces of tramway, did so at their own risk, well knowing the provisions of the general Act. Moreover, section 43 of the general Act expressly contemplates a tramway company being liable to sell portions only of its tramway, for if the tramway is in more than one district a local authority is entitled to buy so much only of the tramway, as is in their district. For these reasons, I think that the plaintiffs' contention fails and a declaration must be made to that effect.

Solicitors, *Hugh Godfrey; W. A. Blaxland.*

Chan. Div.
Vaughan Williams, J. } March, 21 22.

In re THEATRICAL TRUST (LIMITED).
CHAPMAN'S CASE. (*a.*)

Company—Shares—Issue of paid-up shares—Registered contract—Payment not in cash—Illusory consideration —Companies Act, 1867 (30 & 31 *Vict.* c. 131), *s.* 25.

In deciding whether section 25 of the Companies Act, 1867, *has been complied with, the court is not bound to go into the question whether the price given was fair or reasonable, or whether the things given for the shares had a cash value in the market equal to the nominal value of the shares.*

The above-named company was formed in December, 1891, to acquire certain dramatic copyrights and agency contracts from W. E. Chapman. Chapman, Brandon, and two other persons were the first directors.

In July, 1892, an agreement was entered into between Chapman and Brandon whereby Chapman agreed to transfer 400 fully paid shares in the company to Brandon in consideration of Brandon acting as the company's solicitor. On the 10th of August, 1892, an agreement in writing was entered into between Chapman and the company (the directors present being Chapman, Brandon and another) for sale of the contracts, &c. The consideration for the sale was expressed to be Chapman's services and the transfer by him of "the benefit of the contracts in respect of agency and other business (if any) which he had entered into or was in negotiation for" and the payment by him of the expenses of starting the company. The price to be paid by the company was £4,600, to be paid as to £100 in cash, as to £3,200 in fully paid shares of £1 each, and as to £700 in fully paid founder's shares of £10, each and Chapman was to become manager of the company at a salary. No copyrights or contracts were ever handed over, but Chapman deposited afterwards, on the request of the directors, a list of such copyrights and contracts. The agreement of August 10 was duly filed with the registrar of joint-stock companies and 3,900 shares in the company were allotted to Chapman as fully paid up; 400 of these shares he transfered to Brandon and 200 to Greville.

The company was being wound up under the supervision of the court and the liquidator placed the names of Chapman, Greville, and Brandon on the list of contributories, and they now applied to have their names removed from the list.

W. E. Vernon, for Chapman's and Brandon's applications.

Rose-Innes, for Greville's application.

Manson and *James Roberts*, for the liquidator.—The consideration was illusory, and there was no payment within the meaning of section 25 of the Company's Act, 1867. There must be payment in full; section 25 only regulates the mode of payment, *Re Addlestone Co.*, 36 W. R. 57, 37 Ch. D. 191, 205; *Ooregum Gold Mining Co. of India* v. *Roper*, 41 W. R. 90, [1892] A. C. 125. In *Re Eddystone Marine Insurance Co.*, 41 W. R. 642, [1893] 3 Ch. 9, where the consideration is admittedly unsubstantial and illusory and the company does not get the value of the shares, the difference must be paid up in full. *In re Almada and Tirito Co.*, 36 W. R. 593, 38 Ch. D. 415.

They also refered to *Pell's case*, 17 W. R. 1,054, 18 W. R. 31; L. R. 8 Eq. 222, L. R. 5 Ch. App. 11, and *The London Celluloid Co.*, 36 W. R. 673, 39 Ch. D. 190.

Vernon and *Rose-Innes* replied.

VAUGHAN WILLIAMS, J.—I am satisfied the agreement was filed in accordance with section 25 of the Act of 1867. The next question arises with reference to the shares issued to Chapman. It was said that they were issued without any intention that he should pay for them and that his case is therefore within *Re Eddystone Marine Insurance Co.* and *Re Almada and Tirito Co.* The effect of these cases is that section 25 of the Act of 1867 only shows the mode in which payment for shares is to be made, and that if a person complied with that section the result is that he may pay otherwise than in cash, but they do not decide that even where an agreement is registered the shareholder is altogether relieved from payment. The moment he is relieved from the obligation of paying in cash, he may pay in goods, or things without a physical existence, such as a goodwill or a licence. But the cases decide that a man must really pay for the shares, and further, that if the contract makes it manifest on its face that the taker of shares is paying less than their nominal cash value, he may be liable for the balance. They do not say, however,

(*a.*) Reported by V. DE S. FOWKE, Esq., Barrister-at-Law.

that the court can take each contract and say whether the price given is fair and reasonable, or whether the thing given for the shares has a cash value in the market equal to the nominal value of the shares. I do not think the court is concerned with that question. There is no difficulty in *Re Eddystone Marine Insurance Co.*, because no consideration was given; the shares were bonus shares. And there was no difficulty in *Re Almada and Tirito Co.*, because there £1 shares were issued with a part fully paid up—viz., at a discount, and there was no consideration for the discount. But if the consideration is illusory, or if it allows an obvious money measure to be made showing that discount was allowed, or if the shares are openly issued at a discount, the mere fact that the contract is registered would not put the allottee in a position to relieve himself from the payment which the Act of 1862 requires to be made for the shares. In the present case, however, the liquidator has not sustained the onus, which is on him, of showing that the consideration was illusory.

In my opinion the liquidator has not brought the case within the authorities referred to in my judgment, nor does the evidence show that the consideration was illusory, that the shares were issued at a discount or were a present to Chapman. In these circumstances the contention of the liquidator fails.

Solicitors, *Brandon & Nicholson; Greville & White; W. Negus.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) May 6, 23.

O'NEIL v. ARMSTRONG, MITCHELL, & CO. (a.)

Ship—Contract to serve as seaman—Declaration of war by Government owning the ship—Illegality of voyage—Increased danger—Refusal to complete service—Recovery of wages and damages.

The defendants constructed a vessel of war for the Japanese Government, and placed her in charge of a captain, for the purpose of navigating her to Japan and handing her over to the Japanese Government, whose property she had become upon her completion. The plaintiff contracted with the captain to serve on board the vessel as fireman for the voyage to Japan. Before the voyage was completed war was declared between Japan and China, and the plaintiff, on hearing this, left the ship in consequence of the increased risk. The defendants accepted any responsibility of the captain under his contract with the plaintiff.

Held, that the captain was responsible for the act of the owners, the Japanese Government, in declaring war, and thereby increasing the risk of the voyage, and that the plaintiff was therefore entitled to recover from the defendants his wages for the whole voyage, and also a sum for general damages.

Appeal by the defendants from the decision of his honour Judge Seymour, at the county court of Newcastle-on-Tyne.

The facts and arguments are sufficiently stated in the judgment of the court.

Alfred Lyttelton, for the appellants.

Sir Walter Phillimore, Q.C., and *S. T. Evans*, for the respondent, the plaintiff.

Cur. adv. vult.

May 23.—The judgment of the COURT (Lord RUSSELL, of KILLOWEN, C.J., and CHARLES, J.) was delivered by

CHARLES, J.—This was an action for wages and damages brought by the plaintiff, who was one of the crew of a torpedo gunboat called *The Tatsuta*, against the defendants in the county court at Newcastle-on-Tyne. The learned judge gave judgment for the plaintiff for a sum of £32 (erroneously stated originally at £42), made up of £22 for wages and £10 for general damages. The defendants appealed on the ground that the judge was wrong in law in holding that either wages or damages were recoverable. The facts were as follows:—

The Tatsuta was constructed by the defendants at Newcastle for the Government of Japan, and we think it must be taken, although there is no direct evidence upon the point, that upon completion she became the property of the Japanese Government. When ready to sail she was placed by the defendants in charge of Captain Robert William Strannach, whose duty it was to navigate her to Yokohama and then deliver her to the Japanese authorities. The exact position, however, of the captain was not clearly proved, and although the judge in his judgment describes him as the agent, representative, and servant of the Japanese Government, we were informed that no admission of the accuracy of this description was made by the defendants at the trial; but we think enough was established as to his relation to that government to render further inquiry unnecessary. On the 30th of July the plaintiff signed the ship's muster-roll, from which it appeared that he agreed with the captain to proceed as fireman in the vessel from the Tyne to Yokohama for a sum of £30, of which £8 was payable five days after sailing, the remainder being payable at the conclusion of the run. The vessel left the Tyne carrying the Japanese flag on the 31st of July, at a time when the Governments of China and Japan were at peace and when neither plaintiff nor defendants were aware that war was imminent between the two countries. As far, at all events, as the plaintiff was concerned, all he knew was that the vessel was a torpedo boat bound for Yokohama. He stated that he did not even notice her flag.

On the 3rd of August war was declared, and the plaintiff first heard of the declaration on reaching Gibraltar. At Port Said the captain of a British gunboat boarded *The Tatsuta* and made a communication to Captain Strannach. The latter, however, said nothing to the crew, and the vessel proceeded to Aden where she arrived on the 23rd of August.

Upon her arrival Captain Fisher, of H.M.S. *Cossack*, came on board and read the proclamation of neutrality, at the same time warning the crew of the risk to their own safety they would run if they continued the voyage, and of the probability that by going on they would become liable to punishment under the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90). The plaintiff and others of the crew afterwards consulted the Governor of Aden, who also advised them of the dangers they might encounter. In the result the plaintiff and the rest of the crew resolved to cease serving on the ship. They all came ashore with their baggage, and were subsequently provided by the Governor with a passage home. It may here be added that in a notice to leave the port given to the captain by the authorities at Aden the ship is treated as a Japanese vessel of war.

The plaintiff's case was taken as a test case, the decision of which was to determine the defendants' liability to the rest of the crew, as well as to the plaintiff, and the question we have to consider is what, under the circumstances, are his rights to

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

wages or damages, or both. The defendants admitted before and at the trial that they would "accept responsibility for payment of the wages, if under the contract Captain Strannach would be liable to pay them," and further, would accept responsibility "for all acts done by him within the scope of his authority." The matter, therefore, must be regarded as though Captain Strannach were the defendant in this action.

It was contended by the defendants that the principle of *Cutter* v. *Powell*, 6 T. R. 320, was applicable, and that the plaintiff, not having completed the whole voyage, could not recover either on the contract or on a *quantum meruit*. Whilst the defendants' counsel admitted that the change in the character of the voyage on the one hand justified the plaintiff in declining to proceed, he insisted on the other hand that the defendants were relieved from the liability to pay him the agreed wages, which were only due in case he had performed the whole voyage, and that they were not liable in damages. Further, it was argued that the plaintiff was not even entitled to his wages as far as the port of Aden, because there could, under the circumstances, be no fresh contract impliedbetween the parties to pay for the part of the voyage performed. The case was said to be analogous to *Appleby* v. *Myers*, L. R. 2 C. P. 651, 15 W. R. C. L. Dig. 127, where the plaintiffs had agreed with the defendant to erect machinery on his premises at a certain price. Part of the work was done, but before completion the premises were burnt down through no fault of the defendant. The Court of Exchequer Chamber held that this was "a misfortune equally affecting both parties excusing further performance by either, but giving a cause of action to neither."

Now here the defendants urged that the declaration of war was a misfortune of a similar character—something done which was beyond the control either of the plaintiff or the defendants. It is, however, to be noted, in the first place, that in *Appleby* v. *Myers* the defendant had received no benefit from the incomplete work; and in the next place, it is obvious that if the defendants, or the captain for whom they acceptedresponsibility, were in the present case in any way to be held responsible for the declaration of war by the Japanese Government, the authority cited has no application. If the captain was navigating the vessel as master for her owners, the Japanese Government, then there was a responsibility resting upon him as agent for the owners in reference to the change in the character of the adventure, and the case would not be at all analogous to the cases where the performance of a contract has become impossible or illegal by the occurrence of an event beyond the control of either party to it. It would rather be analogous to a case where performance of the contract was prevented by the act of the defendants, and where an action could undoubtedly be maintained for breach of contract by a plaintiff who had been prevented from earning what would have become due to him had the contract been carried out, and where the damages would, *primâ facie*, be the amount of money he would have earned.

The principle which governs each class of case is thus stated by Blackburn, J., in *Appleby* v. *Myers*, L. R. 2 C. P., at p. 661: "The plaintiffs," he says, "having contracted to do an entire work for a specific sum, can recover nothing unless the work is done, or it can be shown it is the defendants' fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract." Now here we think that it was the owners' fault that the voyage was not completed. They declared war, and thus entirely altered the character and conditions of the voyage on which the plaintiff had embarked, and having regard to the defendants' admissions, we are of opinion that they are precluded from treating the declaration of war as an act done by an independent superior authority. They have admitted responsibility for the master of a Japanese vessel of war, and if his owners have taken a step during the continuance of his contract with the plaintiff which has exposed the plaintiff to dangers greater and other than those originally anticipated, he must, in our judgment, be held liable to the plaintiff to pay the wages which, but for the owners' act, would have been duly earned.

This conclusion is entirely consistent, and in accordance with the decision of the Court of Exchequer in *Burton* v. *Pinkerton*, 15 W. R. 1139, L. R. 2 Ex. 340, a case in many respects similar to the present. There the plaintiff agreed with the defendant to serve as one of the crew of a ship whereof the defendant was master for twelve months from London to Rio and back. The ship was destined for the service of the Peruvian Government, and had on board a cargo of coals and ammunition. On her voyage she joined two Peruvian war steamers, to which she from time to time supplied arms and ammunition. At Rio the plaintiff and defendant became aware that hostilities had broken out between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, another Peruvian port. He was at that time acting under the directions of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage, on the ground that it had become illegal and involved greater danger than he had anticipated when he entered into his agreement. He accordingly left the ship. The Court of Exchequer held that the defendant must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate.

In the present case as in *Burton* v. *Pinkerton* the captain's action in going on with the voyage after war had broken out certainly increased the risk incidental to an ordinary voyage, and—apart from any question of illegality under the Foreign Enlistment Act, 1870 (which it is unnecessary to decide) — entitled the plaintiff to treat the captain's conduct as a breach.

We may add that, in our opinion, the defendants would have been liable to pay the plaintiff his wages up to the Port of Aden, even if the declaration of war had been by a power for whose acts they had in no way made themselves responsible. The case would then, we think, have fallen under the third class mentioned by Blackburn, J., in *Appleby* v. *Myers*. It would have been one in which, from the contract of the parties, the conclusion might properly be drawn that they had entered into a fresh contract, whereby the captain became liable to pay for the part of the voyage which had been actually performed. He took the benefit of part performance, and there is evidence that at Aden he treated the run as at an end. Both sides seem to have regarded the original contract as one which could no longer be acted upon, and that being so, we see no reason why for the work actually done the plaintiff could not have sued on a *quantum meruit*.

With regard to general damages there seems no doubt that they are recoverable. The county court judge acted upon the case of *The Justitia*, 12 P. D. 145, 35 W. R. Dig. 191, where general damages were awarded to a seaman for hardships and risks incurred

by him through the vessel being employed for purposes other than those contemplated by the agreement. We see no reason to differ from him upon this subsidiary point. It may be also observed that in *Burton* v. *Pinkerton*, although the majority of the court thought the special damages claimed too remote, the court was unanimously of opinion (L. R. 2 Ex., at p. 349) that the plaintiff was entitled to recover, in addition to his wages, something under the head of general damages for some of the inconveniences and annoyances he had suffered.

In the result we think that the judgment of the court below was right, and that the appeal must be dismissed with costs.

Solicitors for the appellants, *Dees & Thompson*.

Solicitor for the respondent, *P. G. Robinson*, for *Smirk*, Newcastle-on-Tyne.

Q. B. Div.
(Grantham and Wright, JJ.) May 21.

DOWNES *v.* JOHNSON. (*a.*)

Gaming — Betting — Place used for betting — Club — Betting among members—" Persons resorting thereto " —Betting Houses Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3.

The Betting Houses Act, 1853, *does not apply to the case of members of a* bonâ fide *club using the club premises for the purpose of betting with each other.*

Case stated by Mr. Alderman Ritchie, who at the Mansion House heard twelve informations laid by the appellant Downes, on behalf of the City Police, against the respondent, Warren Johnson, charging him with using certain premises for the purpose of betting with persons resorting thereto.

The magistrate dismissed the informations.

The case set out the following facts: Twelve informations were laid on the 18th of January, 1895, by Downes under 16 & 17 Vict. c. 119, against Johnson, charging him under section (1) that "he being a person using a certain house situate at No. 1, Bolt-court, Fleet-street, did unlawfully use the said house for the purpose of himself betting with persons resorting thereto" on certain dates named in September, October, and November, 1894. The premises in question were owned and occupied by the Albert Club (Limited), which was registered under the Companies Act on the 21st of November, 1865. The members were elected by the directors, and were required to hold at least one share. The respondent was a member of the club. On the premises in dispute, books were found which related exclusively to disputed bets between members of the club. A society called the Mutual Protection Society was formed on the 7th of August, 1893, by certain members of the club, of whom the respondent was one, with the object of compiling for the use of its members a "black list" of persons who had made default in the payment of debts or refused to submit disputes as to bets to the decision of any recognized tribunal. The list contained the names and addresses of some 2,000 persons. The club room was used exclusively by members of the club. In the case it was found as a fact that individual members of the club had no prescribed places or pitches in the club room, and that there was no such member who could be accurately described as holding "a bag against all comers." Certain members usually laid odds against horses running in races, and others backed horses, but frequently their respective positions were reversed. There was a tape machine in the club room, and a servant of the club during racing hours called out the starting prices upon which bets were made, and on the days in question the respondent had made numerous bets in the clubroom with members of the club. Refreshments and dinners were served in the club, which contained the usual conveniences for members. There was also a billiard table.

Poland, Q.C. (with him *C. Mathews* and *Muir*), for the appellant.—At the trial evidence was tendered that the respondent had betted with non-members of the club, but the magistrate found that the charge was not proved. The magistrate was of opinion that in construing the words "betting with persons resorting thereto" in section (1) of the Betting Houses Act, 1853, such persons were clearly distinguishable from the owners or occupiers of any "house, office-room, or other place," and consequently he acquitted the respondent of the charge of unlawful betting. The question for the court is whether that is a correct decision in point of law. I submit it is not. The operation of the Act cannot be limited to strangers, as distinct from members resorting to a particular place, if their object in going there is solely to make bets. The respondent, as a member of the club is, I admit, a mere licensee, and not an owner or occupier, because the club is owned and occupied by a limited company, but for all that, he is a person resorting thereto for the purpose of betting, and the Act applies. What constitutes a place kept for the purposes of betting within the meaning of the Act, depends upon the circumstances of the particular case. It is a question of degree as the following cases show: *Eastwood* v. *Miller*, 22 W. R. 799. L. R. 9 Q. B. 440 (where a field used for pigeon shooting matches, on which bets were made, was held to be a "place" within the meaning of section 7 of the Act); *Hornby* v. *Raggett*, 40 W. R. 111, [1892] 1 Q. B. 20; *McWilliam* v. *Dawson*, 56 J. P. 183; *Reg.* v. *Cook*, 32 W. R. 796, 13 Q. B. D. 377; *Jenks* v. *Turpin*, 13 Q. B. D. 505, 32 W. R. Dig. 84; *Wright* v. *Carke*, 34 J. P. 661; *Oldham* v. *Ramsden*, 44 L. J. C. P. 309, 23 W. R. Dig. 825. I submit that there is such evidence of using the club for the purposes of unlawfully betting with persons resorting thereto, as to make the Act apply.

Joseph Walton Q.C. (with him *Horace Avory*), for the respondent.—There is no direct authority on the question raised by this case at all. Of the cases cited, the only one which approaches it, is that of *Oldham* v. *Ramsden*. So far as that goes, it is in favour of the respondent's contention, which is that as long as it is a genuine club, any betting transactions which are carried on there, form only an incident in club life, and do not therefore come within the aim of the statute, and consequently the statute does not apply.

GRANTHAM, J.—None of the cases cited show circumstances such as exist in the present case, and we should not be right in trying to stretch the meaning of the Act to cover the appellant's contention. The object of the Act is clearly set out in the preamble, which recites that it was passed for the suppression of a kind of gaming tending to the injury and demoralization of improvident persons caused though the opening of places called betting-houses; and section 3 directs that anyone convicted of using the same for the purpose of betting with persons resorting thereto shall be liable to a penalty or imprisonment. It is reasonable to suppose that the class of persons for whose protection the Act was

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

passed is not the class of persons who joined together for the purpose of forming a club of this description. The Act was aimed at those betting-houses kept by persons who received money from others who dropped in promiscuously and made bets when they really knew nothing whatever about betting, and were thus inveigled into the vice of gambling. Persons joining a club of this sort probably know a good deal about betting, and joined the club for the purpose, not only of betting there, but of learning what might prove useful information to them elsewhere. There is nothing in the Act which makes it illegal for one member of a club to bet with another member. That is not the kind of mischief that the Act aims at preventing. There is no suggestion that the club was a bogus club and there is evidence that some 750 persons are at the present time registered as members on its books. There were two regular dinners a day provided for members, and newspapers, time-tables, and the ordinary conveniences of a club were to be found there. For these reasons I am of opinion that the appeal fails.

WRIGHT, J.—I am of the same opinion. I wish to point out that the mere fact of membership of a club would not in itself prevent the Act applying. For instance, if it were a club to which any person could go through the form of being admitted a member merely for the purpose of making a bet, the matter would be very different. In the present case the Albert Club (Limited) has existed for thirty years, and there is no evidence that it is carried on solely for the purpose of enabling its members to carry on betting transactions, nor is it suggested that it is a place to which anyone not a member can obtain admission for the purpose of betting.

Appeal dismissed, with costs.

Solicitor for the appellant, *H. H. Crawford, the City Solicitor.*

Solicitors for the respondent, *Lewis & Lewis.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) May 14.

BOWER & CO. v. HETT. (*a.*)

Sheriff—Seizure—Payment made under an execution—"To avoid sale"—Payment to the sheriff made by a stranger—Negligence of sheriff—Notice of payment to the execution creditor—County Court Rules, 1889, *Ord.* 2, *r.* 32—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2.

On the 1*st of October the bailiff seized the goods of a debtor under an execution for more than £20, but at the request of the debtor abandoned possession under an arrangement whereby he was to be entitled to re-enter whenever he thought fit.*

On the 3*rd of October the bailiff obtained possession of the keys of the premises where the goods were. Later on the same day the father of the debtor of his own accord asked for and obtained the keys from the bailiff on the promise that he would pay out the warrant, which he fulfilled on the following day.*

On the 15*th of October a bankruptcy petition was presented against the debtor, who was adjudged a bankrupt thereon. The bailiff received notice of the petition, and subsequently paid over the money paid by the debtor's father to the official receiver.*

Held, that the execution creditor was entitled to recover the money from the bailiff as money had and received to his use.

Held, also, that the money was not money paid "to avoid a sale" within the meaning of the Bankruptcy Act, 1890, *s.* 11, *sub-section* 2, *because* (1) *it was paid to avoid a reseizure, not a sale; and* (2) *it was not paid by or on behalf of the debtor or out of the debtor's estate.*

Held, also, that the money was not money paid "under an execution" within the same sub-section.

Appeal by the plaintiffs from the decision of his honour Judge Bedwell the judge of the Hull County Court.

The action out of which this appeal arose was a claim for damages against the high bailiff of the Brigg County Court for negligence in not levying a certain warrant of execution and in not properly levying the same, and for omitting to send to the plaintiffs, who were the execution creditors, notice of a payment made under the execution, as he was required to do by ord. 2, r. 32, of the County Court Rules.

The facts were as follows:—

On the 28th of September, 1894, the plaintiffs recovered judgment for £23 15s. 8d. against Walter Denton, an ironmonger. On the 29th of September a warrant of execution to enforce the judgment was delivered to the high bailiff. The 29th being a Saturday, no immediate step was taken on that day, but on Monday, the 1st of October, the high bailiff's assistant went to Denton's shop, and meeting Denton there, he arranged with him not to remain in possession, but a letter was addressed by Denton's manager to the high bailiff in which it was admitted that the high bailiff was entitled to take possession whenever he chose to do so. At this time the high bailiff had already been in possession in respect of an earlier warrant on behalf of another creditor, and on the 2nd of October a third warrant was delivered to him. On the same day the debtor absconded, but the business continued to be carried on by the manager until 2 o'clock on the following day. That was the usual closing time, Wednesday being kept as a half-holiday. The keys of the shop were then handed over to the high bailiff. On that afternoon the debtor's father came to the high bailiff and promised to pay the amounts of all the warrants then in his hands if he would return the keys. This the high bailiff agreed to do. Accordingly, the keys were handed back to the debtor's father, and on the next day the warrants were paid off.

Ord. 2, r. 32, of the County Court Rules provides that in cases where the high bailiff is required to hold the proceeds of an execution for fourteen days, he shall send notice of the levy, within twenty-four hours, to the execution creditor.

No such notice was ever sent to the plaintiffs, and the high bailiff retained the money till, on the 16th of October, a bankruptcy petition having been issued against the debtor, the official receiver gave him notice not to part with it. A receiving order was subsequently made, and on the 12th of November the high bailiff handed the money that had been paid by the debtor's father to the official receiver.

The county court judge gave judgment in favour of the defendant, holding that the bailiff had made a proper levy and that though he was guilty of negligence in not giving the required notice, yet he was right in handing over the money paid by the debtor's father to the official receiver.

Section 11, sub-section 2, of the Bankruptcy Act, 1890, is as follows:—"Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his

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a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

Montague Lush (*Sidney Clarke* with him), for the appellants, the plaintiffs. — The bailiff claimed to retain the money under section 11, sub-section 2. The object of that sub-section was to prevent a creditor from getting hold of money which would be substracted from the debtor's estate. The words "or money is paid in order to avoid sale" did not appear in the Act of 1883, and they were added in consequence of the decision in *In re Pearson, Ex parte West Cannock Colliery Co.*, 3 Morell's Bankruptcy Reports, 187, where it was held that a payment made by the debtor was not a sale within the meaning of section 46 of the Act of 1883. But it cannot have been intended to give the official receiver a right to receive money which never belonged to the debtor, which was not paid at his request, and which created no debt from him to the person who paid it. Then the bailiff must show that there was a seizure: *Ex parte Brookes*, 22 W. R. 395, L. R. 9 Ch. App. 301. In sub-section 1 the words are "goods taken in execution," and in sub-section 2 they are "under an execution." That means that there must have been some steps taken under an execution, as for instance a seizure. In the present case I submit there was no seizure. Again, the object of the payment must be to avoid sale, that is to say, the goods must be in readiness for a sale. But, even if in this case the goods were seized, the bailiff did not continue in possesion, and the seizure counts for nothing unless the bailiff remains in possession continuously: *Blades* v. *Arundale*, 1 M. & Sel., 711; *Crowder* v. *Long*, 8 B. & C. 598. [Lord RUSSEL, C.J.—In order to entitle the plaintiff to succeed on his action for goods had and received, must he not show that he assented to the payment made to the bailiff?] In this case the plaintiff had no opportunity of assenting as no notice was given him. The bailiff cannot object to the want of assent which was due to his own negligence. As to the alternative claim for damages for the bailiff's negligence. The breach of duty is admitted. On the 1st of October it was his duty to go into possession and remain in possession, which he did not do. If he had done so, very possibly the father would have made the same offer then as he did later. That would have brought the payment outside the period of fourteen days and, in any view of the question under sub-section 2, the plaintiff would have been absolutely entitled to it.

Cyril Dodd, Q.C., for the respondent, the defendant.—The county court judge found that there had been a seizure, and his view of the facts was accurate and within the principle of *Gladstone* v. *Padwick*, 19 W. R. 1064, L. R. 6 Ex. 203. But it is not necessary to show that there was a seizure. The conditions precedent to the bailiff's right to pay the money to the official receiver are that it was paid under an execution and that it was paid to avoid a sale. It must in the present case have been paid under an execution, otherwise no action could have been brought: *Bissicks* v. *Bath Colliery Co.*, 26 W. R. 365, 3 Ex. D. 174. And as to avoiding a sale, the whole object of the father's payment was to avoid the disgrace of having his son's business sold up. That this was so is a fact impliedly found by the learned judge. There is no justification for reading into the Acts, as is suggested on the other side, words limiting the money, therein referred to, to money belonging to the debtor. It places the sheriff in the difficulty of not knowing whether he ought to pay to the official receiver or to the creditor.

Lord RUSSELL OF KILLOWEN, C.J.—The judgment of the learned county court judge must be reversed. The facts show that theplaintiff was an execution creditor for £23 15s. 8d., and that a writ of *fi. fa.* reached the defendant Hett on the 29th of September. On the 1st of October he went to the place of business of the debtor. On that evidence the learned county court judge was justified in finding that there was a seizure or levy of the goods of the judgment debtor. But what follows is important. The high bailiff takes a letter which amounts to an admission on the part of the debtor that the high bailiff was entitled to enter again on the same warrant. But he leaves no one in possession. In that respect he acted wrongly. How far the bailiff would have been entitled to re-enter after he had relinquished possession it is not necessary to say. At any rate I think that in fact there was a seizure. Monday passes, Tuesday passes, and the business is carried on as usual. On Tuesday the debtor disappears, and on Wednesday the bailiff gets possession of the keys. It is at that point that the father appears. Now, though it is true that the bailiff did seize the goods, yet almost immediately afterwards he abandoned them, and on the 3rd of October he was not in possession.

In that state of things, there being two other warrants out, one a previous warrant, and the other a subsequent one, the father says in effect, "if you will not go into possession and will give me the keys, I will pay off these warrants." I see no evidence to negative the presumption which this state of facts raises—namely, that the father's object was to save his son from the disgrace of having the bailiff in possession. At the same time there is a presumption that the money was the father's money, and there is nothing to show that it ever became part of the property of the judgment debtor, or that the father could even have maintained an action against the son for the amount so paid; but that it is not necessary to decide. I arrive, therefore, at the conclusion of fact that the money was the father's money, that it passed direct from him to the bailiff, and that it never was part of the son's estate, and that it is at least doubtful whether it was paid in such a way as to give the father a right of action against the son or the son's estate.

The money having been paid, the bailiff fails to send to the plaintiff a notification of what has taken place. Meanwhile, on the 15th of October, a bankruptcy petition is filed, on the 16th of October notice not to part with the money is received, and, soon after, the bailiff sends the money to the official receiver. I note here two points. If the payment was not a payment within section 11, sub-section 2, the bailiff had no business to pay it over to the official receiver; and, if he did pay it, he paid it at his own risk; he cannot say, "I paid it erroneously, it is true, but, *bonâ fide*, and by mistake."

Now did he pay the money to the wrong person? That depends on the construction of section 11, sub-section 2. Sub-section 1 deals with the case of goods taken in execution. Then comes sub-section 2. [His lordship read the sub-section, and continued:—]

On that, several questions arise. First, it is argued (and for this purpose sub-section 1 is referred to) that the money there intended, is money paid after there has been a seizure of the debtor's goods. I say

that there was a seizure, and consequently there is no need to consider whether or not seizure was necessary. Secondly, Is the payment in this case a payment "under an execution"? The words of the Act are not "in consequence of," or "after an execution." I think the words used mean under pressure of, or stress of an execution—that is to say, pressure against the person against whom the execution is made.

I cannot feel certain about it, but on the whole I am inclined to think that in that sense this payment was not made "under an execution." Next, Was the payment made to avoid a sale? I think not. It was made in order to avoid a seizure—in order to get possession of the keys of the shop which the bailiff then had. Therefore it was not made to avoid a sale.

The history of the additional words in the sub-section, "or money paid in order to avoid sale," has already been fully referred to in the course of the argument. Do those words mean payments made by anyone, no matter whom? I cannot think so. I can see no good reason for such a construction. The policy adopted by the statute is to secure equal distribution among the creditors of the debtor's estate, and, within certain limits, to prevent the more active and vigilant creditors from gaining an advantage over those rather less diligent. But it cannot properly be said that it is necessary for that object that money should be handed to the official receiver which was paid by a person wholly outside the bankrupt, who paid it, not on behalf of the bankrupt, but behind his back and without his solicitation. What reason can be assigned why that money is not to go to the person for whom it was paid? It did not come out of the general estate, and the creditors are in no way affected. This money, then, being the money of the father, paid by him without the debtor's request under circumstances which put the son under no legal obligation to repay it, and there being no evidence to show that the money passed from the father to the bailiff under circumstances giving ground for the suggestion that it became part of the bankrupt's property, I come to the conclusion that this was not a payment to avoid a sale within the meaning of section 11, subsection 2.

There was a suggestion as to whether, in order to support the action for goods had and received, it was not necessary for the plaintiff to show privity between himself and the bailiff by his assent to the reception of the money by the bailiff. I do not think it is necessary, for the cases show that the moment money is received by the sheriff he becomes liable to an action for money had and received. This proposition was supported by LITTLEDALE, J., in *Morland* v. *Pellatt*, 8 B. & C. 723. It thus becomes unnecessary to consider the alternative ground on which the appellants' counsel based his case.

CHARLES, J.—I am of the same opinion. The first question is whether the money was paid under an execution. There seems to have been a seizure of goods on the 1st of October, at all events the learned county court judge thought so on the evidence before him, and we must give credit to his finding. That seizure was given up owing to an arrangement with the debtor, and at the time when the debtor's father paid the money the bailiff was not actually in possession. Probably he might have re-entered, but as a matter of fact he did not. The father did not pay the money under circumstances which, as it seems to me, could be said to be "under an execution." True, it was by reason of an execution having been issued. But the words of the statute are not "because of an execution," but "under an execution," and these words are not wide enough to include the circumstances under which the debtor's father paid off the warrants. Therefore the sub-section (sub-section 2 of section 11) has no application to the present case.

Besides this there are other grounds for supporting the plaintiffs' claim. The sub-section provides for the retention by the sheriff of the proceeds of goods sold. With regard to that the sub-section expressly says the goods sold are to be the goods of the debtor. The next words, "money paid to avoid a sale," must, I think, be read in conjunction with those preceding. I think the true meaning of the words is, either the debtor's money or money paid for him. There is no evidence that the father paid the money for, or on behalf of, or at the request of, his son, or under circumstances which would entitle him to maintain an action against his son; and, being the father's money, I do not think the bailiff was entitled to keep it. Again, Why was it that the father paid the money? It was not to avoid a sale, but to avoid a seizure of the son's goods and to prevent the bailiff going into possession of the son's business.

On each of these three grounds I think the plaintiffs are entitled to succeed.

As to the question whether an action for goods had and received is maintainable against the bailiff in view of the absence of assent to the reception on the part of the plaintiffs, on the authorities I think there is no doubt that as soon as the bailiff received the money he held it for the use of the plaintiffs. The express assent of the plaintiffs was not necessary, for it is implied by law.

Judgment reversed.

Solicitors for the appellants, *Oldham, Clabburn, & Co.*, for *C. E. Gresham*, Hull.

Solicitors for the respondent, *Collyer, Bristow, & Co.*, for *Laverack & Son*, Hull.

Q. B. Div.
(Cave and Wright, JJ.) March 28.

GOSLING *v.* NEWTON. (*a.*)

Thames Conservancy—Lighterman's apprentice—Vessel of over fifty tons burden—Navigation of same—"One competent man on board and one man in addition"—Bye-law 16 *of the Thames Conservancy—Watermen's and Lightermen's Amendment Act,* 1859 (22 *&* 23 *Vict. c.* 133), *ss.* 54 *and* 80, *and bye-law* 35 *made under that Act.*

The provision contained in bye-law 16 *of the Thames Conservancy, that for the purpose of navigating craft of over fifty tons burden there should be on board at least one competent man "and one man in addition," may be satisfied, as regards the second of the two men, by an apprentice, even though such apprentice be not qualified to take out a licence under section* 52 *of the Watermen's and Lightermen's Act.*

Case stated under 20 and 21 Vict. c. 43 by Albert de Rutzen, Esq., sitting at Westminster Police Court.

Two summonses were taken out by Harry Gosling: one against Aaron James Newton under section 54 of the Watermen's and Lightermen's Act for acting as a lighterman without a licence; and the other against Edwards Eagers under the 16th bye-law of the Thames Conservancy for navigating a barge of above fifty tons burden without one man on board in addition, to assist in the navigation.

It was proved that on the 9th of October, 1894, the

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

barge *Sherwood*, a vessel of over fifty tons burden, was being navigated on the river Thames under the charge of Eagers, a duly-licensed lighterman. He had on board to assist him the other defendant, Newton, who was an apprentice duly bound and nineteen years of age, but had only served a few weeks of his apprenticeship, and was therefore not qualified to hold an apprentice's licence under section 52 of the Act. The effect of that section is that in order to entitle an apprentice to take sole charge of craft he shall have worked and rowed upon the river Thames for at least two years and shall have obtained a licence. By sections 47 and 48 an apprentice was to be bound for not less than five years, and his apprenticeship must commence between the ages of fourteen and twenty. Section 54, under which Newton was prosecuted, subjects to a penalty any person, not being a freeman licensed in pursuance of this Act, or an apprentice, qualified according to the Act, to a freeman or to the widow of a freeman of the Watermen's and Lightermen's Company, who shall at any time act as a waterman or lighterman on the river Thames for hire or gain.

Section 80 of the Act gives to the court of the masters, wardens, and assistants of the Watermen's and Lightermen's Company the power to make bye-laws: "So that the same bye-laws be not inconsistent with any of the laws of this kingdom or with this Act, or with any of the bye-laws, rules, orders, or regulations made or to be made by the conservators of the river Thames under the authority of the Thames Conservancy Act, 1857, or of any Act for the time being in force relating to the conservancy of the river Thames." Bye-law 35 of the bye-laws made under this section is as follows: "In all cases in which it may be necessary or requisite under such Act (meaning the Watermen's Act) or these bye-laws or under the bye-laws of the conservators of the river Thames, that for the benefit of the public using the river in boats, barges, or vessels, two able and skilful persons shall be employed in the management and navigation of passenger boats at Gravesend, and in vessels of more than fifty tons burden navigated on the river, one waterman or lighterman, licensed in manner provided by such Act and bye-laws, or an apprentice licensed to take sole charge of craft, and an apprentice actually bound in manner provided by such Act, but not a person entered on liking for the purpose of being bound shall be deemed and taken to be able and skilful persons within the meaning of such Act and bye-laws respectively." Bye-law 16 of the Thames Conservancy, under which Eager was summonsed, was made in 1872 in pursuance of the Thames Conservancy Act of 1857 and of the other Acts for the time being in force relating to the conservators of the river Thames, and is as follows: "All barges, boats, lighters, and other craft navigating the river shall, when under way, have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above fifty tons burden shall, when under way, have one man in addition on board to assist in the navigation and management of the same."

The magistrate was of opinion that no offence had been committed either under section 54 or under bye-law 16 of the Thames Conservancy.

The prosecutor appealed.

Macmorran and *Gore Browne*, for the appellant.—Bye-law 35 is *ultrà vires*, being contrary to section 54 of the Act, and also to the 16th Thames Conservancy bye-law. Under the latter bye-law "one man in addition" has been defined to mean a "competent man": *Perkins* v. *Gingell*, 50 J. P. 277. That must mean a man duly qualified and licensed. It does not mean that a mere apprentice would do: *Goldsmith* v. *Slattery*, 63 L. T. 273, 39 W. R. Dig. 234. Secondly, bye-law 35 cannot affect bye-law 16, because bye-law 35 was made in 1860 and cannot govern a bye-law made in 1872. Bye-law 35 only professes to interpret "skilful and able," but in bye-law 16 the term "skilful and able" is expressly avoided and "one man in addition," afterwards interpreted to mean a "competent man," is substituted.

Finlay, *Q.C.*, and *Scrutton*, for the respondent, were not called upon.

The judgment of the COURT was delivered by

WRIGHT, J.—The defendant Newton was prosecuted under section 54 of the Act. If he came within its provisions it appears clear that he should have been an apprentice qualified according to section 52, under which an apprentice is to be a person, bound to a freeman or widow of a freeman, between the ages of fourteen and twenty, for five years, whose apprenticeship shall have already run at least two years. Edward Eagers was summoned under bye-law 16, for navigating a vessel of over fifty tons burden with Newton as his second hand, Newton being then nineteen years of age, but his apprenticeship having only run a few weeks.

The two summonses depend on the same question. It is said that under bye-law 16 "one man in addition" is not satisfied by an apprentice who is at the commencement of his apprenticeship. But I think the cases show that an apprentice may be a "competent person." It is not necessary to say that in all cases he is a "competent person." All we need decide is that this particular apprentice is a "competent person."

Solicitors for the appellant, *Safford & Kent*.

Solicitors for the defendants, *Wilson, Bristow, & Carpmeal*.

Q. B. Div. (Mathew and Cave, JJ.) March 2

HOOD BARRS v. CATHCART. (a.)

Married woman—Restraint on anticipation—"Action or proceeding instituted"—Costs of the opposite party—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

The plaintiff had obtained a judgment against the defendant, a married woman having separate property subject to a restraint on anticipation. This judgment was affirmed by the Court of Appeal, but the defendant was given leave to prosecute a counter-claim against the plaintiff. Various interlocutory proceedings in the counter-claim were then taken by the defendant, which were dismissed, with costs to be taxed and paid by her. In some of these orders the judge merely directed the defendant to pay the costs incurred; in others she was expressly ordered to pay the costs notwithstanding the restraint on anticipation. Subsequently a judge in chambers made an order by which he appointed a receiver to take over the rents and profits accruing from a certain part of the defendant's estate, and directed that, "notwithstanding any restriction against anticipation, . . . such sums to be paid, in or towards satisfaction of what shall for the time being be due in respect of the" various orders in question.

Held, on appeal, that the counter-claim was an "action or proceeding" within section 2 of the Married Women's Property Act, 1893, and that that section

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the words, "the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party," gave the judge the power to make the order appealed from, although it included, and thus varied, those orders which did not expressly direct that the costs were to be paid, notwithstanding any restriction on anticipation, by the defendant.

This was an appeal from an order of Wright, J., sitting at chambers.

The plaintiff in the action sought to recover certain costs from the defendant, a married woman, who was possessed of separate property which was subject to a restraint on anticipation.

On the 20th of April, 1893, the plaintiff obtained judgment against the defendant for the amount of his claim, which, on appeal, was affirmed by the Divisional Court, and, on a further appeal, by the Court of Appeal, on the 11th of August, 1893, at which date the action was determined. By her defence the lady raised a counter-claim against the plaintiff for £10,000 damages for alleged negligence, which the Court of Appeal, on the last-mentioned date, gave her leave to prosecute. She thereupon proceeded with her counter-claim, closed the proceedings, and took various interlocutory proceedings in the counter-claim, several of which were dismissed, with costs to be taxed and paid by her. By some of these orders it was expressly directed that she should pay the costs notwithstanding any restraint on anticipation; but by others she was merely ordered to pay the costs incurred.

All the orders were made between the 3rd of February and the 26th of July, 1894.

By an order dated the 9th of October, 1894, Wright, J., at chambers appointed a receiver of the "rent due and in arrear and accruing due from the life estate of the defendant in a certain mansion house . . . notwithstanding any restriction against anticipation . . . such sums to be paid, in or towards satisfaction of what shall, for the time being, be due in respect of the" said orders made between the 3rd of February and the 26th of July. The counter-claim was ultimately dismissed.

Section 2 of the Married Women's Property Act, 1893, provides that, "in any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction, by judgment or order from time to time, to order payment of the costs of the opposite party out of the property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Against the order of the 9th of October the defendant appealed.

T. Willes Chitty, for the defendant.—The order of Wright, J., is wrong, first, on the ground that section 2 of the Married Women's Property Act, 1893, does not apply to the costs arising out of a counter-claim. The section refers to any action or proceeding instituted. A counter-claim is not such an action or proceeding, for it could not be regarded in the nature of an action instituted, that is to say, a proceeding by which a *lis* was commenced. Accordingly the 2nd section of the Act of 1893 does not apply, and consequently there was no jurisdiction for such an order at all. That point has been decided by the Court of Appeal in the case of *Hood Barrs* v. *Cathcart*, [1894] 3 Ch. 376. A plaintiff only can commence or initiate a *lis*, and a counter-claim, being in the nature of a defence, is not an action or proceeding instituted: *Hollington* v. *Dear*, noted in the SOLICITORS' JOURNAL of the 23rd of February, 1895, p. 284. In the second place, the order was wrong because the judge had no jurdisdiction to vary those orders which did not contain the words "notwithstanding any restriction against anticipation," by making them subject to the order appealed from, which did contain those words.

Cock, Q.C., and *Bartley Denniss*, for the respondent, were not called upon.

MATHEW, J., after reading section 2 of the Act of 1893, said:—In my opinion a counter-claim is an "action or proceeding" within the meaning of that section. I see no reason for adopting in the present case the narrower construction that was placed upon the words "action or proceeding" by the Court of Appeal in the case of *Hood Barrs* v. *Cathcart*; that decision related to an appeal by a married woman, and is distinguishable. A counter-claim is equivalent to a cross-action. If any authority were needed to be mentioned by me in support of that proposition, it would be only necessary for me to refer to the established practice of the courts of entering judgment on the claim in the first place and on the counter-claim in the second place.

As to the second point, the section mentions the costs of the opposite party, and goes on to say that the court "shall have jurisdiction by judgment or order from time to time." I think that Wright, J., therefore, had the power to make the order of the 9th of October, 1894, now appealed from.

For these reasons that order must be affirmed, and the appeal dismissed with costs.

CAVE, J.—I concur.

Solicitor for the appellant, *H. R. Elton*.

Solicitors for the respondent, *Hood Barrs & Co.*

House of Lords.

From C. A. (England). } May 30.

HELBY v. MATTHEWS AND OTHERS. (*a*.)

Sale of goods—Agreement for hire—Possession of goods with consent of owner—Hire and purchase agreement—Pledge of goods by hirer—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9.

By an agreement in writing, dated the 23rd of December, 1892, *between the appellant and B., B. agreed to pay a monthly rent or hire instalment of* 10*s.* 6*d.*—i.e., 10*s.* 6*d. down, and thirty-five further payments—for the use of a certain piano, subject to the condition that he might put an end to the hiring at any time by delivering up the piano to the appellant, in which event B. was to remain liable for the arrears of hire (if any) up to the date when the piano was returned. It was further provided that, should B. (the hirer) punctually pay the full sum of* £18 18*s. by the aforesaid monthly instalments, the piano should become the absolute property of B., but until this was done it was to remain the property of the appellant, who might retake possession should the hirer make default.*

Held, that the above constituted a contract of hiring terminable at the will of B., coupled with the condition in his favour, that if he should retain the piano

(*a*.) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

until he had made all the aforesaid monthly payments as they fell due, then the piano was to become his absolute property, and, consequently, it was not an agreement to buy the piano within the meaning of section 9 of the Factors Act, 1889.

An innocent pledgee, therefore, receiving the piano from B. before the instalments were all paid, had no defence under that Act against the appellant's claim in an action of trover.

Decision of the Court of Appeal (42 *W. R.* 514, [1894] 2 *Q. B.* 262) *reversed.*

Lee *v.* Butler, 42 *W. R.* 88, [1893] 2 *Q. B.* 318, *distinguished.*

This was an appeal from the COURT OF APPEAL (Lord ESHER, M.R., A. L. SMITH and DAVEY, L.JJ.), reported 42 W. R. 514, [1894] 2 Q. B. 262.

The action was brought by the appellant, a musical instrument dealer, against the respondents, who were pawnbrokers, to recover possession of a piano or its value.

By an agreement made on the 23rd of December, 1892, between the appellant, herein called the "owner," and Charles Brewster, therein called the "hirer," the owner agreed, at the request of the hirer, to let on hire to the hirer a pianoforte, No. 896, maker, Ross, and in consideration thereof the hirer agreed as follows:—

(1) "To pay the owner, on the 23rd day of December, 1892, a rent or hire instalment of ten shillings and sixpence (10s. 6d.), and 10s. 6d. on the 23rd of each succeeding month."

(2) "To keep and preserve the said instrument from injury (damage by fire included)."

(3) "To keep the said instrument in the hirer's own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing."

(4) "That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument, and for that purpose leave and license is hereby given to the owner (or agent and servant or any other person employed by owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake possession of the said instrument, without being liable to any suit, action, indictment, or other proceeding by the hirer or anyone claiming under said hirer."

(5) "That if the hiring should be terminated by the hirer (under Clause A below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return, or set off for payments previously made.

The owner agreed.

(A) "That the hirer may terminate the hiring by delivering up to the owner the said instrument."

(B) "If the hirer shall punctually pay the full sum of £18 18s., by 10s. 6d. at date of signing, and by thirty-six monthly instalments of 10s. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

(C) "Unless and until the full sum of £18 18s. be paid, the said instrument shall be and continue to be the sole property of the owner."

The piano was delivered to Brewster, who, after paying seven instalments, pledged the piano with the respondents for £4 10s.

Brewster having failed to pay a subsequent instalment, the appellant brought the present action in the Bloomsbury County Court against the respondents. Judgment was given for £18 18s. to be reduced to a nominal amount upon return of the piano to the appellant, with costs. The respondents appealed to the Queen's Bench Division, where, on the 24th of January, 1894, Lord Coleridge, C.J., and Day, J., dismissed the appeal, with costs. Leave was given to the respondents to appeal to the Court of Appeal, and on the 9th of May, 1894, the Court of Appeal allowed the appeal.

The appellant appealed to this House.

R. B. Finlay, Q.C., and *Joseph Walton, Q.C.* (*W. B. Hextall*, with them), for the appellant.—The sole question is whether Brewster got possession under an "agreement to buy" within the meaning of the Factors Act, 1889. There is no such agreement. It is a mere option to purchase. The case is different from *Lee* v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318. Lord Westbury in *Weston* v. *Collins*, 13 W. R. 510, 34 L. J. Ch. 353, explains the distinction, where certain things must be done before there is a binding contract, though the offer cannot be retracted. One of the conditions is that the hirer makes thirty-two payments, and the option is gone if he fails. What is paid is hire.

A. R. Jelf, Q.C., and *H. D. Greene, Q.C.* (*C. L. Attenborough*, with them), for the respondents.—Section 9 of the Factors Act, 1889, is aimed at a mischief. *Lee* v. *Butler* disposed of any such scheme as this. The contract is one of sale. If this is a conditional contract, it is not the less a contract, a contract of sale with a power of changing it into a hire agreement. This is a distinct obligation to pay on the 23rd of December and the 23rd of each succeeding month. The term "instalment" is wholly inapplicable to a mere hiring and can only mean a portion of a larger sum. The amounts paid were payments for purchase. *Ex parte Winfield, In re Florence*, 27 W. R. 346, 10 Ch. D. 591, was also referred to.

Finlay, Q.C., replied.

The House took time for consideration.

May 30.—Lord HERSCHELL, L.C.—The appellant was the owner of a piano, of which he had given possession to one Brewster, under an agreement in writing of the 23rd of December, 1892, to the terms of which I shall have occasion to refer to immediately.

On the 22nd of April, 1893, Brewster improperly and without the consent of the appellant, pledged the piano with the respondents, who are pawnbrokers, as security for an advance. The appellant, upon discovering this, demanded the piano from the respondents, and on their refusing to deliver it, brought an action of trover. The defence set up by the respondents was that they had received the piano from Brewster in good faith, and without notice of any claim on the part of the appellant, and that Brewster having "bought or agreed to buy" it from the appellant they were protected by section 9 of the Factors Act, 1889.

The county court judge held that the defence was not proved, and his judgment was upheld by the Divisional Court of the Queen's Bench. The Court of Appeal, however, came to the conclusion that the defence had been established, and reversed the judgment of the Divisional Court. The only question was whether the respondents had made out that Brewster had bought or agreed to buy the piano. This depends upon the true effect of the agreement under which he obtained it.

By that agreement Brewster (called therein the hirer) agreed to pay the owner on the 23rd of December, 1892, a rent or hire instalment of 10s. 6d., and 10s. 6d. on the 23rd of each succeeding month; to

keep the said instrument in the hirer's own custody, at the address named in the agreement, and not to remove the same without the owner's previous consent in writing. He further agreed that if the hiring should be terminated by him under a subsequent clause of the agreement, and the instrument returned to the owner, the hirer should remain liable to the owner for arrears of hire up to the date of the return, and should not be entitled to any allowance, credit, return, or set-off for payments previously made. The owner, on the other hand, agreed that the hirer might terminate the hiring by delivering up the said instrument to the owner. And, further, that if the hirer should punctually pay the full sum of eighteen guineas by 10s. 6d. at the date of signing, and by thirty-six monthly instalments of 10s. 6d. in advance as aforesaid, the instrument should become the sole and absolute property of the hirer. It was also agreed that unless and until the full sum of eighteen guineas were paid the instrument should be and continue the sole property of the owner.

It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano, and to be entitled to its use so long at he paid the plaintiffs the stipulated sum of 10s. 6d. a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had "agreed to buy" the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano. He had an option, no doubt, to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become, the purchaser. I cannot see, under these circumstances, how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made, to impose that obligation.

The Master of the Rolls said: "It is a contract by the seller to sell, and a contract by the purchaser, if he does not change his mind, to buy; and if this agreement goes on to its end, it ends in a purchase. Therefore, it seems to me that the true and proper construction of this instrument, after all, is this: it is an agreement by the one to sell, and an agreement by the other to buy, but with an option on the part of the buyer if he changes his mind to put an end to the contract." I cannot think that an agreement to buy, "if he does not change his mind," is any agreement to buy at all in the eyes of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it. It appears to me that the contract in question was in reality a contract of hiring, and not in name or pretence only. But for the provisions that if the hirer punctually paid the 10s. 6d. a month for thirty-six months, the piano should be his property, it could not be doubted that it was a mere agreement for its hire, and I cannot see how the fact that this provision was added made it any the less a contract of hiring until that condition had been fulfilled.

I think it very likely that both parties thought it would probably end in a purchase, but this is far from showing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision. One can well conceive cases, however, in which a person who had not made up his mind to continue the payments for three years would nevertheless enter into such an agreement. It might be worth his while to make somewhat larger monthly payments for the use of the piano in order that he might enjoy that option if he chose to exercise it. In such a case how could it be said that he had agreed to buy when he had not only come under no obligation to buy, but had not even made up his mind to do so? The agreement is, in its terms, just as applicable to such a case as to one where the hirer had resolved to continue the payments for the three years, and it must be construed upon a consideration of the obligations which its terms create, and not upon a mere speculation as to what was contemplated, or what would probably be done under it.

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell; though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy; and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It was argued for the respondents that the case came within the mischief intended to be provided against by section 9 of the Factors Act, 1889, and that the enactment ought, therefore, to be so construed as to cover it. I can see no reason for thus straining the language of the enactment. A person who is in possession of a piano under such an agreement as that which existed in the present case is no more its apparent owner than if he had merely hired it, and in the latter case any one taking it as security would have no claim to hold it as against the owner.

Reliance was placed on the decision in *Lee* v. *Butler*, and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there, an agreement to buy. The purchase money was to be paid in two instalments; but as soon as the agreement was entered into, there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any

obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments, the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question.

It was further urged for the respondents that when Brewster pledged the piano with them it became impossible for him to return it to the appellant, and he became, therefore, from that time bound to make the stipulated payment and to become the purchaser. I cannot accede to this argument. In my opinion it is impossible to hold that Brewster, having only a right under the contract to buy, provided he complied with the prescribed conditions, could convert himself into a purchaser as against the owner by violating the conditions of the contract.

I think the judgment appealed from must be reversed. The respondents must pay the costs of this appeal, and in the court below.

Lord WATSON.—This case depends upon the construction of an agreement made on the 23rd of December, 1892, between the appellant and one Charles Brewster, in terms of which, a piano belonging to the appellant, was on that date delivered to Brewster. On the 21st of July, 1893, whilst the instrument admittedly remained the property of the appellant, Brewster gave it in pawn to the respondents for the sum of £4 10s.

The present action was then brought by the appellant against the respondents in the county court of Middlesex for recovery of the piano or its value. The defence set up by the respondents, which has occasioned this litigation, is, that, at the date of pawning, Brewster was in possession of the piano under an agreement for its purchase, and was therefore in a position to make an effectual pledge to them under section 9 of Factors Act, 1889, it not being disputed that they received the pledge in good faith, and without notice of the appellant's right.

In these circumstances, the case is narrowed to the single question, whether the possession of Brewster was attributable to a contract of purchase, as the respondents maintain, or to a contract of hiring, as contended for by the appellant. The county court judge held Brewster's possession to have been that of a hirer, and, in the Divisional Court, the same view was taken by the late Lord Chief Justice, and Day, J. In the Court of Appeal, the Master of the Rolls, Smith, L.J., and Lord Davey were all of opinion that the agreement constituted a contract of sale and purchase; and they accordingly reversed the decisions of the courts below, and gave judgment for the respondents.

The terms of the agreement are exceeding simple; and had it not been for the conflict of judicial opinion which they have provoked, it would not have occurred to me that their true character and substance admitted of much doubt. The only stipulations which are of materiality to the present question are these: Brewster undertook to pay a monthly rent or hire instalment of 10s. 6d., commencing on the 23rd of December, 1892, subject to the condition that he might terminate the hiring at any time by delivering up the piano to the appellant. In the event of the hiring being so terminated, he was to remain liable to the owner for arrears of hire up to the date when the piano was returned. Then follows a stipulation to the effect that, "If the hirer shall punctually pay the full sum of £18 18s., by 10s. 6d. at date of signing, and by 36 monthly instalments of 10s. 6d. in advance, as aforesaid, the said instrument shall become the sole and absolute property of the hirer."

These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire, so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing or to pay a price for it. There is no purchase, and no agreement for purchase, until the hirer actually exercises the option given him. The respondents' counsel endeavoured to assimilate this case to *Lee* v. *Butler*, but in reality the two cases differ essentially. In *Lee* v. *Butler*, the so-called hirer was bound absolutely to make payment of £1 on on the 6th of May and of £96 4s. on the 1st of August 1892, these sums being described as "rent for the hire or use" of certain furniture, which was the subject-matter of the agreement, it being declared that upon due payment of these rents amounting to £97 4s., the furniture was to be the sole and absolute property of the hirer. It appears to me to have been rightly held that Mrs. Lloyd, the hirer in that case, had truly agreed to purchase the furniture, and could therefore give a good title to a *bonâ fide* purchaser. Her legal obligation to pay the price attached as soon as the agreement was executed.

Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that, whilst he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was in no sense an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement to sell. In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view, the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered, there could, in this case, be no contract to purchase by Brewster, until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano.

The distinction between a pre-contract of that kind, and a proper agreement for the sale and purchase of goods, does not appear to me to have been sufficiently regarded by the learned judges of the Appeal Court. Their lordships seem to have assumed that, because the appellant had bound himself to sell if Brewster chose to buy upon the terms prescribed, he was in reality a seller; and that the existence of a seller necessarily implies the existence of a buyer. In my opinion that reasoning is inconclusive. Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in the terms of the agreement.

Another argument was urged for the respondents, which I find thus succinctly stated in their fifth reason of appeal: "That upon Brewster pledging the pianoforte with the respondents he put it out of his power to exercise his right to determine the agree-

ment by returning the pianoforte, and thereby the agreement to purchase became absolute and unconditional." The argument is, in my opinion, untenable. In a question with the appellant, Brewster could not become purchaser of the instrument, except upon the condition of his observing the stipulations of the agreement and making regular payment of each monthly instalment until the 23rd of November, 1895, which he was under no obligation to do. By the act of pawning, he violated these stipulations; and that dishonest act, which was committed after he had paid only seven out of thirty-six instalments, is not calculated to suggest that he entertained any intention of becoming purchaser of the piano. It is quite true that Brewster thereby put it out of his power (at least, until he could raise the amount for which it was pawned) to return the piano to the appellant; but he, at the same time, broke his contract, and forfeited his right to exercise the option of purchase given him by the agreement.

For these reasons I am of opinion that the order of the Appeal Court ought to be reversed, and the judgment of the Divisional Court restored.

Lord MACNAGHTEN.—In this case I think his honour Judge Bacon took the right view. It seems to me that the agreement under consideration means what it says, and can mean nothing else.

On the 23rd of December, 1892, by a contract of that date, a dealer in musical instruments, agreed to give a customer the use of a certain piano on the terms of his paying 10s. 6d. down and the like sum on the same in each succeeding month. The customer was to be at liberty to return the instrument whenever he pleased, and thereupon, if no arrears were due at the time, all liability on his part was to cease. But there was an inducement, and a very strong inducement, held out to him to make him keep the piano, in the stipulation that at the end of two years and eleven months, if in the meantime the monthly payments, amounting in all to eighteen guineas, were punctually made, the piano was to become his without more.

That is an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable. I rather doubt whether the meaning of the parties can be better elucidated or their relative position more clearly defined by speaking of an "option" or of a "defeasance," or by translating their contract into other and more formal language. At least I am unable to express the obvious intention of the parties in simpler or plainer words than those which they have used. The musical instrument dealer let out a piano by the month, and undertook to sell it to the customer who hired it conditionally on his making a certain number of monthly payments. But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano, or any interest in the nature of a lien, or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come. The customer was under no obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep the piano for a single day or a single hour. He was no more bound to purchase it after he had signed the agreement than he was before. The contract, as it seems to me, on the part of the dealer, was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation, as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want, and for which, at the time, they cannot pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance, if faults are developed or defects discovered, if a coveted treasure is becoming a burthen and an incumbrance, it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for Parliament to interfere. It is not for the court to put a forced or strained construction on a written document, or to import a meaning which the parties never dreamed of, because it may not wholly approve of transactions of this sort.

Lee v. *Butler*, on which the Court of Appeal relied, was a very different case. There a person who got some furniture under an agreement, which was called a hire-purchase agreement, was bound by the terms of the agreement to pay for and purchase the furniture. I do not see how *Lee* v. *Butler* can be an authority for the respondent's contention. Nor can I understand why the customer in the present case should be taken to have agreed to purchase the piano which he hired, because he fraudulently pledged it, and so put it out of his power to return it without redeeming the pledge.

I agree that the judgment under appeal should be reversed.

Lord MORRIS.—I concur.

Lord SHAND.—I am also of the same opinion. The right of the defendant to refuse delivery of the piano in question under the 9th section of the Factors Act depends on his being able to show that Brewster, in whose possession it was, had either bought it or agreed to buy it from Mr. Helby, the plaintiff and appellant, and the decision of this question depends entirely on the true construction of the agreement between the plaintiff and Brewster, under which the latter got possession of the instrument. It is true that by that agreement Brewster undertook to pay to the appellant not only a first instalment of 10s. 6d. described as a "rent or hire instalment," but to pay the same amount on the 23rd of each succeeding month, and that it was provided that on the payment of thirty-six monthly instalments the piano should become his property. If these stipulations had been unqualified there would have been an absolute obligation or agreement by Brewster to acquire the property in the instrument, and by purchase, although the instalments were described as for rent or hire; and the case of *Lee* v. *Butler* would have directly applied. But the whole obligations by Brewster were qualified by the stipulation: "That the hirer may terminate the hiring by delivering up to the owner the said instrument." This provision appears to me to make it clear that there was no purchase

and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired; and he need not allow the transaction to become one of purchase unless he desired to do so.

An agreement to purchase would infer an obligation to pay a price, the payment of which could be enforced by action, while here it is plain that no action for any balance of the alleged price could be maintained, if Brewster thought fit at any time to return the instrument to its owner. The substance of the transaction was a hiring of the piano, for the use of which monthly instalments were to be paid, with a provision that the arrangement might ultimately result in a purchase, but that this should be entirely at the option of the hirer, and should depend entirely on his thinking fit to make payment of thirty-six monthly instalments.

The contract of hiring only was to cease at his option on the instrument being returned to the owner.

It was maintained that under the general words of undertaking to pay future instalments, there was an agreement to purchase within the meaning of the Factors Act, although there was power to resolve the agreement or to bring it to an end by returning the instrument. It seems to me to be very difficult to hold that, even if in form the agreement could be correctly thus described, this would satisfy the provision of the Factors Act, which it has been forcibly maintained, requires an absolute obligation to purchase and pay a price, or at least an obligation which is not merely dependent on the will or wish of the alleged purchaser.

In this case, however, I think there was an agreement of hiring only with an option to the hirer to become the purchaser; and that although there was an obligation to sell, if the hirer should avail himself of the right of option to purchase, there was no obligation or agreement to purchase. I cannot hold that there is such an agreement on the part of one who having the beneficial use of the property of another, agrees to pay instalments described as rent or hire instalments, and which he is entitled to treat as payments for hire only, because it is also stipulated that by continuing to make the payments for a certain time, he shall acquire the property, he having at the same time the power at any moment, and at his own will, by returning the property to the owner, to put an end to any obligation to pay any further instalments.

Judgment appealed from reversed, and the judgment of the Queen's Bench Division restored; the respondents to pay the costs here and in the court below.

Solicitor for the appellant, *H. E. Tudor.*

Solicitor for the respondents, *John Attenborough.*

Court of Appeal.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) — May 16.

GWILLIAM *v.* TWIST AND ANOTHER. (*a.*)

Master and servant—Right of servant to delegate duty—Necessity—Opportunity of communicating with master—Liability for negligence of volunteer—Agent of necessity.

An omnibus belonging to the defendants was being driven by a driver in their employment. A police inspector, noticing that the driver was drunk, ordered him to discontinue driving. The omnibus was then a quarter of a mile from the defendants' yard. A person, who happened to be standing by, at the request of the driver, and with the acquiescence of the conductor, drove the omnibus home. While so doing that person negligently drove over the plaintiff and caused him injuries, in respect of which he sued the defendants.

Held, that, inasmuch as there was an opportunity of communicating with the owners, it was not necessary for the driver to delegate his duty, and therefore the defendants were not liable.

Decision of the Queen's Bench Division, ante, p. 400, *reversed.*

Appeal from the judgment of a divisional court on an appeal from a county court, reported *ante*, p. 400.

The action was brought to recover damages for personal injuries sustained by the plaintiff in consequence of the negligent driving of an omnibus belonging to the defendants. The omnibus was being driven in the streets of Birmingham by a man named Harrison, a driver in the employment of the defendants.

A police inspector, noticing that Harrison had had too much to drink and could not drive the omnibus with safety, ordered him to discontinue driving. The omnibus was at that time a quarter of a mile from the defendants' yard. A man named Veares, who had formerly been a conductor in the defendants' employment, happened to be standing by, and he, at the request of Harrison and with the acquiescence of the conductor, proceeded to drive the omnibus home. While on his way he negligently drove over the plaintiff, who was passing in the street.

At the trial the county court judge found that the accident was caused by the negligent or unskilful driving of Veares, that Veares volunteered to drive the omnibus with the acquiescence of the defendants' servants, and that the police inspector had acted properly. He reserved the case for further consideration, and subsequently gave judgment for the plaintiff for £30. He was of opinion that it was necessary that someone should drive the omnibus home, and that, the omnibus having been placed in the control of Harrison and the conductor, it was within the scope of their authority to authorise Veares to drive, and that on this ground the defendants were liable for his negligence. He was also of opinion that Veares might be regarded as an agent of necessity, and that on this ground also the defendants were liable.

On appeal the Divisional Court (Lawrance and Wright, JJ.) affirmed the judgment of the county court judge.

The defendants appealed.

Edward Pollock, for the defendants.

Houghton, for the plaintiff.

The following cases were cited: — *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Nicholson* v. *Chapman*, 2 H. Bl. 254.

Lord ESHER, M.R.—A question of importance has been raised in the argument in this case—viz., whether, where it becomes necessary for a servant entrusted by his master with a particular duty, to delegate that duty to somebody else, such delegation makes the person to whom the duty is delegated the servant of the master so as to render that master liable for his wrongful acts. That question, however, we need not determine; for a servant entrusted with a particular duty cannot delegate it to another person unless it is necessary that he should do so.

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

The question we have to consider is whether there was any evidence on which the county court judge could reasonably find that there was a necessity for the driver of this omnibus to delegate his duty to Veares. I do not think that the county court judge did, in his finding of facts, find that there was such a necessity; but in his judgment he seems to assume that the facts which he did find gave rise to such a necessity. I will therefore take it that he meant that a necessity existed. Was there evidence to justify that? A servant has no right to delegate his duty without first consulting his master, if he has an opportunity of doing so; for unless he has no opportunity to consult his master it cannot be a case of necessity. Now, here an omnibus was being driven by a driver who was not in a fit state to drive, and he was ordered by the police not to drive any more, and that order he was bound to obey. The omnibus was then only a quarter of a mile from the owners' yard. It is obvious that the omnibus might have been left standing where it was with reasonable safety, and the horses might have been kept still while a messenger was sent to the owners to obtain their instructions as to what should be done. There was no necessity for the driver to delegate his duty without first communicating with his masters. I think that the Divisional Court ought to have said that there was no evidence of any such necessity, and therefore the driver had no authority to authorize Veares to drive. In my opinion the doctrine of agents of necessity is not a doctrine of general application, but is confined to the particular cases to which it has been applied, such as that of the master of a ship and of an acceptor of a bill of exchange for the honour of the drawer and salvage cases.

The appeal must therefore be allowed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal allowed.

Solicitor for the plaintiff, *W. E. Aldis*, for *H. Parry*, Birmingham.

Solicitors for the defendants, *T. A. Dennison & Co.*, for *Tanner*, Birmingham.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) April 26, 27, and 29.

HUDDERSFIELD BANKING CO. (LIMITED) v. LISTER & SONS (LIMITED) AND OTHERS. (a.)

Consent order—Mistake of fact—Setting aside fixtures—Mortgagee and debenture-holders.

An order made by consent in an action can be set aside upon the like grounds as those upon which the agreement embodied in such order might have been set aside.

A consent order having been made, and it having been afterwards discovered that the parties had consented to it under a common mistake as to a material fact,

Held, that the order ought to be set aside.

This was an action raising the question whether a consent order could be set aside upon the ground of mistake of fact common to both parties.

The action was brought by the above-named bank for a declaration that a certain arrangement for the sale of certain looms, and their assent to such arrangement, and to an order of the 17th of October, 1892, were agreed to be given under a mistake as to material facts, and that such mistake was caused by the wrongful acts of persons in the employment of the official receiver, and that the looms belonged to them; and they also asked for an order that so much of the said order of the 17th of October, 1892, as contained their consent should be set aside, and that the proceeds of the sale of the looms belonged to them.

The circumstances which led up to the present action were as follows:—

An action was brought against the defendant company in March, 1892, by debenture-holders, in which the official receiver, who was the liquidator of the defendant company (which was then in liquidation), was appointed receiver on behalf of the debenture-holders. The bank, the plaintiffs in the present action, who were not parties to the debenture-holders' action, claimed thirty-five looms in the mills occupied by the defendant company as mortgagees under certain mortgages by which as they alleged they had become entitled to all fixed plant and machinery on the premises.

The debenture-holders contended that all the looms in question were loose chattels and comprised in their security and not in the mortgage to the bank.

To determine this question a summons was taken out in the debenture-holders' action upon which the bank appeared, and on the 17th of October, 1892, the said order of that date was, with the consent of the bank, made; and it was thereby directed that the looms should be sold and the proceeds of the sale of thirty-three of them should be paid to the receiver for the debenture-holders.

The looms were thereupon sold, and the proceeds of the thirty-three paid to the receiver.

It appeared from the evidence that prior to the 17th of October, 1892, the looms were inspected by the agents of the bank and of the receiver, and the thirty-three were found to be in fact not affixed to the freehold and were thought never to have been so affixed, but the others were known to have been affixed, though then unfixed, and when the order of that date was made neither the bank nor the receiver were aware that the thirty-three in question had ever been affixed to the freehold. The bank after the sale discovered that the said thirty-three looms had in fact been so affixed, and this action was brought by them against the company, the official receiver, and the debenture-holders.

Vaughan Williams, J., held that the plaintiffs were entitled to the relief they sought and made an order accordingly.

The debenture-holders appealed.

Farwell, Q.C., and *W. R. Sheldon*, for the appeal.—The consent order was wrongly set aside. The looms were fixed without the authority of the mill-owners and unfixed before the mortgagees took possession. [LINDLEY, L.J.—I suppose a consent order can be set aside on the ground of mutual mistake?] No. A consent order is as good as an order in an action: *In re South American and Mexican Co.*, *ante*, p. 131, [1895] 1 Ch. 37; Daniel's Chancery Practice, 1871, Vol. 1, p. 837. It is just as if the defendant came and said, "I might have brought more evidence, but I didn't": *Bradish* v. *Gee*, Amb. 229; *Webb* v. *Webb*, 3 Swans. 658; *Duranty's case*, 7 W. R. 70. The doctrine of mistake never goes so far as to extend to a case where the transaction has been carried out according to what both parties meant. The doctrine applies only to agreements where the language does not carry out the intention: *Flower* v. *Lloyd*, 27 W. R. 496, 10 Ch. D. 327, James, L.J., at p. 333; *Mexican, &c., Land Co. (Limited), Lund's case*, 7 W. R. 333; *Vadala* v.

(a.) Reported by WM. SCOTT THOMPSON, Esq., Barrister-at-Law.

Lawes, 38 W. R. 594, 25 Q. B. D. 310; *Abouloff* v. *Oppenheimer & Co.* 31 W. R. 57, 10 Q. B. D. 295, Lord Esher; *Attorney-General* v. *Tomline*, 26 W. R. 188, 7 Ch. D. 388. "Agreement" means a perfected agreement, not an agreement *in fieri* [LINDLEY, L.J. —In *Duranty's case* the mistake was on one side only:] *Stewart* v. *Kennedy*, 15 App. Cas. 108, 38 W. R. Dig. 179. [KAY, L.J.—What do you say to rectifying a settlement? LINDLEY, L.J.—It is more difficult to rectify than to set aside]; *Clayton* v. *Leach*, 37 W. R. 663, 41 Ch. D. 103 [LINDLEY, L.J., referred to *Bloomer* v. *Spittle*, 20 W. R. 435, L. R. 13 Eq. 427]; *Okill* v. *Whittaker*, 2 Ph. 338; *Davenport* v. *Stafford*, 8 Beav. 523, at p. 532 [LINDLEY, L.J., referred to *Trigge* v. *Lavallée*, 11 W. R. 404, 15 Moo. P. C. C. 298, 9]; *Brooke* v. *Lord Mostyn*, 13 W. R. 115 2 De G. J. & S. 373. If the order had been made *in invitum*, court would not have reheard case on it being shown that Listers had removed looms. [KAY, L.J., referred to *Bingham* v. *Bingham*, 1 Ves. sen. 126.] The looms were never fixed with the authority of Listers. A builder cannot deprive me of my property by affixing anything contrary to my orders: *Wake* v. *Hall*, 31 W. R. 585, 8 App. Cas. at p. 202, Lord Blackburn; *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382. A mortgagor while in possession is entitled to the fixtures, and may deal with them as he thinks fit: *Cumberland Union Banking Co.* v. *Maryport Hematite Steel and Iron Co.*, 40 W. R. 280, [1892] 1 Ch. 415; *Gough* v. *Wood*, 42 W. R. 469, [1894] 1 Q. B. 713. This was a compromise. [LINDLEY, L.J.—Where is there any evidence as to that].

They also referred to *Legge* v. *Croker*, 1 Ball & B. 506; *Brownlie* v. *Campbell*, 5 App. 925, 29 W. R. Dig. 532; *Garrard* v. *Frankel*, 30 Beav. 445 11 W. R. Ch. Dig. 28; *Boyd* v. *Shorrock*, 16 W. R. 102, L. R. 5 Eq. 72; *Paget* v. *Marshall*, 33 W. R. 608, 28 Ch. D. 255.

Cooper Willis, Q.C., and *Kershaw, Q.C.* (for the respondents), were not called upon.

LINDLEY, L.J.—An order was drawn up by consent. That order is set out in the statement of claim in the present action. It is dated the 17th of October, 1892, and it was an order made on the summons of the plaintiffs in the debenture-holders' action which had been served on the bank. [His lordship read the order.] Now let us consider what it was that the bank were consenting to. They consented to the sale of these looms, which everybody at that time thought were Listers' chattels, and not included in their mortgage. They consented to that. Under those circumstances the looms were sold, and the receiver has got the money. Since then it has been found out that these thirty-three looms had been originally screwed down and fixed, and had thereby become the property of the mortgagees. That fact was never known and never suspected by anybody. That fact having been discovered, the banking company say by their present action, "Set aside that consent order on the ground that it was made under a common mistake, and instead of the receiver handing over the money to the debenture-holders, order it to be handed over to us." Vaughan Williams, J., has made an order to that effect, and he has done it upon this ground. He has done it on the fact that that consent order was made by mistake, not on one side, but common mistake on both sides; that there is jurisdiction to set it aside; and that it would be a failure of justice if he did not rectify that mistake.

Now Messrs. Lister & Co. (Limited), appeal, and they contend that that order is wrong. They say first of all that there is no jurisdiction to set aside this consent order upon such materials as we have to deal with, and go so far as to say that a consent order can only be set aside on the ground of fraud. I dissent from that proposition entirely. A consent order, I agree, is an order, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that point, but that a consent order can be impeached, not only on fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual, I also have not the slightest doubt. Now if authority for that be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length, I mean the cases of *Davenport* v. *Stafford*, and *Attorney-General* v. *Tomline*. The only question to my mind on this point of setting aside a consent order, is to see whether the agreement upon which it was based can be invalidated or not. Of course, if that agreement cannot be invalidated, the consent order is good. If it can be, the consent order is bad.

Now on the point of jurisdiction let us see what there is against setting aside the agreement. How does that stand? It is an agreement carried out by payment to the receiver—that is to say, he sold the things under that agreement, and has got the money; but I take it that an agreement which is founded upon a common mistake, and which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation, can be set aside formally, if necessary, or treated as set aside and as invalid without any process or proceedings to do so. In point of law the moment you have got rid of the consent order, I take it it is quite plain an action would lie at law for money had and received at the instance of the bank against the receiver, upon the ground of the mutual mistake, or rather, as it would be put in law, of a total failure of consideration. If authority for that be wanted, the cases will be found collected in the ordinary books on contract, but in particular *Strickland* v. *Turner*, 7 Ex. 208. That related to the sale of an annuity, the annuitant having died shortly before the sale was executed. It was a sale by trustees, who were vendors, and the purchaser knew nothing about the death of the annuitant. The money was paid over, the purchaser brought an action to recover it back, and it was held, as a matter of course, that he was so entitled.

On the same principle there are cases in equity, of which *Bingham* v. *Bingham* may be referred to as a leading example, in which an agreement to purchase a property was set aside and the money restored, upon the ground that the property really belonged to the man who had professed to buy it. It was a common mistake, but the transaction was set aside. I am aware that *Bingham* v. *Bingham* has been occasionally criticized, and in some of the earlier editions of Lord St. Leonard's book on Vendors and Purchasers he seemed to think there was something wrong about it. In his later editions he changed his opinion; and *Bingham* v. *Bingham* was carefully examined in the House of Lords in *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R. 2 H. L. 149, and was distinctly affirmed. The principle of it was assented to and laid down to be correct, and, in a still later case, of *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779, Hall, V.C., again went through the whole of the cases relied on, and came to the conclusion that *Bingham* v. *Bingham* was sound law. As I understand the case I cannot conceive on what ground there should be any question of its soundness. It appears to me in perfect accordance with well settled principles of law, both of this country and of all civilized countries as far as I know. Therefore there is no difficulty, so far as I can see, either in

getting rid of the consent order or in getting rid of the agreement as based upon a mistake common to both parties—a mistake of this nature, that both parties thought and believed that these thirty-three looms never had been fixed at all, whereas in fact they had. It was a common mistake of fact, on which mistake the agreement under which the receiver received the money, was based.

Now I pass to another point, which was Mr. Sheldon's. He said this was a compromise. He says there were thirty-five of these looms, and the real arrangement was, not that the thirty-three should be sold upon the common mistake I have alluded to, but that there was a sort of arrangement of this kind, that Lister & Co. claimed all the thirty-five, and the bank said: "Give us two; there are two screwed down"; and Listers said: "You, the bank, may have two, but give us the balance." If that had been the true arrangement, the aspect of the case would have been totally different. This part of the case was carefully considered by Vaughan Williams, J., and he finds that upon the facts, and, I think, after seeing the evidence of Mr. Taylor, who said distinctly that there never was any such give and take arrangement at all, it would be impossible to adopt that view of the transaction. There was no compromise at all. It was simply an oversight.

Then it was said, supposing that be so, still these looms were unfixed before the mortgagees took possession, and on the authority of *The Cumberland Union Banking Co.* v. *The Maryport Hematite Iron and Steel Co.*, and *Gough* v. *Wood* that is sufficient, and the mortgagees cannot claim. The answer to that is this. This issue turned on the view rightly or wrongly—I do not pause to consider that now—that the chattels were unfixed and properly unfixed on the implied authority given by the mortgagees. They were not unfixed in the ordinary course of trade or anything of that kind, but they were unfixed really on purpose to prevent the mortgagees claiming them. The proposition as to inferring an authority on the part of the mortgagees or an implied authority on the part of the mortgagees to unfix them, or to come to the conclusion that they were unfixed in the ordinary course of trade for the purpose of being replaced by others, is untenable. *Gough* v. *Wood* really does not apply to the case at all. I do not think there is any other point of real importance. It appears to me that the appeal breaks down in every direction and that it must be dismissed, with costs.

LOPES, L.J.—I am of the same opinion. There are two questions that arise in this case. The first is, Was the court set aside a consent order which has been passed and drawn up; and, secondly, are these thirty-three looms fixtures? I will deal with the question first whether they are fixtures, because if the looms are not fixtures the consent order would be right and there would have been no mutual or common mistake. Are the thirty-three looms fixtures? The learned judge found they were so fixed to the soil as to become part of it. I am of opinion the learned judge was right. The conclusion I draw from the evidence is this, that the machines were fixed to planks, that the planks were fixed to the soil in such a way as to prevent the machines when they were moving either laterally or vertically. The screws of the screws raise to my mind the idea of fixation, or intention on the part of those placing the machines where they were placed to so fix them in the soil so that they would adhere to the soil. This is the view that the learned judge took, and in my opinion it was the right view.

But it was said during the course of the argument that even assuming all that, what was done by the manufacturers—namely, the annexation—was done without the knowledge of the defendants and without their authority, and must therefore be disregarded. I cannot adopt that contention. As I said during the course of the case, if I order a carpenter to come into my room and fix a bookcase for me, and in the course of so fixing it he fixes it in such a way that it becomes annexed to the freehold, it appears to me that I, telling him to make a good job of it or to fix it properly, could not be heard to say that that was not done with my authority, and that, therefore, annexation must be entirely disregarded, and that it does not become part of the freehold. That is very much this case, because, as appears from the evidence of Mr. Illingworth, who was the maker or manufacturer, they were told by Listers to place these machines *in situ* and to make a good job of them, and, acting on that, they placed the machinery in the way that I have endeavoured to describe. I think, therefore, that it cannot be contended but that these thirty-three looms were fixed to the soil in such a way as to pass to the mortgagees.

Then it is said there was a consent order which was drawn up and passed, and that the court has no jurisdiction to set it aside. Now it appears to me that the two cases which have been referred to are sufficient authority to show that it can be set aside. One was the case alluded to by Lindley, L.J., of *Davenport* v. *Stafford*, and the other *The Attorney-General* v. *Tomline*, and the law seems to be this: that a consent order may be set aside for the same reasons as those on which you may set aside an agreement. It appears to me directly a common mistake is established you can set aside an agreement. It cannot be contended here, I think, that there was not a common mistake. I rather understood it was admitted that both parties honestly believed that these thirty-three looms were loose chattels at the time the consent order was made. But then it is said that the true nature and character of this transaction is that it was a compromise. Now the order to my mind points in the other direction. I rather conclude that the transaction was this: that the one party was satisfied that the two looms were fixed to the soil and the other party was satisfied that the thirty-three were not fixed to the soil, and acting on that, not in any give or take way, but merely acting on this belief in that respect, they proceeded to this consent order.

Another point was made—namely, that these thirty-three looms were unfixed before the mortgagee took possession, but as has been pointed out with reference to the case that was relied upon, that case proceeded upon the ground that they were unfixed by the implied authority of the mortgagees; and there is also this observation to be made, that whereas in that case it might be said that they were removed in that way, that cannot be said in the present case. I have come to the conclusion, therefore, that the learned judge was right in his judgment in every respect, and I therefore think the appeal should be dismissed.

KAY, L.J.—I will add a few words on my own behalf, because one of the questions raised in this case is of very considerable importance. It was denied in argument that the court had any jurisdiction whatever to set aside the consent order except in the case of fraud.

Now what is a consent order? After all it is only the order of the court carrying out an agreement between the parties. Supposing the order out of the way and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud, but in case it was based upon a

mistake of material fact which was common to all the parties to it. Then if you may set aside an agreement on that ground, why should you not be able to set aside such an agreement simply because an order has been founded upon it?

It seems to me both on principle and on authority when once you find the agreement has been come to between parties who were under a common mistake of a material fact you may set aside that agreement, and this court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if the order had been acted upon by them, and third parties' interests had intervened, and so on, difficulties might arise, but nothing of that kind occurs here. Here we have got simply the parties to this agreement and order before us. No one else seems to have obtained any kind of interest under it, and therefore it seems to me that if it be made out that it proceeded upon the common mistake of a material fact there is ample jurisdiction in the court to set it aside.

Then did it or did it not? The only bodies or persons who were parties to this agreement and this consent order for this purpose were the original mortgagees and the subsequent debenture-holders. The question was, Which of the looms that were in the mortgaged property were in the nature of fixtures. It was agreed that two were, and it was agreed that thirty-three were not, but as to the thirty-three there does not seem to have been any dispute or contest whether they were fixtures or not. Experts went down and examined what the condition of things was, and found that these thirty-three looms were completely loose. Therefore they came to the conclusion that they never had been fixed, and they were not treated as fixtures at all. That was not the fact. The fact was that they had been fixtures just as much as the two that were treated as fixtures. I will not say any more on the question of whether they were fixtures or not. On the whole I think the learned judge came correctly to the conclusion that they had been, owing to the manner in which they were fixed to the floor as much fixtures as the two which it was agreed, must be treated as fixtures.

But then this point was raised. It was said, true they may have been at one time fixtures, but if they were, they were never fixed by the authority of the mortgagors who were in possession, but it was an accidental thing done without any authority from them at all. How stand the facts? As far as I can make out they certainly had when this question was about to arise been fixed to the floor for some months, probably eighteen months. During all that time the mortgagors were in possession, and it certainly would be very difficult to persuade me that they must be treated as being entirely ignorant of the fact that these looms were fixed to the floor of their own mill. But when I come to look at the evidence I find, as I understand the evidence, that they were in fact affixed by the workmen of the mortgagors of of this company. Mr. Lister told the workmen to make a firm job of it, and in pursuance of those general instructions what the workman did was to lay down the planks on the floor to strengthen the floor, which planks were nailed down to the joists of the floor, and then upon those planks were fixed the looms by screwing into the slots in the feet of the looms these screws that have been spoken of which, as to the two looms which were admitted to be fixtures had heads wide enough to extend beyond the width of the slot itself, and so to hold those two looms down vertically as well as to prevent them sliding horizontally. As to the thirty-three the evidence is clear they would have done for them exactly the same if they had had screws with heads of that same size, but they had not, though they seem to have had plenty of screws with heads of a smaller size, that is, as I understand, heads of such a size that they would slide up and down in the slots. In order to prevent that, they put under the heads of each of these smaller screws a washer of iron which extended beyond the sides of the slot and which made them for this purpose precisely equivalent to the larger screws that fasten down the two. That that was done by the authority of the mortgagors seems to me upon the evidence to be beyond the possibility of reasonable question. I therefore think there was a mistake of fact, and of a material fact which was common both to the mortgagees and to the debenture-holders between whom this agreement was made and on whose behalf this consent order was made. The mortgagees were induced to consent by ignorance of this material fact, which also the other side were ignorant of. That seems to me to enable this court to deal with, and to have enabled the learned judge in the court below to deal with, the consent order as he did deal with it—namely, to say that the agreement upon which it was founded was based upon a common mistake of a material fact, and, therefore, that there was jurisdiction to set that agreement aside, and consequently to set aside the order which was founded upon it.

But then it was argued or suggested to some extent by Mr. Farwell and urged more strenuously by his junior that this was a compromise. A compromise means if there is a question of doubt and the parties agree. "We will not try it out but we will settle it between ourselves by a give and take arrangement." I quite agree if that was so it would be extremely difficult to interfere with the order. But was there ever any doubt as to these thirty-three looms? Did either of the parties consider they were fixtures? They did not. There never was any such doubt at all, and therefore there certainly was no settlement of any doubt of that kind. I cannot see that in this case there is any element of a compromise. It seems to me that that argument fails in point of fact, because there was no question of doubt as to these thirty-three looms which was comprised by the arrangement that was made.

Then it was suggested that this was one large arrangement and that this was only a part of the large arrangement. We have looked into the evidence with regard to that, and as between the mortgagees and the mortgagors I can find nothing like an arrangement except as to the thirty-five looms and that arrangement, so far as it was made, I have dealt with already and have come to the conclusion that it proceeded upon a mistake of material fact.

Then the cases of *Gough* v. *Wood* and the *Maryport Hematite Iron case* were referred to as supporting the argument that even if they had at one time been fixtures, yet before the mortgagees took possession the mortgagors had a right to remove them. As between mortgagor and mortgagee, I simply dissent from that proposition entirely, and if those cases are examined and at any rate if the case before this court is examined—*Gough* v. *Wood*—it will be found that it proceeded absolutely and entirely upon this, that from the circumstances of that particular case, the mortgagees must be taken to have assented to what which the mortgagors did in removing the fixtures before they took possession. Here there is no pretence for saying that. This was not a removal of the looms in the course of the trade of the mortgagors and as a legitimate act of that trade. The case in the case of *Gough* v. *Wood* was that of a nurseryman who, in carrying on his business, removed trees which had been planted in the soil for the purpose of selling them, and converted them into chattels and

sold them. That would be a proper thing to do in carrying on his business. But there is nothing of that kind here. Therefore, I think those cases do not support the argument attempted to be founded upon them, and on the whole I agree with the decision of the learned judge in the court below. I think this appeal fails, and that it must be dismissed, with costs.

Appeal dismissed.

Solicitors, *Ramsden, Radcliffe, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield; *Iliffe, Henley, & Sweet*, for *Laycock, Dyson, & Laycock*, Huddersfield.

High Court of Justice.

Chan. Div. Chitty, J. } May 1.

In re CROWTHER, MIDGLEY *v.* CROWTHER. (*a.*)

Will—Trust for sale—Power to postpone—Profits of business pending sale—Direction as to interim *income—Capital or income.*

A testator devised and bequeathed his real and personal estate upon trusts for sale, conversion, and investment of the proceeds upon trust for his wife during her life, and after her death for his children attaining twenty-one. He empowered his trustees to postpone the sale of his real estate and the conversion of his personal estate for such period as to them should seem expedient, and directed that until such sale and conversion the income should belong to the persons who would be entitled under the trusts to the moneys arising from sale and conversion or the income from those monies (as the case might require), if such sale and conversion had actually taken place. The testator at his death, in 1872, *was engaged in a business, which was carried on by the executors and trustees until the death of the widow in* 1894, *and the profits had been paid to her as annual income.*

Held, that the widow was entitled to the whole of the profits as income.

In re Chancellor, Chancellor *v.* Brown, 32 *W. R.* 465, 26 *Ch. D.* 42, *distinguished.*

Action and motion for judgment.

The testator, who was engaged in the businesses of a rope and twine manufacturer and general shopkeeper, by his will dated the 10th of February, 1872, after making certain bequests of furniture and other domestic effects, bequeathed all other his personal estate, and devised all his real estate to his wife Mary Crowther, the defendant Thomas Crowther, and William Crowther, upon trusts for sale and conversion and investment of the proceeds.

And the testator empowered his trustees to postpone or delay the sale of his said real estate and the conversion of his said residuary personal estate or any part thereof, respectively, for such period as to them should seem expedient, and directed that until such sale and conversion the income arising therefrom should, from the time of his decease, belong to and be received by the person or persons who would be entitled, under the trusts thereinafter contained, to the moneys arising from such sale and conversion, or the income arising therefrom (as the case might require) if such sale and conversion had actually taken place. The trust funds and securities were to be held upon trust for the testator's wife during her life, and after her death for his children attaining the age of twenty years or marrying under that age, and if more than one in equal shares, but subject, nevertheless, as to the shares of such of his children as were daughters, to the trusts thereinafter contained, which were the usual trusts in favour of daughters and their children. And the testator appointed the said Mary Crowther, the defendant Thos. Crowther, and the said Wm. Crowther, trustees and executors of his will.

The testator died on the 12th of November. 1872, and his will was shortly afterwards proved by his executors.

The executors and trustees carried on the general shopkeeper business, in which the testator was engaged at the time of his death, in conjunction with his partner, William Crowther, in the rope and twine making branch, at a profit until the widow's death in 1894, and the profits had been paid to her as annual income.

This action was brought by a grandchild of the testator, entitled to a share of capital, for a declaration that the excess beyond 4 per cent. of the profits of the business during the twenty-two years since the testator's death should be accounted for as part of the capital of the estate.

Byrne Q.C. and *Tanner*, for the plaintiff.

Farwell, Q.C. and *J. G. Wood*, for the defendants.

The cases cited were *In re Chancellor, Chancellor* v. *Brown*, 32 W. R. 465, 26 Ch. D. 42; *In re Norrington, Brindley* v. *Partridge*, 28 W. R. 711, 13 Ch. D. 654; *Brown* v. *Gellatly*, 15 W. R. 1188, L. R. 2 Ch. App. 751; and *Kirkman* v. *Booth*, 11 Beav. 273.

CHITTY, J., after stating the above facts and reading the material parts of the testator's will, continued:—The question to be determined is whether the trustees were authorized by the will to carry on the business.

It is said for the plaintiffs that there has been a breach of trust. There is no allegation of loss thereby to the estate, the value of the business has admittedly increased since the testator's death. But it is said that the power to postpone does not mean a power to postpone for such period as the trustees may deem expedient, but there is a limit arising, to use the expression of James and Thesiger, L.JJ., in *In re Norrington*, out of an artificial rule of the Court of Chancery. The power of postponement is said to be for the purpose of selling, not of carrying on the business. It seems an extraordinary thing that there should be an arbitrary rule for inserting words in a provision so express in its terms as this is. The testator says, My trustees may postpone the sale as long as they think expedient, the court is to say, No, the trustees are not entitled to postpone selling as long as they think expedient, the meaning is that the year which the law allows may be extended for some short additional period to two or three years, with a view to effecting a sale at the end of that limited time.

As soon as the estate is divisible the power to postpone, of course, comes to an end. Why the clause should not be read as authorizing the carrying on of the business meanwhile, for the benefit of the estate, I am at a loss to understand. The power to postpone involves power to carry on the business in the meantime, *In re Chancellor, per* Fry, L.J. So long then as the trustees postpone the sale, they may lawfully carry on the business. So long as they carry on the business, the profits, being income of unconverted property, are to be treated as annual income for all the purposes of the will, and pass to the person entitled to such income under the will. In my

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

opinion I should be inventing a trap to catch unwary trustees, if I were to hold that the effect of this provision was to give some ill-defined limited power of postponing to some period other than that which the trustees thought expedient.

In *In re Chancellor*, which was relied on for the plaintiff, executors carried on their testator's business at a profit for nearly two years, before selling it, and it was only necessary to decide that postponement of the sale for the period there was justified, and that the *interim* profits belonged to the tenant for life, and the case before me is in no way concluded by that decision, or the other authorities cited in argument.

The plaintiff accordingly fails, and I hold that the whole of the profits were properly treated as income.

Judgment for defendants.

Solicitors, *Elliott & Ash*, for *H. H. Steward*, Birstall; *Flower, Nussey, & Fellowes*, for *Carr & Cadman*, Gomersal.

Chan. Div. } May 30.
Kekewich, J. }

CROSLAND v. WRIGLEY. (a.)

Insurance, Life—Benefit of wife and children—Foreign assurance company—Lex loci contractûs—Lex loci solutionis.

A policy of insurance on the life of a husband for the benefit of his wife and children was effected by an Englishman domiciled in England through the English branch of an insurance company which carried on business in New York.

Held, that the policy must be construed in accordance with the law of the place of domicile of the insuring parties.

Mr. R. Skilbeck insured his life for the benefit of his wife and children in the Equitable Life Assurance Society of the United States, whose principal office was in New York. The moneys assured was expressed to be payable to "Eliza Jane Skilbeck, wife of R. Skilbeck, for her sole use if living, in conformity with the statute, and, if not living, to the children of said R. Skilbeck or their guardian for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said R. Skilbeck."

At the time of the assurance being effected the said R. Skilbeck had two children (daughters) only, one of whom died in his lifetime, and the plaintiff was her legal personal representative. E. J. Skilbeck predeceased her husband. The Assurance company paid the moneys assured to the defendant, F. A. Wrigley, who was the surviving daughter. The assured was an Englishman domiciled in Yorkshire.

This was an action whereby the plaintiff, as legal personal representative of the deceased daughter, claimed one-half of the moneys assured, and the questions raised were whether the provisions of the policy must be construed according to the law of the State of New York, the domicile of the company, or according to the law of England, where the assurance moneys were to be paid, and also whether, according to the law of the country which governed the contract, the two daughters shared as tenants in common or were joint tenants, or whether the children entitled to share in the assurance moneys were only such as survived the assured, the effect of which latter construction would be to vest the whole property in the defendant.

Marten, Q.C., and *Vaughan Hawkins*, for the plaintiff, cited: *In re White's Trusts*, John. 656, 8 W. R. Dig. 102; *Ex parte Dever*, 18 Q. B. D. 660, 35 W. R. Dig. 96; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202; *Jacobs* v. *Crédit Lyonnais*, 32 W. R. 761, 12 Q. B. D. 589; *In re Missouri Steamship Co.*, 37 W. R. 696, 42 Ch. D. 321; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, 39 W. R. 65, [1891] 1 Q. B. 79; *P. & O. Steam Navigation Co.* v. *Shand*, 13 W. R. 1049, 3 Moore P. C. (N. S.) 272.

Renshaw, Q.C., and *W. A. Peck*, for the defendant, cited: *In re Seyton, Seyton* v. *Satterthwaite*, 35 W. R. 373, 34 Ch. D. 511; *In re Davies Policy Trusts*, [1892] 1 Ch. 90, 40 W. R. Dig. 141.

KEKEWICH, J.—The broad rule is that the law of the country where the contract is made presumably governs the construction of the contract; but from this rule there can be large departures, as for instance, where it is governed by the *lex loci solutionis*. It may be that the assurance company intended that they should have a discharge according to the law of their own country, though the benefit of the distribution should be decided according to English law. I do not think that it could be held to be the intention of the parties that the contract ought to be construed according to the law of the domicile of the company. There is very little evidence here of the constitution of the company or the law governing it. In each of the States of the American Union the law differs. Though to a large extent the law of the various States is very similar to that by which we are governed, in some respects there is a great divergence — *e.g.*, in various branches of shipping and mercantile law. There may also be large differences as to the status of legitimate children, their guardianship, &c.; questions which enter largely into this case. It is difficult to arrive at a conclusion that a gentleman resident here with his wife and family should make a post-nuptial settlement to be governed by the law of the domicile of the assurance company. In my opinion the parties intended the contract to be construed according to the law of the place of domicile of the parties insuring, and I hold that the children surviving meant the children surviving the insured, and that, as only one child was then living she was absolutely entitled.

Solicitors, *Ramsden, Radcliffe, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield; *Iliffe, Henley, & Sweet*, for *Laycock, Dyson, & Laycock*, Huddersfield.

Chan. Div. } June 27, 28, 18
Romer, J. }

JOHNSON v. GEORGE NEWNES (LIMITED).

Copyright — Periodical — Series of separate stories under one general heading—Author, when entitled to sue—Publication in periodical only, not separately—Registration, when sufficient — "Book" — Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18, 19.

A. published in a periodical a series of short stories under one general heading, under an arrangement with the proprietors that he should be entitled to separately publish the stories when the series in the periodical was completed. A. registered the general heading only.

(a.) Reported by F. T. DUKA, Esq., Barrister-at-Law.

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

the date of first publication as the date when the first story appeared. B. published a copy of one of the stories, which appeared more than two months after such date.

Held, (1) *that the copyright in the whole series was in A.*; (2) *that A. could sue B. for infringement without having published his stories apart from the periodical*; (3) *that the registration of the general heading, with the date as above stated, entitled A. to sue in respect of any subsequent story of the series under section* 19 *of the Copyright Act*, 1842.

Trial of action.

The plaintiff, Henry Thomas Johnson, wrote, under the general heading "Birds of the Night," a series of short stories depicting nocturnal experiences in London. These stories had but a slight connection with each other, and bore separate names, and were printed from time to time in a newspaper called the *Weekly Dispatch*. The first of them was printed, with a separate sub-title, in that newspaper on the 8th of September, 1893, and the eleventh (the story now in question) appeared in the same newspaper on the 19th of November, 1893. It was headed as follows: "Birds of the Night, by Henry T. Johnson, author of 'That Man Cheedlepump,' 'Jack of Hearts,' &c. XI. 'The Cabman's Story.'"

The *Weekly Dispatch* was registered at Stationers' Hall on the 13th of April, 1892. "Birds of the Night" was registered by Johnson at Stationers' Hall on the 7th of December, 1893, the date of first publication being stated in the certificate of registration to be the 8th of September, 1893. "The Cabman's Story" was not separately registered.

"The Cabman's Story" was, with slight variations, on the 2nd of December, 1893, printed in *Tit-bits*, a weekly newspaper published by the defendants, George Newnes, Limited. The story had been sent to *Tit-bits* in response to an offer of a prize of a guinea for the best story which should be sent in; and this sum was awarded to the sender by the defendants, they having no knowledge that the story was substantially a copy of "The Cabman's Story" by Johnson.

Under the arrangement between the proprietors of the *Weekly Dispatch* and Johnson he was paid by them for "Birds of the Night," and had the right of separately publishing the stories, but not till after the whole series should have appeared in the *Weekly Dispatch*.

After Johnson had registered his copyright as above dated, he brought this action against the defendants George Newnes, Limited, in which he alleged himself to be the author and registered proprietor of a subsisting copyright in a book entitled "Birds of the Night," and claimed that the defendants should be restrained by injunction from continuing to infringe his copyright, should render an account of profits and should deliver up all copies in their possession of so much of the book as had been copied.

The defendants pleaded by way of defence that the plaintiff was not the proprietor of a copyright in "Birds of the Night" or in "The Cabman's Story," and that neither of them was a book or capable of registration as a book under the Copyright Act, 1842, 5 & 6 Vict. c. 45; and in the alternative that the plaintiff was not the first publisher of either publication and that the date of first publication was not truly stated. They further denied that the story was a serial, and said that there had been no registration of the true name, namely, "The Cabman's Story."

The plaintiff had not at the date of the trial published, except in the *Weekly Dispatch*, either "Birds of the Night" or any part thereof.

Hopkinson, Q.C., and *F. Dodd*, for the plaintiff.—Under the second proviso of section 18 of the Copyright Act, 1842, the plaintiff is the proprietor of the copyright, not only of the whole series but of each story. He would not be entitled to sue if it could be proved both that he had been paid for his services and that it had been agreed that the copyright should belong to the proprietors of the *Weekly Dispatch*: *Walter* v. *Howe*, 29 W. R. 776, 17 Ch. D. 708 [*Smith* v. *Johnson*, 12 W. R. 122, 4 Giff. 632; and *Sweet* v. *Benning*, 3 W. R. 519, 16 C. B. 459, were referred to by ROMER, J.]. "The Cabman's Story" being part of the series, "Birds of the Night" is a book within section 2; and the plaintiff may sue irrespectively of the provisions of sections 18 and 19. Unless an author has assigned the entire copyright, he is proprietor under section 3. The defence that the defendants only published part of the plaintiff's work is not sufficient: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association*, 37 W. R. 337, 40 Ch. D. 425. The 8th of September, 1893, registered as the date of first publication, was the correct date, as being the date of publication of the first part of "Birds of the Night." Registration protects the then unpublished parts of the series: Copyright Act, 1842, s. 19; *Bradbury* v. *Sharp*, W. N. [1891] 143. Registration is only a condition precedent to the right to sue. It is no defence that the defendants were not aware that they were infringing a copyright.

Mayhew v. *Maxwell*, 9 W. R. 118, 1 J. & H. 312, was also referred to.

Neville, Q.C., and *Watt*, for the defendants.—The second proviso of section 18 of the Copyright Act, 1842, does not apply. By section 19 the only copyright in the stories is vested in the proprietors of the *Weekly Dispatch*. At any rate the plaintiff would have no copyright in "The Cabman's Story" until separately published; and this was not until more than two months after the date registered as "the time of the first publication." The plaintiff has not registered "The Cabman's Story" so as to comply with section 19.

Hopkinson, Q.C., in reply.—The copyright remained in the author; and the proprietors of the *Weekly Dispatch* could not separately publish the stories: *Bishop of Hereford* v. *Griffin*, 16 Sim. 190. And of course other people could not publish them.

He also referred to *White* v. *Geroch*, 2 Barn. & Ald. 298.

ROMER, J.—The plaintiff is clearly the author of this story which appeared in *Tit-bits*. It was one of a series of stories published by him under the general heading, "Birds of the Night," in successive weekly issues of the *Weekly Dispatch*, each part in itself forming more or less a separate story.

The first question is whether the proprietors of the *Weekly Dispatch* had acquired the copyright of these stories. I have come to the conclusion on the facts that they had not. Undoubtedly the plaintiff was paid by them for permission to them to insert these stories in their journal, but in my judgment on the facts he was not paid on the terms that the copyright in the stories should belong to the proprietors of the journal in question. Therefore the copyright in these stories remained in him, and the proviso at the end of section 18 of the Copyright Act, 1842, does not apply; for, as I think, that proviso only refers to a case where an author has parted in the first instance with the copyright in his work to the proprietor of the magazine or periodical work in which it afterwards appears.

The next question is whether an author who has not parted with his copyright has the right to sue an

infringer before the author has published his story in a separate form. It is said that, looking at sections 2 and 3 of the Copyright Act, the plaintiff did not acquire the copyright in these separate stories, because there had been and has been up to the present time no separate publication of those stories in accordance with section 2 of the Act.

Now, in my opinion, if you find in a volume separate parts, each distinguished or distinguishable from the others, and the volume is published, each part separate and distinguished in the volume itself is "separately published" within the meaning of section 2. If that were not the correct view one result would be this, that if two authors published separate stories in one volume, neither author could sue for an infringement of his copyright in his story unless he first took his own story out of the book and published it separately. In my judgment the Copyright Act leads to no such absurd result.

It follows that in my judgment there was a separate publication of these stories in the *Weekly Dispatch*, and the plaintiff, as their author, accordingly acquired a copyright under section 3 of the Act. He therefore had a copyright, and only needed to register before he could sue. He has registered. The question remains whether that registration is a proper one. It is said not, because this portion of "Birds of the Night," "The Cabman's Story," was a separate work in itself, and published on the 19th of November, 1893, whereas in registering, the plaintiff stated the date of first publication of his work to be the 8th of September, 1893. But "The Cabman's Story" was only a part of a series constituting one work. I think the plaintiff comes within the provisions of the 19th section of the Act. I think he is the proprietor of the copyright in a work published in a series of books or parts, the first having been published in the *Weekly Dispatch* on the 8th of September, 1893. That being so, and section 19 applying, it is clear that he has registered in due form, and he is entitled to sue.

That point taken by the defendants also failing, it follows that the plaintiff is entitled to relief in respect of the production by the defendants of this story. Clearly he is entitled to an injunction in the usual form.

Then damages are asked for. Doing the best I can on the evidence before me, and bearing in mind what has been said *pro* and *con*, I assess the damage at £25; and I order the defendants to pay the costs of the action.

Solicitors, *F. Tatton; G. Hardman Hoyle.*

Q. B. Div.
(Pollock, B., and Wright, J.) June 12.

LONDON COUNTY COUNCIL v. DAVIS. (a.)

Metropolis—Buildings—Land laid out as a street for foot traffic—Metropolis Management and Buildings Acts (Amendment) Act, 1882 (44 & 45 *Vict. c.* 14), *ss.* 7, 8.

The respondent commenced to erect on land previously vacant two blocks of buildings, which were designed for artizans' dwellings. They were to contain forty separate tenements or sets of rooms, sufficient to accommodate 150 *persons. Between the buildings there was a space or passage, which was made for the convenience of, and as a means of access for, those living in the buildings. The space was shut off from the street by means of gates. All the tenements had separate access to it—those on the ground floor by separate doors into it, and those above by means of a common staircase and balcony.*

Held, that the magistrate could properly hold that the space was not a "road, passage, or way laid out as a street for foot traffic" within the meaning of the Metropolis Management and Buildings Acts (Amendment) Act, 1882, *ss.* 7, 8.

Case stated, under statutes 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49, by Haden Corser, Esq., one of the police court magistrates sitting at Worship-street.

Two summonses were taken out on the complaint of the London County Council against M. Davis, the first of which alleged that he did "unlawfully commence to form or lay out a certain road passage or way for building as a street for foot traffic only, without the sanction of the London County Council contrary to section 8 of the Metropolis Management Act, 1882.

The second summons was under section 7 of the same Act, for "unlawfully commencing to form or lay out a certain road, passage, or way for building a street for foot traffic only, in such manner that such road, passage, or way would not afford direct communication between two streets," without the sanction of the London County Council.

The passage in question leads out of Hunt-street and passes between numbers 28 and 34, Hunt-street and then between two blocks of buildings either now being erected or proposed to be erected at the back of 28 and 34, Hunt-street, respectively. It was made for the convenience of persons dwelling in the two blocks referred to. It is 200 feet long and 20 feet wide, and is closed at its entrance by means of gates.

The two houses, numbers 28 and 34, Hunt-street have their sole means of access in the passage. The two blocks mentioned as being behind these houses consist of forty sets of living rooms, sufficient to accommodate 150 persons, and are designed for artizan's dwellings. Each set of living rooms is separated from the rest, and has a separate means of access. Those on the ground floor have separate doors into the passage, and with regard to the upper floors, though there is only one staircase in the building leading from the ground floor to the first floor, yet that staircase forms a means of approach to a balcony which runs all round the building at the level of the first floor.

Communicating with which the sets in the ground floor have separate doors, while those in the floors above have separate staircases.

The land now occupied by these blocks of buildings, and the passage was formerly a vacant space.

The magistrate holding that the passage was not intended to be a street for traffic within the meaning of the Act dismissed both the summonses.

Section 8 of Metropolis Management and Buildings Acts (Amendment) Act, 1882, provides that "where after the passing of this Act, it is intended by any person to form or lay out any road, passage, or way for building as a street for foot traffic only, such person shall, at least three months before such road, passage, or way is begun to be so formed or laid out, make an application to the board giving notice of such intention, and setting out a plan of the proposed street, with such particulars in relation thereto as may be required by the board, and if it appears to the board that it is expedient that such road, passage, or way should not be formed or laid out for foot traffic only, or that such road, passage, or way should be formed or laid out for foot traffic

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

ubject to any conditions which the board may pre-
nt, the board may, by order made at any time
efore the expiration of the said period of three
onths, decline to sanction the forming or laying out
f the same for foot traffic only, or may sanction the
rmation or laying out of such road, passage, or way
r foot traffic only subject to such conditions as they
ay think proper to prescribe, and thereupon, and
til the board shall otherwise direct, such road,
ssage, or way shall not be formed or laid out for
uilding as a street for foot traffic only where the
ard have declined their sanction, or shall not be
rmed or laid out for building as a street for foot
affic only, except in accordance with the conditions
scribed, where the board have given their sanction
bject to such conditions.

Any person forming or laying out, or commencing
form or lay out, or keeping open any such road,
ssage, or way for foot traffic only contrary to the
visions of this section shall, for every such offence,
liable to a penalty not exceeding forty shillings,
d to a further penalty not exceeding twenty
llings for every day on which such offence is
ntinued after the day on which the first penalty is
curred."

By section 7 similar provisions are enacted with
ard to persons "who intend to form or lay out
y road, passage, or way for building as a street for
purposes of carriage traffic, or of foot traffic
y, in such manner that such road, passage, or way
not afford direct communication between two
ets."

Avory (*Daldy* with him), for the appellants.—
passage is a road laid out as a street. There are
ses on either side, which have separate access to
The approach to a private house would not
a street, nor perhaps the joint approach to
or three houses, but where you get forty
rate tenements having access to it it becomes
reet. A street need not be one dedicated
he public. A private road may be a street:
ry of St. Mary's Islington v. Barrett, 22 W. R.
L. R. 9 Q. B. 278; and *Midland Railway Co.*
Vatton, 34 W. R. 524, 17 Q. B. D. 30. The gates at
ntrance might, at any time after the completion of
uilding operations, be removed, and then, though
place would obviously be a street it would be
sible to convict the owner, for the offence is
ming or laying out a road" or "keeping open
road," and it would be impossible to convict
r the latter words without showing that there
ome one originally liable under the former. It
frequent practice now among builders to erect
porary gates and then pull them down, thus
g the Act as interpreted in *Metropolitan*
of Works v. *Nathan*, 34 W. R. 164. That
is distinguishable from the present, because
t case there was already an existing street and
wner had only added to the buildings already
ng on it. This case is more analogous with *Daw*
London County Council, 59 L. J. M. C. 112, 38
Dig. 130. The magistrate in his judgment laid
stress on the significance of the word "traffic"
l in the Act. He thought it must mean the
e to and fro of the public. But the word is
sed in order to draw a distinction between
lar and other traffic.

ps, *Q.C.* (*Scott-Fox* with him), for the respond-
ere stopped.

OCK, B.—I do not think that we are deciding
question that involves any great principle
e Act of Parliament. I think what we have
is this; given a state of facts with regard to
lling of a series of houses for the occupation of the humbler classes, and given an access to those houses from the public street, whether it was competent for the magistrate fairly to come to the conclusion that the road or passage by which that access was obtained was not intended to be used by the public, and, if he is right in coming to that conclusion, then whether he was right in his further opinion that it was not laid out or commenced to be laid out as a street for foot traffic within the meaning of the Act.

Now Mr. Avory began by saying that there has been a difficulty about *Nathan's case* and other cases, because it was thought in some of them that the question whether the way under consideration was a street or not must depend on whether there had been a dedication to the public. That, no doubt, was considered and dealt with in the case of the *Vestry of St Mary's, Islington*, v. *Barrett*. But that clearly is not the question here. The question is of a very different kind. Looking at the character of the building, looking at that space which is left for the purpose of giving a full and convenient access to the tenements from the public street, to my mind it is a very different case from the ordinary way which is laid out as a street for all intents and purposes, except that the builder desires to close either or both ends for the purpose of keeping that, which otherwise would be beyond all doubt a street, private. That he cannot do that, is the decision in the case, which was decided by Lord Coleridge and Mathew, J., of *Daw* v. *the London County Council*. In the present case I think the facts are entirely different. I think it is a question very much of degree.

That this space is new there is no doubt. It is not an adaptation of an old court or yard to new purposes. It is a space created for the first time; and the question is, what is the proper and fair definition of that space so created, which can only be arrived at by looking at the purpose for which it was created. To my mind the conclusion to which the learned magistrate has come is the one which is correct in point of fact and the one at which he could properly arrive in point of law also, and therefore I think this appeal fails.

WRIGHT, J.—These enactments clearly may apply, although there is no intention whatever to dedicate the way to the public, as for instance, where a permissive user by the public is intended. They may also possibly apply in some cases where no user permissive or otherwise by the whole public is intended, for instance, if all the persons of a particular class, or inhabiting a particular place, or having a particular object are intended to have even permissive user of a way. I doubt whether they apply at all where the way is nothing but a common private access to dwelling-houses. But all these points remain to be decided by any court which may hereafter have to consider the question, because I agree with my learned brother that in this particular case it was competent for the magistrate to find that the words of the Act, "street for the purposes of traffic," were not satisfied. I do not think this case is to be taken as putting a legal construction on the word "traffic." But, supposing the street had only been a quarter of its present length, I should have thought that the magistrate would have been right in saying it would not be within the section. Then I do not see how we can say fairly that, because it is a trifle longer than that, it is within the section—so clearly within it that the magistrate was wrong in saying that it was not.

Appeal dismissed.

Solicitor for the appellant, *Blaxland.*

Solicitors for the respondent, *Wild & Wild.*

Q. B. Div.
(Pollock, B., and Wright, J.)

June 12.

REG. v. WELLS. (a.)

Local government—Quo warranto—*Treasurer to district council—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 81, *sub-section* 1.

The office of treasurer to a district council is not one with respect to which the remedy of quo warranto *will apply.*

Rule *nisi* for a *quo warranto* calling on George Wells to show by what authority he exercised the office of treasurer to the District Council of Ludlow, acting as rural sanitary authority.

George Wells, on the 9th of March, 1885, was appointed treasurer to the highway board of the district of Ludlow, in Shropshire, and acted in that capacity until 1894. Thomas Henry Atherden, since the 21st of April, 1881, had acted as treasurer to the board of guardians of the union of Ludlow, and since the 23rd of May of the same year had acted as treasurer to the board of guardians acting as rural sanitary authority. On the 25th of March, 1895, under the provisions of the Local Government Act, 1894, the district council took over the powers and duties of the highway board and became the rural sanitary authority. An election was held for the purpose of appointing a treasurer to the new council, the result of which was that George Wells was elected and appointed treasurer, and Thomas Henry Atherden, claiming to be entitled under section 81 of the Act to fill the office of treasurer to the district council in its capacity of rural sanitary authority, obtained this rule *nisi*.

Section 81, sub-section 1, of the Act of 1894, provides that: "Where the powers and duties of any authority other than justices are transferred by the Act to any parish or district council, the officers of that authority shall become the officers of that council"; and sub-section 4 provides that "every such officer, vestry clerk, and assistant overseer, as above in this section mentioned shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

Bosanquet, Q.C. (*Acland* with him), showed cause.—The object of the Act was that there should not be several different funds as heretofore, but one fund and one treasurer. The words of the Act present a difficulty, but the district council have solved the difficulty in this case by electing a treasurer. Officers appointed under the Public Health Act, 1875, hold their offices at will, and have in no sense a tenure for life or such continuous tenure as will support a *quo warranto* against one usurping it. Mr. Atherden's proper remedy is to claim compensation under section 81, sub-section 7.

A. T. Lawrence, in support of the rule.—That the funds were intended to be kept separate is shown by reference to sections 29 and 58 of the Act of 1894. The question whether Mr. Atherden was entitled to be treasurer of the district council depends on his position with regard to the former rural sanitary authority. His position was that he held the office subject to dismissal by the Local Government Board as successors of the Poor Law Commissioners, but he was not removeable by the authority itself. The appointment by the guardians of the treasurer of the union was made under article 153 of the General Orders made by the Poor Law Commissioners in 1847. Article 187 of the same General Order provided that every officer appointed under the order should continue to hold his office until he died, or resigned, or was removed by the commissioners, or was proved to be insane to the satisfaction of the commissioners. 10 & 11 Vict. c. 109, provided that that General Order should continue in force. The Public Health Act, 1872, in constituting the guardians as the rural sanitary authority provided (section 12) that the treasurer of the union should be treasurer of the rural sanitary authority. The Public Health Act, 1875, sections 318 and 326, provided for the continuance of the offices under the rural authority as regulated by the Act of 1872. So that in 1894 George Wells was properly acting as treasurer to the board of guardians in their capacity of rural sanitary authority. That such an office existed and was required is shown by section 195 of the Act of 1875, which requires officers to pay over to the treasurer all money owing by them on the balance of their accounts. There was no provision in the Public Health Acts for the dismissal of officers by rural sanitary authorities as there was, by section 189, in the case of urban sanitary authorities. Therefore the office was in the nature of a freehold office; and, being improperly excluded, Mr. Atherden could maintain a *quo warranto* against the usurper: *Reg.* v. *Overseers of St. Martin's-in-the-Fields*, 17 Q. B. 149; *Darley* v. *The Queen*, 12 Cl. & F. 520. He had no other remedy. There was no salary attached to the office, and that being so, he could have no claim for compensation, which was a circumstance that made the remedy of *quo warranto* all the more requisite.

POLLOCK, B.—In this case many difficult points were raised in the argument, but the real point seems to be this: The district council of Ludlow, having power to deal with certain funds, have appointed Wells as their treasurer to hold them. What power they had to do so it is not necessary to inquire. They are a corporate body, having the power to collect and disburse funds, and they must have someone to hold the money. Atherden's contention is that whatever rights Wells may have, at any rate he (Atherden) is entitled to the office of treasurer to the council. He says he was appointed, in April, 1881, treasurer of the Ludlow Union. He was appointed by the guardians, and was removable only by the Local Government Board. Later in the same year he was appointed treasurer of the rural sanitary authority.

Quoad his appointment as treasurer to the guardians he has no *locus standi*, because the only claim he has is under s. 81, and the powers of the guardians as such were not transferred to the council. But his position as treasurer of the Ludlow Sanitary Authority is different. In respect of that office he had some important duties to perform, but it was in no sense a public office such that if a person were excluded from it the court would grant a *quo warranto* against the person holding it. The real meaning of section 81 is that, whereas certain duties were performed by certain persons under the late bodies, in future they are to be performed by the same persons under the district council; but it was not intended that they should take a place of a similar character. It is a confusion of ideas to think so, and it is assisted by the fact that the council have, in one instance, appointed as their treasurer one who was formerly treasurer to the highway board.

WRIGHT, J.—The first and most fatal objection is that no such office exists as that to which this application relates. The Local Government Act has omitted to make any provision for the constitution of

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

treasurer to the district council, as it has done in the case of the parish council. The Local Government Board could, if necessary, make a rule to supply the deficiency, and therefore the omission is of no material importance. What does exist is a partial and personal relation between the council and someone who was formerly treasurer of another body.

Further, section 81 is a transitory provision, and I cannot think that a *quo warranto* will apply in the case of a transitory appointment. A second objection is that the duties of the treasurer to the district council are not of that "public and substantive" character which are required to support a *quo warranto*. The duties of a treasurer are enumerated in the Poor Law Acts, and are mere ministerial Acts. I think, also, it is fatal to the application that the office is held during the will of a third person, namely, the Local Government Board, who have power to put an end to the appointment under their rules. As to the construction of section 81, I agree with my learned brother. So far as powers of other bodies are transferred to the district council, the officers of that body are to perform similar duties to those they had formerly discharged, and are to be paid accordingly.

Solicitors for the defendant Wells, *Chester & Mayhew*, for *Weyman & Weyman*, Ludlow.

Solicitors for the relator, *Cree & Son*, for *W. J. Mountford*, Ludlow.

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 28.

In re HAMILTON.
TRENCH *v.* HAMILTON. (*a.*)

Will—Construction—Absolute gift—Precatory trust—"I wish them to bequeath."

A testatrix by her will made a bequest in the following terms: "I give, bequeath, and appoint to my dear nieces, Mrs. G. and Lady A., the sum of £2,000 apiece for their sole and separate use, and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew S. and my dear niece Mrs. P.

Held, affirming the decision of Kekewich, J., *that there was no precatory trust, and that Lady A. took the legacy of £2,000 absolutely.*

The rule laid down in In re Adams and the Kensington Vestry, 32 *W. R.* 120, 883, 27 *Ch. D.* 394, *preferred to that laid down in* Malim *v.* Keighley, 2 *Ves. jun.* 333.

Appeal from Kekewich, J.

Susanna Hamilton, who died on the 3rd of May, 1857, by her will dated the 5th of January, 1856, made the following pecuniary bequests: "I give, bequeath, and appoint to my dear nieces Mrs. Gascoigne and Lady Ashtown the sum of £2,000 apiece for their sole and separate use, and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew Silver Oliver and my dear niece Mrs. Pakenham in such mode as they shall consider right."

The will contained no trust legacies.

Lady Ashtown died on the 23rd of February, 1893, and her executors took out an originating summons against the legal personal representative of Susanna Hamilton and members of the families of Silver Oliver and Mrs. Pakenham, to have it decided whether Lady Ashtown took the legacy of £2,000 absolutely, or whether that sum was, after her decease, subject to any, and what trusts in favour of the families of Silver Oliver and Mrs. Pakenham.

Kekewich, J., held that there was no precatory trust, but that Lady Ashtown took an absolute interest in the legacy of £2,000.

One of the defendants, the only child of Silver Oliver, appealed.

Cozens-Hardy, Q.C., and *J. T. Prior*, for the appellant.—If this is not a precatory trust it is difficult to see what can be one. Lady Ashtown took only a life interest. [LINDLEY, L.J., referred to *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321, 30 W. R. Dig. 229]. The two early cases of *Mason* v. *Limbury*, cited Ambler, 4, and *Malim* v. *Keighley*, 2 Ves. Jun. 333, have never been overruled and are indistinguishable from the present case. In *Knight* v. *Boughton*, 11 Cl. & F. 513: *Lamb* v. *Eames*, 19 W. R. 659, L. R. 6 Ch. App. 597; *Hutchinson* v. *Tenant*, 26 W. R. 904, 8 Ch. D. 540; *In re Adams and the Kensington Vestry*, 32 W. R. 120, 883, 27 Ch. D. 394; and *In re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253, 37 W. R. Dig. 205, the case of *Malim* v. *Keighley* was not cited. They are, moreover, distinguishable from the present case.

They also referred to *Pigg* v. *Clarke*, 24 W. R. 1014, 3 Ch. D. 672, and *Lambert* v. *Thwaites*, 14 W. R. 532, L. R. 2 Eq. 151. [LOPES, L.J., referred to *Cruwys* v. *Colman*, 9 Ves. Jun. 319. KAY, L.J., referred to *Wright* v. *Atkins*, 1 Ves. & B. 313.]

W. M. Cann (*Warmington, Q.C.*, with him).—*Malim* v. *Keighley* cannot be supported against the later cases. *In re Diggles* is similar to the present case, and the word "desire" used in that case is not weaker than "wish." "Family" is a vague term: *Horland* v. *Trigg*, 1 Bro. Ch. C. 142.

Cozens-Hardy, Q.C., replied.

LINDLEY, L.J.—In this case we have to construe a will which, apart from the cases, I should have thought plain. The will is the will of a lady and is dated the 5th of January, 1856. It is a short will and it consists entirely of pecuniary legacies. There is not, in language, a trust from beginning to end of the will. There is no bequest of any fund to any trustee, and there is no trustee. It is a mere string of pecuniary bequests. [His lordship read the bequest as set out above, and continued:—] That is the whole of it. Now Lady Ashtown, as I understand, is dead, and the question is whether the child of Silver Oliver takes one-half of the £2,000 which was bequeathed to Lady Ashtown. The facts as to Mrs. Pakenham's family have been stated, and I rather think there is more than one child of hers.

Now let us look at this language apart from all authority, and ask ourselves whether we can say, without stretching the language, that what this testatrix meant was that Lady Ashtown should have this £2,000 bequeathed to her for her life only, and that she should keep it subject to the duty of investing it, receiving the income for her life and that then all she could do with it was to bequeath it between the families of the nephew, Silver Oliver, and Mrs. Pakenham, in such a way as she should think fit. Is that the true reading of it? I confess, apart from authority, I should have thought not. I should have thought that was the very last thing that was intended. I should have construed this will in this

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

way: "I give this £2,000 to Lady Ashtown, but I express my wish that it should be employed in this way, subject to any reason she may see to the contrary, I should wish her to leave it or bequeath it to these families," but a desire to impose on her a trust, with the natural consequence of cutting down her interest to a tenancy for life, I should not be able myself to spell out of this language.

But then we are told that there are decisions which compel us to construe this as giving her a life interest, and we are referred to a case of *Malim* v. *Keighley*, in which the then Master of the Rolls said this: "I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it." Everything in that passage, to my mind, turns upon the emphasis which is to be attributed to this expression, "the way in which it shall go." If it means "the way in which it *shall* go"—imperative—I do not quarrel with it. But contrast that with what appears to me a far sounder principle of construction, which is to be found in the judgment of Cotton, L.J., in the case of *In re Adams and the Kensington Vestry*. There the learned judge says; "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly, confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will." I say in this case we are bound to see that the beneficiaries are not made trustees unless intended to be made so by their testatrix. That is the true rule, and a sounder one than that expressed by the Master of the Rolls. It was adhered to in *In re Diggles*, *Gregory* v. *Edmondson*, and appears to me a far sounder principle than to take the arbitrary rule laid down by the Master of the Rolls in *Malim* v. *Keighley*.

The principle is to take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended to say so, although previous judges have said the contrary in some wills more or less similar to the one which you have to construe. I am prepared to act on that principle, and, acting on that principle, it appears to me that we should be straining these words to create a trust in obedience to decisions on former wills more or less different, and we should not be giving effect to the intention of the testatrix in this case. Therefore, I think the appeal fails.

LOPES, L.J.—The question we have to consider in this case is whether the words of the gift create a precatory trust in favour of the families of Silver Oliver and Mrs. Pakenham, and we are asked to come to the conclusion that what the testatrix intended was this, merely to give a life interest to Lady Ashtown with a power to appoint in favour of the families of Silver Oliver and Mrs. Pakenham, and we are asked to infer that that was her intention from the language she uses. I rather expect that if we were only to be guided by the earlier authorities there would be strong ground for saying that this would be a precatory trust, but it seems to me perfectly clear that the current of conclusions with regard to precatory trusts is now changed, and it appears to me that the result of the change is this, that the court will not allow a precatory trust to be raised unless, on the consideration of all the words employed, it comes to the conclusion that it was the intention of the testator or the testatrix, as the case may be, to create a precatory trust.

Now, that being so, what we have to look at is the intention of the testatrix in this case. I cannot for a moment infer the intention of the testatrix which has been suggested. I will not refer to the case of *In re Adams and the Kensington Vestry* because my learned brother, Lindley, L.J., has already referred to that. But there is this expression used in the case of *In re Diggles* which appears to me to be applicable to the present case. It is there said: "The later cases have established the reasonable rule that the court is to consider in each particular case what was the testator's intention."

Now, construing this will which we have before us according to the ordinary use of the English language, I think that the testatrix did not mean to give an interest for life only to Lady Ashtown with a power of appointment in favour of the other persons named, but that she intended to give her the £2,000 absolutely, trusting to her affection and honour to follow the wish which is expressed, if she found it desirable so to do, when the occasion required, but not intending in any way to fetter or bind her with regard to her disposition of the property. That being so, I think the learned judge's decision was right. I may remark that there is no trust in any part of this will, and, therefore it would be still more difficult to infer the particular precatory trust which has been endeavoured to be set up in this case.

KAY, L.J.—It is very important, no doubt, that the current of authorities, as it is called, should be as uniform as it can possibly be made, because unless it be so, it is extremely difficult for persons without the assistance of the court to construe for themselves the words of any particular will. Therefore, when the current of authority lays down a particular canon of construction, I conceive the court would be very reluctant indeed to depart from it. But what, on the other hand, seems to me to be of equal and even greater importance is that we should not, by an arbitrary rule which is supposed to have been laid down in cases more or less like the one we have to construe, defeat the intention of the testator in the particular will which we have to construe.

Now, looking at this will by itself, quite apart from authority, I, for myself, have not the slightest hesitation or doubt as to what the proper construction of the will is, and I think that no one, whether a lawyer or layman, would, looking at these words, hesitate at all as to what the testatrix really meant. The words are very few. The testatrix says, "I give, bequeath, and appoint to my dear nieces, Mrs. Gascoigne and Lady Ashtown the sum of £2,000 apiece for their sole and separate use, to be independent of their husbands." I pause there signedly, because, though one part of the gift cannot be construed as a whole, and you must read the whole before arriving at the true construction, and it is really beyond question that what is given is an absolute legacy of £2,000 to each of these ladies. There is no trustee interposed. There is nothing in the world to limit the absolute nature of the gift, and then when we proceed I think there is something

which really confirms that. The next words are, "and I wish them to bequeath the same equally between the families of my nephew, Silver Oliver, and my dear niece, Mrs. Pakenham in such mode as they shall consider right."

Now, there she treats them as having, under this gift, the property absolutely in themselves, so that they can deal with it by their will, and if she had intended that that should not be so, certainly she would not have used these words, "I wish them to bequeath the same." Therefore I cannot find any indication whatever to lead me to any construction but this, that these legacies of £2,000 were given in the first instance to these ladies absolutely.

Now all that is expressed here may be completely satisfied by supposing that they take absolutely these two legacies, and that the testatrix expressed a wish, which she did not mean to be at all binding that when they make their own wills they should dispose of this £2,000 in a particular way, unless they saw reason to the contrary. That satisfies every one of the words. To my mind that is the *primâ facie* clear meaning of the words.

Now see what we are asked to say. We are asked to say that is not the meaning of the words, that these ladies were not to take absolutely, but for life only, and that they were not to have power to bequeath, that is to make wills, as if it was their own property, but that they had merely the power of appointment by will, and then that we ought to imply that which the testatrix has not said, that in default of appointment it is to go to these people who are indicated as objects of the power. If that had been the intention the testatrix, if she was well advised, would have said, "I give this property to trustees in trust for each of these legatees for life, and I give them a power of appointment by will amongst the families of these other persons after their own death, and in default of appointment I give it to those families." All that we are asked to imply. It is quite impossible to arrive at that on the mere construction of these words. There is no trust expressed. There is no power of appointment. It is a wish that they should bequeath that which was absolutely given to them. There is no gift in default of appointment and there is no gift in default of their making a will. There is nothing of that kind. All that has to be implied, and therefore it seems to me it would be extremely wrong to raise this implication upon words like these.

But then it is said, you are bound to do it because of the current of authority. To hold that I am bound to read this will in the way in which it is argued it should be read, because of the current of authority, would be to tell me I am bound to defeat the intention of this particular testatrix because, in somewhat similar cases, the court has come to a different conclusion. That is not the way to use authorities on the construction of a will, and where I find nothing which will warrant me in coming to that conclusion I decline to admit that there is any rule of construction which obliges me to treat a will in such a way as to do what I think would be to defeat the intention of the testator or testatrix. I do not think it necessary at all to go into a critical examination of any of the preceding cases. I think without much exercise of ingenuity one might distinguish every single case which has been cited in the particular case before us. But I come to the conclusion, upon this will, that no precatory trust was intended, that it was intended by the testatrix to give an absolute interest in each of the legacies of £2,000, and that the wish she has expressed was not meant to be a binding wish so as to compel them to do that which she says she wishes them to do. Accordingly, I think the decision of the learned judge in the court below was right, and that this appeal fails.

LINDLEY, L.J.—I meant to add that there is another intention which is pretty strong in this case, and that is that the bequest is to be to the families of these two people. The word "families" is rather a vague word, but is intended to indicate that the wish of the testatrix was that the property should be distributed among the people who might fairly be called the "families" of the two persons. Therefore, it is extremely difficult to imply in a case of this kind any gift in default.

Appeal dismissed.

Solicitors, *Cope & Co.; Wilkinson & Son.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ., and Chan. Div.) — March 7; May 25.

TAUNTON *v.* SHERIFF OF WARWICKSHIRE. (*a.*)

Company—Debenture—Execution creditor—Rights of—When complete.

Held, by Kekewich, J., *that, where debenture-holders intervene after sale by a sheriff, but before the sale moneys are handed over to the execution creditor, the equity of the debenture-holders is not displaced, and the proceeds of sale belong to them.*

Held, by the Court of Appeal *that, upon the facts of the case there had been no sale by the sheriff, and the decision of* Kekewich, J., *affirmed on that ground.*

This was an action to restrain the sheriff from selling certain goods belonging to the Birmingham Ammunition Co. (Limited).

The plaintiffs were holders of debentures of the company which were charged on the company's assets as a floating security. Judgment was obtained by trade creditors of the company on the 9th of February, 1895, and execution thereon levied on the 14th of February.

On the 16th of February a debenture-holders' action was commenced, and notice thereof given to the sheriff and the creditors.

On the 21st the writ in this action was issued and an *interim* injunction granted.

Notice of this injunction was sent to the sheriff's officer, but did not arrive till after the time appointed for the sale. In the meantime, however, the sheriff's officer had seen the plaintiff's solicitor, and the latter had handed to him the sum of £70 5s. 6d., with a letter stating that the money was paid under protest, and giving him notice not to part with the money. The sale was therefore not proceeded with, and on the 22nd of February a receiver was appointed in the debenture holders' action.

T. B. Napier, for the plaintiffs.—The debenture-holders are entitled to this money: *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *In re Opera (Limited)*, 39 W. R. 705, [1891] 3 Ch. 260.

Ryland, for the execution creditor.—The execution was complete before the intervention of the debenture-holders.

Macaskie, for the sheriff.

Napier, in reply.

KEKEWICH, J.—The question in cases of this kind is what is the equity of the debenture-holders. The

(*a.*) Reported by F. T. DUKA and ARNOLD GLOVER, Esqs., Barristers-at-Law.

execution creditor has rights which are interfered with by the interposition of the court on behalf of the debenture-holders. In order to understand what the equity of the debenture-holders is, it is necessary to look at their charge. It is over all the company's property, and it is stated to be a floating security which "shall not hinder any dealings by the company in the course of its business with all the property hereby charged in such manner as the company may think fit." I am not here concerned with a dealing by the company in the course of its business, but with an execution on a judgment which results from dealings in the course of the company's business, though neither the execution nor the sale under it is a dealing by the company.

Now what is "a floating security"? I am not aware of any precise definition, and shall not attempt one. Here the security was not enforced until after execution had issued and the goods had really been sold, though, in fact, shortly before notice of the injunction, the execution creditors had been paid out by the debenture-holder. Was his equitable charge then rendered active? I have to decide what is the position of the debenture-holder after the property is sold and before the money is handed over. I think, giving effect to the language used by Lindley, L.J., in *In re Opera* (*Limited*), that if the property is sold and the money not handed over, the equity of the debenture-holder is not displaced. The sheriff must therefore pay the money, after deducting his costs, including his attendance here, to the receiver in the debenture-holders' action.

May 25.—The trade creditors appealed.

Ryland, for the appellants.—The payment of the £70 5s. 6d. constituted a sale of the property. The debenture-holders have merely an equitable charge. They were too late in perfecting that charge in the only proper way—namely, by the appointment of a receiver. They cannot assert their rights merely by notice.

He referred to *Swain* v. *Morland*, 3 Moore, 740; *In re Panama, New Zealand, and Australian Royal Mail Co.*, 18 W. R. 441, L. R. 5 Ch. App. 318; *In re Florence Land and Public Works Co.*, 27 W. R. 236, 10 Ch. D. 530; *In re Colonial Trusts Corporation*, 15 Ch. D. 465, 29 W. R. Dig. 40; *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*, 33 W. R. 797, 29 Ch. D. 715; *Edwards* v. *Standard Rolling Stock Syndicate*, 41 W. R. 343, [1893] 1 Ch. 574; *In re Opera* (*Limited*), 39 W. R. 705, [1891] 3 Ch. 260.

Macaskie, for the sheriff.

T. B. Napier, for the plaintiffs, was not called upon.

LINDLEY, L.J., after stating the facts, said: The cardinal fact about this case is that the goods were never sold. It is impossible to mistake the meaning of the payment of the £70 5s. 6d. and of the letter. It is obvious that the goods were never sold, and that the £70 5s. 6d. does not represent the price of the goods. It is the amount of the judgment and costs, and was paid to the sheriff until it could be ascertained who was entitled to it.

Now, who is entitled to the money? Is it the plaintiffs'? What were the rights of the debenture-holders? The debentures gave an equitable charge on all the assets of the company, and that involved a right in equity, if the money became due, to appoint a receiver. The plaintiffs asserted that right, and a receiver was appointed before the goods were sold. That being so, it was the duty of the sheriff not to sell: see *In re Opera* (*Limited*).

But it is said that the execution creditors had a right to have the property sold before the receiver was appointed. Is that so? If the sheriff had sold after receipt of notice of the debenture-holders' claim, what would the court have done? Suppose the sheriff had interpleaded, the judge would have postponed his decision till after he had seen the result of the debenture-holders' action.

I think that the debenture-holders exerted their rights in time, and that Kekewich, J., took the right view. The key to the case is that the receiver was appointed before sale.

LOPES, L.J.—I am of the same opinion. After the facts are once understood the case is an easy one. The fact is there never was any sale, and a receiver was appointed. That is a complete answer to the appellants' case. The debenture holders did everything in their power to assert their rights. When the notice of the 18th of February was given, the sheriff should immediately have got an interpleader issue. If that had been done the money would have come to the hands of the debenture-holders. I do not say what would have happened if the sale had taken place and the money had actually been handed over. It is not necessary to decide that here.

KAY, L.J.—Mr. Ryland has addressed an ingenious argument to us to prove that there had been a sale, and that this money stands in the position of proceeds of sale; but when the actual facts are looked at, it is clear that there was no sale. The debenture holders obtained the appointment of a receiver on the 21st of February, and that moment the security attached upon all the property of the company, including the goods that were to have been sold, but were not. While the action was pending, and after notice of the action being pending had been given, the debenture holders deposited this sum of money with the sheriff. They had not had time to appoint a receiver, but they did all they could. The money was not purchase money, but merely the amount of the sheriff's claim. It was placed *in medio* to await the result of the action. Then, by the appointment of a receiver, the debenture-holders perfected their security, and I think the money belongs to them, and not to the execution creditors.

Appeal dismissed.

Solicitors, *Belfrage & Co.*, for *Reece & Harris*, Birmingham; *Taylor, Hoare, & Pilcher*, for *Richards, Child Heath*, Warwick; *Barlow & James*, for *P. B. Butlin*, Birmingham.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 2[illegible]

BONHOTE v. HENDERSON. (a.)

Settlement—Voluntary settlement—Rectification.

The decision of Kekewich, J. (*reported* ante, p. [illegible]) *affirmed upon the evidence.*

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 20.

In re TUCKER. (*a*.)

Settled Land Acts—Cost of improvement where no prior scheme—Payment by tenant for life—Application for repayment out of capital moneys—45 & 46 Vict. c. 38, s. 26—53 & 54 Vict. c. 69, s. 15.

A tenant for life having actually paid the cost of improvements in respect whereof no scheme under section 26 of the Settled Land Act, 1882, had ever been submitted, applied to the court under section 15 of the Settled Land Act, 1890, to be recouped out of capital moneys in the hands of the trustees.

Held, that the court has jurisdiction to allow such recouping; but that, the works having been executed and paid for, the application must be considered with greater strictness than if the work was still to be done.

This was an appeal from a decision of Kekewich, J., in chambers upon a summons under the Settled Land Acts, 1882 to 1890.

The summons was by the tenant for life of certain settled estates for an order that the trustees of the settlement for the purposes of the above Acts might be directed to apply the sum of £652 7s. 8d. out of capital moneys arising under the said Acts in their hands, subject to the said settlement, in payment for certain improvements upon the lands subject to the settlement—namely (*a*) additions and alterations for sanitary purposes to the principal mansion house necessary or proper to enable it to be let; (*b*) the rebuilding of certain stables at a farm and the sinking of a well and the providing of water supply to certain other farms. The works had been done by the tenant for life at the end of 1893 and beginning of 1894 without any scheme having been submitted to the trustees in accordance with section 26 of the Settled Land Act, 1882. The cost of part of them, £305, had been paid by the tenant for life out of his own pocket, there being at the time when payment was required no capital moneys subject to the settlement available for laying out on improvement. Of this £305, £175 had been expended in alterations and repairs to the drainage and sanitary arrangements of the mansion house to suit the requirements of the tenant of it, and further part of it was expended on repairs to the other buildings.

The tenant for life desired that the £652 7s. 8d. asked for by the summons should be applied in reimbursing him this £305 and paying for the other works. Kekewich, J., declined to allow him to be reimbursed the £305, being of opinion that the court had no jurisdiction under section 15 of the Settled Land Act, 1890, to allow capital moneys to be applied in recouping to the tenant for life money which he had actually paid for improvements. He allowed the cost of the remainder of the works to be paid out of the capital moneys.

The tenant for life appealed from the decision so far as it was adverse to him.

Ashton Cross, for the tenant for life, cited *In re Gaskell*, 42 W. R. 219, [1894] 1 Ch. 485; and *In re Ormerod*, 40 W. R. 490, [1892] 2 Ch. 318. [LOPES, L.J., referred to *In re Dalison*, 41 W. R. 15, [1892] 3 Ch. 522; and *In re Hotchkin*, 35 W. R. 463, 35 Ch. D. 41.

W. Howland Jackson, for the trustees.

LINDLEY, L.J.—I do not think that in this case we ought to tie our hands further than they have been tied by the Legislature. I do not say that in no case can the court empower trustees to reimburse to a tenant for life such money as he has disbursed upon the estate for a purpose authorized by the Settled Land Acts for the expenditure of capital money. Although, however, I am not prepared to say that the mere fact of payment does prevent the court from allowing the expenditure, yet I do say that when the tenant for life has paid the money and comes to the court to ask to be reimbursed, the court is bound to be very careful. It is very difficult after the work has been done to see what was proper. A tenant for life who does such things on his own account, without giving estimates or anything of that sort, and then comes to the court and asks to be reimbursed must not be surprised if the court does not assist him and he is not allowed the cost of what he has done out of the capital of the estate. If he wants the assistance of the court he ought to make out and supply proper estimates as required by the Act of 1882.

The Act of 1890 has enlarged the powers of the court, but in proportion as they are enlarged, the court must be the more careful to see that they are properly exercised. I take it that the duty of the court is this, to see what is fair and right as between the tenant for life and remainderman, and not to throw upon capital the expense of what in fairness ought to come out of income. But suppose what has been done does come within the objects for which the Acts allow the expenditure of capital money, the court is not bound to authorize such expenditure to come out of the capital. We must look at it from a business point of view, and see whether it is fair and right that the expense should come out of the capital, or whether it is in respect of things which are part of the ordinary incidents of occupation. A great part of the expenditure here ought not to be allowed. It was in respect of matters which are needful for the enjoyment of the property, and they are not such things with which, as between tenant for life and remaindermen, capital ought to be saddled. Now what is to be done. I think that some of these items can fairly be thrown upon capital. I do not take the view that the court is bound to refuse to allow this expenditure out of capital, simply because the matters have been already paid for. I think it would be fair if we were to allow £100 in respect of them in addition to what Kekewich, J., has allowed.

LOPES, L.J.—The expense in this case was incurred a year and a half before the application of the tenant for life, and the work was paid for by him. He now comes to the court and asks for repayment under section 15 of the Act of 1890. Kekewich, J., has decided that the court has no jurisdiction to allow repayment of what has been paid by the tenant for life, and the question is whether or not there is such jurisdiction. For some time I had doubts. The question turns upon section 26 of the Act of 1882, and section 15 of the Act of 1890. [His lordship read the sections.] If it depended on section 26 I should say that there was no jurisdiction to allow the reimbursement, as under that section a scheme had to be submitted. But then the latter section does away with the necessity for a scheme. At first I was inclined to think that there was no jurisdiction to allow repayment to a tenant for life, but I think that is too narrow a construction to put upon the section, and that there is jurisdiction to allow payment of the money out of capital, although it has been already paid by the tenant for life. Where, however, the court is asked to exercise this power after the execution of the works, the application must be dealt with

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

in a different way than if it had been made before they were executed. In such a case the court will look at the matter more critically and carefully, and will act with greater jealously and anxiety, for this reason when the work has been done, it is more difficulty for the court to determine whether or not the improvements were necessary and reasonable. It is no longer possible for the court to see for what the new improvements were substituted, and it cannot see with the same accuracy as if the application had been made before the work was done. I think that extreme care ought to be exercised on the part of the court in determining whether the expense, which has been incurred, ought to be allowed out of capital.

In the present case a large proportion of the things which have been done cannot be called improvements. They are alterations or rather in the nature of repairs. It is not easy to determine in respect of what kind of improvements the expense ought to be borne by the tenant for life and of what it ought to be thrown upon capital. We must take a business-like view of the matter and determine what is fair as between tenant for life and remaindermen. It is impossible to lay down any general rule. What is usually done by a man in occupation of premises must be done at the expense of the tenant for life. If, however, the things that are done are not such as are usually done by the occupier, but are permanent and larger improvements likely to benefit the remaindermen more than the tenant for life, then it is fair that the expense of them should come out of capital. In every case the question must depend upon the circumstances, and in the present case I think that some of the things that have been done and which are called improvements are really repairs and ought to be paid for by the tenant for life. If we allow him £100 in addition to that which has been already allowed, I think we shall be doing him ample justice.

KAY, L.J.—I agree and I have nothing to add.

LINDLEY, L.J.—The trustees' costs can come out of the capital of the estate. The tenant for life must pay his own.

Appeal allowed.

Solicitors, *Knight & Gregson; Barton & Pearman.*

From Q. B. Div.
(Lord Esher, M.R., and Lopes and Rigby, L.JJ.) April 9.

ANDREWS AND ANOTHER v. NOTT-BOWER. (*a.*)

Defamation — Libel — Privilege — Licensing sessions — Report by head constable on licensed houses — Publication of report by order of justices.

The head constable of a borough, by direction of the licensing justices, sold copies of a report containing remarks upon the various licensed houses in the borough, which had been prepared by him for the use of the justices, to persons who had business at the general annual licensing sessions in order to facilitate their business at the sessions.

In an action for libel by the licensee of a public-house against the head constable in respect of certain remarks made by him in the report upon the public-house in question,

Held, that, as the report was published by direction of the licensing justices for the proper and effective discharge of the business of the licensing sessions, the occasion of the publication was privileged, and in the absence of actual malice the action would not lie.

Application by the plaintiffs for a new trial in an action for libel tried before Lawrance, J., with a jury.

The alleged libel was contained in a report prepared by the defendant upon the licensed houses in Liverpool.

The plaintiff, Agnes Andrews, and her sister were respectively, the licensee of and the barmaid at a public-house at Liverpool.

The defendant, who was the head constable of Liverpool, on the 9th of August, 1894, served notice upon the plaintiff, Agnes Andrews, that he intended at the next general annual licensing meeting to object to the renewal of her licence, upon the ground that she permitted improper conduct to take place between her barmaids and men upon the licensed premises, that she was not a fit and proper person to hold a licence, and that the licence was not required to meet the wants of the neighbourhood.

The justices of the city of Liverpool on the 27th of June, 1894, passed a resolution that the watch committee be requested to instruct the head constable to revise and correct the schedule of licensed houses, and to report on the use of back doors for trade purposes since the limit of 6 o'clock was fixed by the magistrates, and to add any further information he considered desirable. Upon the 2nd of July the watch committee passed a resolution that the above request should be complied with, the defendant being present. The defendant accordingly prepared a report in the form of a book upon the various licensed houses in Liverpool, and in the column headed "superintendent's remarks," it was stated, as regards the plaintiff's house, that the licensee had been served by the police with notice of objection to the renewal of her license, the grounds of objection given above being set out. This was the libel complained of.* This report was presented to a special meeting of the justices on the 21st of August, when it was resolved that the head constable, so far as he was able, should issue copies to any person who might apply for and require the same in order to facilitate his business at the general annual licensing meeting on payment of 10s. 6d. for each copy. This resolution was entered in a book, and every person who purchased a copy of the report had to sign a certificate stating that he had read the above resolution of the justices, and that he required a copy of the report to facilitate his business at the general annual licensing meeting. A copy of the report was sent to each of the justices, and thirty-six copies were sold to solicitors, barristers, brewers, and others having business at the licensing sessions, who signed the above certificate.

At the trial the learned judge ruled that the occasion of the publication was privileged and that there was no evidence of actual malice, and directed judgment to be entered for the defendant.

Finlay, Q.C., and *W. F. Taylor* (*Shee, Q.C.*, with them), for the plaintiffs.—The publication of this report was not made on a privileged occasion. The publication to the justices would be privileged, but the publication to any other person simply because he had business at the licensing sessions was not privileged. Such a person might be interested in one licensed house or perhaps more, but that would not make the publication to him of the remarks upon all the other licensed houses privileged. He would have

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

*It appeared that no suggestion of impropriety on the part of the barmaids was intended, nor was any such evidence offered.

no interest in those houses. The report complained of as libellous, was published to persons who had no interest in that house, and therefore the occasion was not privileged. There is no statutory authority authorizing the licensing justices to direct the chief constable to prepare this report and to sell it, and therefore he is not protected upon that ground. By section 7 of 19 & 20 Vict. c. 69, constables are to perform, in addition to their ordinary duties, all such duties connected with the police as the justices in general or quarter sessions or the watch committee direct. There was no order from the justices in general or quarter sessions or from the watch committee to the chief constable to prepare this report. Section 191, sub-section 2, of the Municipal Corporations Act, 1882, only directs a constable to obey all such lawful commands as he receives from any justice in the borough, and therefore that section cannot be vouched by the defendant as his authority for selling this report.

They referred to *Stockdale* v. *Hansard*, 9 A. & E. 1; *Searles* v. *Scarlett*, 40 W. R. 696, [1892] 2 Q. B. 56; *Boxsius* v. *Goblet Frères*, 42 W. R. 392, [1894] 1 Q. B. 842; *Hebditch* v. *MacIlwaine*, 42 W. R. 422, [1894] 2 Q. B. 54.

Bigham, Q.C., and *Mulholland, Q.C.* (*Horridge*, with them), for the defendant.—The head constable was bound by section 7 of 19 & 20 Vict. c. 69, to obey the orders of the watch committee or of the justices in general or quarter sessions. The justices requested the watch committee to direct the head constable to draw up this report, and the watch committee passed a resolution to that effect, and the head constable drew up the report, and it was printed and sent to the justices. The justices then, for the convenience of those having business at the sessions, and to facilitate the business, passed a resolution that copies should be sold to those having business at the sessions. The justices have the conduct of the sessions and it was competent for them to make that order. The report only contains a statement that the house was objected to on various grounds, and that is true. The head constable was bound to obey that order of the justices, and therefore the occasion was privileged. The occasion was also privileged on the ground that every licensed person has an interest in knowing what objections are made to any other licensed house, as an objection in Liverpool nearly always alleges as one ground of objection that the house is not wanted for the requirements of the neighbourhood. Indeed, every person in Liverpool is interested in this report.

They referred to *Allbutt* v. *General Medical Council*, 37 W. R. 771, 23 Q. B. D. 400.

Finlay, Q.C., replied.

Lord ESHER, M.R.—In my opinion the decision of the learned judge was right. The justices of Liverpool have the conduct of the court for the renewal of licences. Every licence-holder in Liverpool must have his licence renewed, and therefore every licensed house in Liverpool is before that court each year. Each case has to be considered by the justices with regard to the whole town. Those justices are a court exercising judicial functions of an onerous character. They have to hear all the cases in a not very prolonged time, and when they consider any one case they may have to consider it with reference to a great many other cases. That being the state of things, after very long experience the justices have come to the conclusion that it would be of great assistance to them in the exercise of that responsible jurisdiction if they had a book such as the book before us compiled. They therefore requested the watch committee to direct the head constable to compile this book. We are told that the chief constable is present at the meetings of the watch committee, and the resolution of the watch committee that the request should be acceded to having been arrived at in his presence, that is to my mind equivalent to an order by the watch committee to him to compile the book. The case is thus brought within the terms of section 7 of 19 & 20 Vict. c. 69, which provides that constables shall, in addition to their ordinary duties, perform all such duties connected with the police as the justices in general or quarter sessions assembled, or the watch committee, from time to time direct and require. The book when compiled was to be be used by the justices in administering the law, and they then came to a further resolution that it would be of great assistance to them in the exercise of their judicial functions that anyone who has to come before them should, if he so desired it, have a copy of this book. They therefore directed the head constable to hand this book to all persons who might apply for and require it in order to facilitate their business at the general annual licensing meeting. The head constable, therefore, in issuing this book to persons who were about to appear before the justices, either as counsel or solicitors or parties to the jurisdiction which the justices were exercising, was doing that which he was bound to do, and which the justices had a right to command him to do. It was an order of the court as to the mode in which its business should be carried on, given to one of its own officers, which makes what that officer has done a thing done on a privileged occasion. There is no evidence that I can see that he delivered this book to anybody but those who were within the class I have mentioned, and therefore I think that the occasion was privileged. The appeal must therefore be dismissed.

LOPES, L.J.—I am of the same opinion. This case raises a somewhat novel and difficult point. The only question we have to consider is whether this was a privileged occasion. It would appear that the justices, for the convenient conduct of the business at the general annual licensing sessions, ordered the report in question to be prepared. They had a perfect right to do that. The report when prepared was delivered to the justices, and it has not been suggested that there was any violation of the privileged occasion there. I do not see any evidence that the report was delivered to persons not having business at the licensing sessions. But it is said that it was delivered to certain persons who had business at the licensing sessions, and that was a publication of the document unnecessarily excessive, unnecessarily wide, and that the privilege was thereby destroyed. It is a new point, and one naturally feels some hesitation about it. But I have come to the conclusion that the privilege was not lost by what was said to be the excessive and too wide publication of this report. The report was made and published by direction of a competent authority—namely, the justices. It was a report that was convenient and desirable for the proper and effective discharge of the business of the licensing sessions, and, as far as I can see, the defendant did not do anything more than he was ordered to do by a competent authority—namely, the court. That being so, I come to the conclusion that the occasion was a privileged one, and that nothing has been done which can be said to be a violation or an abuse of that occasion. In *Stuart* v. *Bell*, 39 W. R. 612, [1891] 2 Q. B. 341, Lindley, L.J., said that "the reason for holding any occasion privileged is common convenience and welfare of society, and it is obvious that no definite line can be so drawn as to mark off with precision those occasions which are

privileged, and separate them from those which are not." I think that those words are applicable to the present case, because it seems to me that this was a report which was convenient, and, indeed, almost necessary for the proper conduct of the business of the sessions, and it was ordered by a competent authority. The occasion, therefore, was privileged, and there being no evidence of actual malice, the non-suit was right.

RIGBY, L.J.—I am of the same opinion. We have only to see whether the publication of this alleged libel took place upon a privileged occasion. I should have had some difficulty in coming to the conclusion that the occasion was privileged by reason merely of the interest which any one of the persons engaged at the licensing sessions had in one or more out of the two thousand or more cases mentioned in the report. But when we consider how this publication was made we see that it was published by virtue of the resolution of the justices who had to conduct the proceedings at the sessions. I know that it was a special meeting of the justices, but there cannot be a doubt that the whole body of the justices acting at the sessions adopted what had been done at the special meeting. Then the question arises, Was it within their authority to make such a provision as this? In my opinion it was. The instance of a calendar at a criminal sessions is a similar case. Here the justices had to deal with all these cases, and in the conduct of the public business and in the public interest they directed that not only they themselves, who form the bench, but also all the suitors and professional men who came in any capacity to their court might be furnished with a copy of this report. I think that was within their authority. As to the technical objection that it was not a court of quarter or general sessions, but only a meeting of justices, I believe that that can be got over by a technical reason. By section 191 of the Municipal Corporations Act, 1882, the head constable is bound to obey the lawful commands of any justices having jurisdiction, and therefore a meeting of the justices was, perhaps, not necessary. I think that they had the power. I am clear that it was brought to the knowledge of the head constable that the justices required him to issue this report, containing notes upon the proceedings that were to come before them, and on that ground I think that the occasion was privileged.

Application dismissed.

Solicitors for the plaintiffs, *Wynne, Holme, & Co.*, for *Fisher, Sandys, & Co.*, Liverpool.

Solicitors for the defendant, *F. Venn & Co.*, for *G. J. Atkinson, Town Clerk*, Liverpool.

From Q. B. Div. (Lindley and A. L. Smith, L.JJ.) March 13.

LUMLEY *v.* RAVENSCROFT. (*a.*)

Lessor and lessee—Agreement for lease by adult and infant—Repudiation—Specific performance—Interlocutory injunction.

A. R. and C. R., one of them being a minor, agreed by their agent to grant to the plaintiff a lease of certain premises vested in them jointly as lessees. The plaintiff brought an action claiming specific performance of the agreement by the adult defendant, and an interlocutory injunction to restrain her from letting the premises to any person other than the plaintiff until the trial of the action.

Held, that an injunction ought not to be granted where no case for specific performance has been made out. Specific performance cannot be decreed against an infant, and, therefore, in the absence of any misrepresentation or misconduct on her part, ought not to be granted against the adult defendant. It follows, therefore, that an interlocutory injunction against her ought not to be granted.

Appeal from a decision of Day, J., at chambers.

The defendants to the action were a brother and sister, Charles and Alice Maud Ravenscroft, the brother being a minor.

By an agreement in writing dated the 5th of October, 1894, the defendants, by their agent, agreed to let on lease to the plaintiff the ground floor of the house No. 34, St. James'-street. The plaintiff in the action claimed specific performance of the agreement; alternatively, damages, and an injunction to restrain the defendants until the trial of the action from letting the premises to any other person than the plaintiff. Day, J., granted on interlocutory injunction against the lady in the terms of the claim.

The agreement was repudiated by the defendants in January, 1895, on the ground that the infant defendant, on behalf of himself and his sister, had purported to enter into an agreement on the 11th of September, 1892, for the letting for the same premises to another person.

Alice Maud Ravenscroft appealed.

Younger, for the appellant.—An injunction ought not to be granted, unless the defendant, Alice Ravenscroft, can be compelled to convey her interest whatever it may be. The plaintiff can only take his injunction by electing now, whether at the trial he will be satisfied with her interest, or will take damages only and no assignment. Specific performance cannot be decreed against an infant, and where a person entitled to a moiety of an estate enters into a contract with respect to the entirety specific performance will not be granted as to the moiety in the absence of fraud or misrepresentation. *Price* v. *Griffith*, 1 De G. M. & G. 80; *Thomas* v. *Dering*, 1 Keen. 729. The defendant's title has not even been accepted, so that an injunction will not be granted for specific performance. The plaintiff's remedy (if any) is in damages only.

Lush Wilson, for the plaintiff.—The adult defendant instructed her agent to let the premises, and this is sufficient to bring the case within the exceptions to the principle of *Price* v. *Griffith*. If I am bound to elect, I elect now to take what the defendant can give me, and not damages.

Younger replied.

LINDLEY, L.J.—This is an appeal from Day, J., who granted an injunction to restrain Alice Ravenscroft, one of the two defendants, from dealing with the property until the trial of the action. There is a valid binding agreement between the plaintiff and Moore, the agent for the two defendants, contained in two letters of the 5th of October, 1894. If Moore's principals, who are the two defendants, were *sui juris*, there would be a complete contract and no difficulty would arise. But unfortunately one of them, Charles Ravenscroft, is an infant. The agreement is for a lease by the two of them of the property which has been leased to the two of them. The law is plain. You cannot get specific performance against an infant, and on the evidence before us it

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

case is made out for specific performance against the other defendant either. This case cannot be brought within the exceptions as to misrepresentation or misconduct in *Price* v. *Griffith* and *Thomas* v. *Dering*. You cannot get a decree of specific performance against one share in the absence of some fraud so as to bind the other. It appears to me the only remedy is by way of damages. If specific performance would be wrong on the materials before us, it follows that an injunction must be wrong, and the order of Day, J., must be discharged. Costs will be costs in the action.

A. L. SMITH, L.J.—On the facts before us a case for specific performance has not been made out, and therefore the injunction fails.

Appeal allowed.

Solicitors for the appellant, *Proudfoot & Chaplin.*

Solicitors for the respondent, *Longbourne, Stevens, & Co.*

High Court of Justice.

Chan. Div. North, J. — May 22; June 29.

EAST STONEHOUSE LOCAL BOARD *v.* VICTORIA BREWERY CO. (*a.*)

Practice—Costs—Witnesses' expenses—Ord. 65, *r.* 27, (9), (20), (29), (37), *and* (38)—*Photographs—Notice to admit.*

The costs of witnesses subpœnaed, but not actually called, are within the taxing master's discretion. The taxing master must exercise his discretion under ord. 65, 27 (9), *without reference to scales and rules before the Judicature Act.*

Turnbull *v.* Janson, 26 *W. R.* 815, 3 *C. P. D.* 264, *followed.*

Semble, *the costs of a photographer called as a witness simply to prove photographs should not be allowed, unless notice to admit his proof has been given and the other side has refused to admit it.*

Summons to review taxation.

An action was brought by the plaintiffs against the defendants for damages for pollution of water. Judgment for the plaintiffs, with costs other than those of certain interlocutory proceedings, was pronounced by Romer, J., on the 31st of October, 1894. The bill of costs was taxed, and the costs of eleven witnesses were allowed by the taxing master, though three only were actually called. Among the eight who were not called was a photographer and the country solicitor. The taxing master allowed the witnesses a sum for hotel expenses in addition to the scale charge.

Swinfen Eady, Q.C., and *Manby*, in support of the summons.—We object, first of all, to the allowance of the costs of the eight witnesses who were not called. Next we object to the allowance for hotel expenses. It was not disputed at the trial that there had been pollution, so it was unnecessary caution to call so many witnesses to prove it. We object to the allowance of hotel expenses at all. Witnesses are entitled to their fee as witnesses and their expenses as well; but anyhow we object to the allowance of the hotel expenses of the eight witnesses who were not called. It was unnecessary to call a photographer to prove photographs; the proper course would have been to give notice to admit them, under ord. 32, r. 2. Another witness was the country solicitor. What could he prove? [NORTH, J.—The taxing master has seen the proofs, and I cannot interfere with his discretion.]

They cited *Batley* v. *Kynoch*, L. R. 20 Eq. 632, at p. 638; *Smith* v. *Buller*, 23 W. R. 332, L. R. 19 Eq. 473; *Brocas* v. *Lloyd*, 4 W. R. 540, 23 Beav. 129; *Nokes* v. *Gibbon*, 5 W. R. 216, 26 L. J. Ch. 208; *Clark* v. *Gill*, 2 W. R. 652, 1 K. & J. 19.

R. Younger, for the respondents.—All the items objected to are within the taxing master's discretion. [NORTH, J.—I only wish to hear you as to the photographer and as to the hotel expenses.] A photograph is not a document, notice to admit which can be given. Moreover, the photographer was acquainted with the *locus in quo*, and would have given valuable evidence in our favour. As to the allowance of hotel expenses, there is an express decision in *Turnbull* v. *Janson*, 26 W. R. 815, 3 C. P. D. 264, that the scales in use before the Judicature Act are no longer binding.

Cur. adv. vult.

NORTH, J., 29th June.—There are two points raised by this summons. The first is that eleven witnesses have had their costs allowed by the taxing master, although three only were called. It is said that the costs of the other eight are unnecessary. It is clear, however, that the fact that witnesses are not actually called does not establish that no costs ought to be allowed, and the taxing master says, in the exercise of his discretion, that these were necessary witnesses. I cannot interfere with the discretion of an experienced taxing master in a matter of detail where no principle is involved.

There is this much to be said, however. One of these witnesses was a photographer. He charged £30 for photographs. The taxing master allowed his expenses, but reduced his bill to about £10. If I was myself a taxing master I should not allow the costs of a photographer who was brought to London simply to prove photographs unless his proof had been shown to the other side and they had declined to admit it; and I may follow some such rule in future.

It is next said that hotel expenses cannot be allowed in addition to the allowance under the scale. There is this to be said: the scale was made at a time when witnesses were never called in the Chancery Division. Ord. 65, r. 27, (9), (20), (29), (37), and (38), must be considered, and (38) is relied upon as showing that the scale is now binding. But *Turnbull* v. *Janson* clearly settles that point, and shows that the taxing master has a discretion, and that was a case at common law. [His lordship read the judgment of Lindley, L.J.] The taxing master was right in principle.

Summons dismissed with costs.

Solicitors for the applicants, *Wedlake, Betts, & Wedlake*, for *Batchelor & Geake*, Plymouth.

Solicitors for the respondents, *Crowders & Vizard*, for *R. R. Dodd, jun.*, East Stonehouse.

Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. North, J. April 24.

HOOD-BARRS v. CATHCART. (a.)

Judgment creditor—Interest not capable of being taken in execution—1 & 2 Vict. c. 110—27 & 28 Vict. c. 112.

The statute 27 & 28 Vict. c. 112 applies to an interest in land which is incapable of being taken in execution, and a judgment does not operate as a charge upon the land of the debtor until the requirements contained in the statute have been complied with.

Action.

By an indenture of settlement dated the 19th of July, 1887, certain real estate was settled upon trust for Mrs. Cathcart for life without power of anticipation, then upon trust for her husband during his life, with remainder to the children of the marriage and an ultimate remainder in default of children to Mrs. Cathcart in fee simple.

There had not been any issue of the marriage up to the present time.

The plaintiff was a judgment creditor of Mrs. Cathcart and he now brought this action asking for relief by foreclosure or sale of Mrs. Cathcart's interest in remainder.

S. Hall, Q.C. and *C. Johnston Edwards*, for the plaintiff.—The plaintiff is entitled to the relief which he asks under 1 & 2 Vict. c. 110 ss. 11 & 13; 27 & 28 Vict. c. 112 does not apply, because the interest is not one capable of being taken in execution. Moreover, that Act was passed to prevent the mischief of a number of persons claiming under the debtor, and it does not apply at all between the debtor and creditor. As against his creditor a debtor is not entitled to say that the judgment does not operate. [They cited *In re Anthony*, 40 W. R. 316, [1892] 1 Ch. 450; *In re Hamilton*, 34 W. R. 203; 31 Ch. D. 291; *In re Bailey's Trusts*, 17 W. R. 393, 38 L. J. Ch. 237; *In re Onslow, Plowden* v. *Gayford*, 36 W. R. 883, 39 Ch. D. 622; *In re South*, 22 W. R. 460, L. R. 9 Ch. App. 369.]

Mrs. Cathcart did not appear.

NORTH, J.—I think it is clear that the plaintiff is not entitled to what he asks. He has obtained a judgment against a married woman. Under a settlement dated the 19th of July, 1887, Mrs. Cathcart takes the first life interest without power of anticipation, then the husband takes for life, and there are subsequent limitation to children of the marriage. In the event of there being no children, and there have been none up to the present, there is an ultimate remainder to Mrs. Cathcart in fee simple. It is not in terms settled to her separate use, but the effect of the Married Woman's Property Act is that it is so settled. The judgment creditor seeks relief by foreclosure or sale against this interest in remainder. He says that under 1 & 2 Vict. c. 110, ss. 11 and 13, he is in a position to obtain such relief. The interest now sought to be reached is not one Mrs. Cathcart has been seised or possessed of down to the present time. There might be something to be said for this construction were it not for subsequent legislation.

27 & 28 Vict. c. 112, made a change in the law, and interfered with the remedies of the creditor. That Act provides that no judgment is to affect land until it has actually been taken in execution, and in section 2 land is defined in the widest possible terms. A judgment therefore is not charged on land until it has been actually taken in execution. The former Acts were not repealed by this enactment, but something fresh had for the future to be done by the creditor to entitle him to the benefit of the former Acts. There has not been either legal or equitable execution in this case, so it is impossible that the judgment should affect the land. It is said that the statute only applies to property that can be delivered in execution, but I can find no such limitation in the Act, and "land" is not confined to an interest in possession. On the construction of the Act I am completely against the plaintiff, and I must dismiss the action.

Solicitors, *Hood-Barrs & Co.*

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

Chan. Div. Romer, J. April 24, 25; June 9, 1894.

PORTSEA ISLAND BUILDING SOCIETY v. BARCLAY. (a.)

*Building society—Power to lend on a first mortgage, and to release part of a mortgaged property—Postponement of security on part payment of mortgage moneys by third person—*Ultrà vires.

A building society which had power under its rules to lend to its members on first mortgage, and also to release any portion of a mortgaged estate if satisfied that the remainder would be sufficient security, lent to H., one of its members, £17,000 on a first mortgage. Having exhausted its borrowing powers, the society applied to the I. Co. for a loan, and an arrangement was made whereby the I. Co. lent £6,000 to H. on the security of the property comprised in the building society's mortgage, the building society joining in the deed to postpone its own mortgage. H. handed the £6,000, when received by him, to the building society, and was credited with that amount in reduction of the £17,000 loan.

Held, that the transaction between the society, the I. Co., and H. was ultrà vires *the society; that the society's security for £11,000 had priority over the I. Co.'s security for £6,000; and that as between the I. Co. and the society, the former were not entitled to any security as against the latter in respect of so much of the £6,000 as had been applied in payment of the debts and liabilities of the society.*

Persons dealing with a building society are affected with notice of the limitation of its directors' authority as established by its rules.

Trial of action.

The Second Portsea Island Benefit Building and Investment Society was established in June, 1847, and its rules were duly certified and enrolled in accordance with the provisions of 6 & 7 Will. 4, c. 32. The society was, on the 20th of September, 1876, incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and on the 14th of October, 1876, its registered name was changed to that of the Portsea Island Building Society. On the 4th of November, 1876, certain alterations were made in the rules of the society, such alterations being duly certified and registered.

The provisions made by the rules thus altered, so far as material for the purposes of this case, were as follows:—

1. Its object is to raise a fund by the subscriptions of its members for making advances to members out of the funds of the society, upon security of freehold, copyhold, or leasehold property by way of mortgage.

4. Any person shall become a member by taking a

(a.) Reported by C. HERBERT BROWN, Esq., Barrister-at-Law.

share or an aliquot part of a share, and paying the first monthly subscription in respect thereof.

8. The directors shall have power from time to time to borrow from any person any sum (not exceeding two-thirds of the sum then due on mortgage to the society from its members) for the purpose of enabling the society to make advances to its members. . . . No person lending any sum of money under this rule shall be required to see to the application, or be liable to loss through the misapplication thereof.

9. The society will make advances of any sum to its members, repayable by monthly subscriptions of not less than 10s. per cent. on the amount advanced on the first Tuesday of every month, with interest monthly at the rate of £5 per cent. per annum; not more than three-fourths of the value of the mortgaged property shall be advanced thereon.

11. In no case shall any property be deemed sufficient security for moneys to be advanced by this society, which shall be subject to previous mortgage, otherwise than to this society. The directors may from time to time accept any other security by mortgage in manner hereinbefore mentioned in place of any existing security, or may direct the release of any portion of any mortgaged estate, if they shall be satisfied that the remainder will be sufficient security. All mortgage and other securities belonging to the society are to be kept in the strong room in the offices of the society.

The society had, in the year 1873, begun to engage in banking business, making advances (some unsecured) without reference to its rules, and borrowing in excess of the two-thirds' limit permitted by rule 8. This change in its business, which was effected by one Wills, the secretary, was concealed from the directors for several years, but became known to them in the year 1878, on the depositors requiring payment of the moneys owing to them. On ascertaining the state of affairs the directors sought to borrow money from the Imperial Life Assurance Co., and entered into communication with its solicitors with that object. That company declined to advance money, having regard to the doubts entertained as to whether the society had not already exceeded its borrowing powers; and the money was borrowed elsewhere. The negotiations between the society and the insurance company were, however, relied on in this action as indicating that the insurance company had then notice of the borrowing powers having been exceeded.

By an indenture of mortgage dated the 16th of July, 1883, certain freehold hereditaments at Gosport were assured by one C. W. House to the society by way of security for an advance of £8,250. The same property was subsequently further charged by way of security for further advances, the whole amount advanced exceeding £17,000. In this action it was agreed that the case should be dealt with by the court on the footing of the advances having been made to House as a member of the society.

In the year 1891 the directors of the society discovered that overdrafts had been made to a very large amount, and that its borrowing powers had been greatly exceeded. They thereupon again applied to the Imperial Life Assurance Co., and ultimately the following arrangement was carried into effect: House borrowed £6,000 from the insurance company, and by an indenture dated the 1st of December, 1891, and made between House of the first part, the building society of the second part, Beck & Redward (the trustees of the building society and therein called the trustees) of the third part, and Barclay, Chambers, & Hale (the trustees of the insurance company, and therein called the mortgagees) of the fourth part, after reciting that House was seised in fee of the Gosport property above mentioned, subject to the mortgages to the building society, and that the mortgagees had agreed, at the request as well of the building society as of House, to lend to House the sum of £6,000, upon having repayment thereof, with interest secured in manner thereinafter appearing, and that the society had, at the request of House, agreed to postpone its mortgages to the security intended to be thereby effected, and that, for the purpose of releasing in favour of the mortgagor, the estate (if any) of the trustees in the mortgaged premises, the trustees had agreed to join in those presents in manner thereinafter appearing, it was witnessed that in pursuance, &c., and in consideration "of the sum of £6,000 at the request of the society" paid to House by the mortgagees, House covenanted to pay the mortgagees £6,000 with interest at six per cent. per annum. And it was also witnessed that in further pursuance, &c., and for the consideration aforesaid, the society, as mortgagees at the request of House, conveyed and released, and the trustees, by the direction of the society, conveyed and confirmed, and House, as beneficial owner, conveyed and confirmed to the mortgagees, the Gosport property discharged from all moneys due under the society's mortgages, but subject to a proviso that if House or the society should, on the 1st of June then next, pay the mortgagees £6,000 and interest, the mortgagees would, at the request and cost of House, reconvey the mortgaged premises "to the use of the society, its successors and assigns, or as they should direct, subject to such right or equity of redemption as the same premises would, if these presents had not been executed, have been for the time being subject to, under and by virtue of the society's mortgages on payment of the moneys thereby secured, and with the same power of sale and other powers and authorities in all respects as would have been subsisting, or might have been exercised, if these presents had not been executed."

At the time when the mortgage was executed the building society deposited with Barclay, Chambers, & Hale, House's title deeds held by them, and executed a memorandum of the same date, declaring that such deeds had been deposited as a collateral security for the loan of £6,000 that day made to House at the request of the society.

On the completion of this transaction, House received a cheque for £6,000 from the trustees of the insurance company, which he immediately handed to the building society, and received credit for that amount in reduction of his mortgage debt to the building society.

All the costs of the above arrangement were paid by the building society out of their own funds, and they also, on House objecting in the course of negotiations to pay six per cent. interest, undertook to pay and to give him an indemnity in respect of interest at that rate.

On the 12th of December, 1891, a similar arrangement was entered into as to certain properties mortgaged by Wm. Lowe and Robert Lowe to the society, such arrangement being made between those mortgagors, the society, and Barclay, Chambers, & Hale.

On the 9th of January, 1892, resolutions were passed for the voluntary winding up of the building society, and appointing one Edmunds liquidator; and on the 21st of January, 1892, an order was made by the county court at Portsmouth, that the winding up should be continued under the supervision of that court, and that one Hunt should be appointed liquidator in addition to Edmunds.

This action was commenced by the building society and its liquidators against Barlay, Chambers,

Hale, House, W. Lowe, and R. Lowe, for a declaration that the mortgages to Barclay, Chambers, and Hale and the memorandum of deposit above referred to, were *ultrâ vires* the society and void, and that the same should be set aside and cancelled, or in the alternative for a declaration that the society were first mortgagees and were not postponed to the mortgages to the defendants Barclay, Chambers, and Hale, and for delivery up of the documents referred to in the memorandum of deposit, and an injunction to restrain the defendants Barclay, Chambers, and Hale, from parting with the same except to the plaintiffs.

The defendants Barclay, Chambers, and Hale, set up the defence that the mortgages to them were valid, and alleged by way of counter-claim that the monies advanced by them to House and the two Lowes were advanced at the request of the society, so that the respective borrowers might comply with the requirements of the society and reduce the amounts secured by their respective mortgages. They further alleged that it was within the powers of the society, in accepting payments in reduction of debts due to them on mortgage, to postpone their own securities in favour of the persons making such payments, and that, in any case, the transactions amounted to a transfer of part of the society's mortgage debts, and that they, the defendants Barclay, Chambers, and Hale, ought to rank *pari passu* with the building society. They further alleged that they had acted *bonâ fide* and without notice, and that they had lent the money on the faith of representations by the society that it would rank as secured by first mortgage, and that the respective transactions were within the powers of the society. They further alleged that the society had devoted the sums lent by them to payment of its debts and liabilities, and that they were entitled to stand in the place of the creditors and depositors of the society who had been paid out of the said moneys. They accordingly claimed a declaration that they stood in the position of first mortgagees in respect of the moneys advanced by them, and that their securities might be enforced by foreclosure or sale, or in the alternative, a declaration that their securities were valid transfers and that they were entitled to rank *pari passu* with the society in respect thereof, and that their securities might be realized on that footing. They also claimed payment by House and the two Lowes of the moneys advanced to them, or in the alternative a declaration that they, the defendants Barclay, Chambers, and Hale, were entitled to stand in the place of the creditors and depositors to whom those sums had been paid by the Society.

The defendant House put in a defence declining to admit the allegations in the claim or counter-claim.

At the trial neither William or Robert Lowe appeared.

Haldane, Q.C., *Carson, Q.C.*, and *Edward Ford*, for the plaintiff society.—The defendants Barclay, Chambers, & Hale, made the advances knowing that the society's borrowing powers were exceeded, and therefore that the transaction was *ultrâ vires* the society. The transaction was in reality an investment on second mortgage by the society, and was *ultrâ vires*, being forbidden by rule 11. The power given to the directors to release any portion of a mortgaged estate does not apply. The deposit by the society of deeds belonging to its members did not give a security to the insurance company: *Moye* v. *Sparrow*, 18 W. R. 400. Even if under the rules the deeds could have been pledged, the transaction was *ultrâ vires*: *Murray* v. *Scott*, 33 W. R. 173, 9 App. Cas. 519. A building society cannot deal with its assets so as to enable a third party to relieve a member from his liability to the society: Building Societies Act, 1874, s. 13.

They also referred to *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 24 W. R. 794, L. R. 7 H. L. 653.

Cozens-Hardy, Q.C., and *Rowden*, for the defendants Barclay, Chambers, & Hale.—The transaction was within the society's powers and was not a borrowing by them. They could have assigned any part of the mortgage debt which was their property. It was competent for them to require House to pay off all or any part of his debt to them, and, as he could not pay, to ask the insurance company to lend him money for the purpose. So far as the society's security was postponed the money went into their own pockets. At any rate these defendants are assignees of the debt to the extent of £6,000. This was not a new transaction, but a partial realization of a valid security. What was done was really the best means of getting back the money, or a portion of it, and would not have been a breach of trust if done by trustees. The action of the society was justifiable as incidental to their position as mortgagees; *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood*, 44 Ch. D. 412, 38 W. R. Dig. 25; *Small* v. *Smith*, 10 App. Cas. 119, 33 W. R. Dig. 35. The insurance company, if not entitled to rank as first mortgagees, are at any rate entitled to rank *pari passu* with the society as regards their respective securities. The insurance company are at least creditors of the society, so far as the moneys were devoted to payment of its debts and liabilities: *Cunliffe, Brooks, & Co.* v. *Blackburn and District Benefit Building Society*, 33 W. R. 309, 9 App. Cas. 857.

Clayton, for House.—House is not liable in respect of the money, which was lent not to him but to the society, and if liable, his debt to the society must be decreased by the same amount.

Haldane, Q.C., replied.

ROMER, J.—The facts of this case are not in dispute. The directors of the plaintiff society (hereafter called the society) being in want of money applied to the Imperial Life Insurance Co. (hereafter called the Imperial) for a loan. But the society's borrowing powers were exhausted, so it was found that no loan could validly be made. Arrangements were then come to between the directors of the society, the Imperial, and certain persons to whom advances had been made by the society on the security of freehold or leasehold property, such arrangements being similar in each case. I need only take one as an example. The defendant House was indebted to the society in a sum considerably exceeding £6,000. It has been agreed that I should deal with this case on the footing of the money having been advanced to him as a member by the society in pursuance of its objects and rules. The arrangement was that he should borrow £6,000 from the Imperial, on the security of the property mortgaged by him to the society, the society joining in the security to release its charge in favour of the trustees of the Imperial, so as to give the Imperial a first charge and should further secure the Imperial by a deposit of House's deeds and securities held by them. The £6,000 was to be paid by House to the society in part payment of his debt, leaving the balance of his debt to the society secured by a second charge on the property. The directors of the society paid out of its funds all the costs incurred in carrying out the arrangement.

The question is, whether the deed of the 1st of December, 1891, is binding on the society. It is admitted that the deposit of deeds and memorandum of deposit of the same date is not binding, and I need not further consider it. In my opinion the directors of the society were not authorized on its behalf to postpone its security as they purported to do by the deed of the 1st of December, 1891, and that deed is not binding on the society. Persons dealing with a building society are, of course, affected with notice of the limitation of the authority of its directors under its rules, and I therefore have to consider the rules in the present case. Now it is provided by rule 11 that in no case shall any property be deemed a sufficient security for moneys to be advanced by the society which shall be subject to previous mortgage otherwise than to the society, and further, that the directors may from time to time accept any other security by mortgage in manner thereinbefore mentioned in place of any existing security. By this I understand any other sufficient security as before defined which would not include a second mortgage. It is also provided by the rule that the directors may direct the release of any portion of any mortgaged estate if they shall be satisfied that the remainder will be sufficient security. Now these rules not only do not expressly authorize such a transaction as I am considering, but they at any rate *primâ facie* negative its validity. By the transaction in question the directors have accepted for the balance of the debt due from House an insufficient and improper security under the rules—namely, a second charge. And there are certainly no other rules which expressly authorize the transaction. It follows that to enable the trustees of the Imperial to uphold the deed in question as against the society they must show that the directors of the society had implied authority to execute the deed. But I cannot see any sufficient ground on which to imply such authority. It certainly is not within the general powers of this directors to be implied from the nature of the society and its objects. It is not one of the objects of this society to finance a member or outsider, though a debtor to the society, or to assist him in borrowing either by guaranteeing the loan to him or by giving security on the society's property for the loan, which was really the effect the postponement by the society of a charge on the debtor's property. Nor were the directors authorized on the ground that they were only exercising the ordinary remedies of mortgagees or only doing what was necessary to work out their legal rights or remedies as mortgagees.

It is suggested that this transaction was in the nature of a realization of his security by a mortgagee, and as such justified; but in no strict or true sense can this be said to be a realization of security, nor was it necessarily incidental to any realization of security or to the position of the directors as holders of security. To entitle them to enter into any such unusual transaction as this, the directors must show either express authority under the rules, or what was called in the case of *Small* v. *Smith* a "potential necessity" for their adopting that course. The facts of the case negative the idea that the directors were driven to the course they adopted by any necessity whatever, apart from their general need to get money paid into their bank. So far as appears they never contemplated or considered any course except the one adopted, and that of borrowing, which could not be legally carried out. I must therefore hold that the society is not bound by the deed. The result of this is to put the Imperial in the position of second mortgagees. But it is contended on their behalf that I ought to impose some terms on the society before making a declaration in its favour, so as to prevent or mitigate the effects of such a result. But if the deed is not binding on the society I ought so to declare. The Imperial acted with full knowledge of the powers of the directors of the society, and must take the consequences. I cannot restore the parties to their old positions. The mortgage deed executed by House in favour of the Imperial is still binding as between those parties, and I cannot cancel it; nor indeed am I asked by either of those parties to do so. Neither can I cancel the transaction as between House and the society, by which House has paid part of his debt to the society. It is said that if the directors of the society had sold and transferred to the Imperial part of House's debt that would have been within the powers of the directors, and that, therefore, I ought to hold that the charge of the Imperial for £6,000 ranks *pari passu* with the charge of the society for the balance of its debt. But I do not see how I can do that, even assuming that the directors could validly have sold and transferred to the Imperial a part of House's debt. As a matter of fact the directors of the society never did sell or transfer to the Imperial part of House's debt. That was not the transaction intended or carried out. If a transaction entered into on behalf of a building society is not binding on that society, what right has the court to turn it into another transaction merely because that happens to be somewhat similar in its results and might have been validly entered into? Besides, the £6,000 is not, and cannot now be made, part of the original debt due from House to the society. The rate of interest is different, and in other incidents the mortgage by House to the society differs from the mortgage by House to the Imperial.

It was also contended that I should direct the society to pay off the £6,000 now due to the Imperial, and take a transfer of the Imperial's debt and security. But I have no right to order this, or to compel it to invest its present funds in any such purchase. Lastly, it was suggested that in some way the Imperial were entitled to stand as creditors of the society for so much of the £6,000 as was applied in paying its debts and liabilities. But this suggestion appears to me to be made under a confusion of ideas. The £6,000 was not lent by the Imperial to the society, but to House, and when received by the society from House, was applied in reduction of his debt; and I cannot undo that. The Imperial are creditors of House for the £6,000 they lent to him, but are not creditors of the society. The society cannot be obliged both to credit House with this £6,000, and to still be liable for it, or for any part of it, to the Imperial.

The result is that as regards the transaction with House, I must order the deeds and documents deposited to be handed over to the plaintiff society, and the memorandum of deposit of the 1st of December, 1891, to be cancelled, and declare that the deed of mortgage of the 1st of December, 1891, is not binding on the society, and that the society's charge takes priority over that of the trustees of the Imperial. There will be similar orders and declarations in respect of the transactions with the two Lowes. And the defendants, the trustees of the Imperial, must pay the society's costs of the action.

Having regard to the defences of the defendants, House and the Lowe's, and the other circumstances of the case, I make no order as to the costs of those defendants of the action; but I must dismiss the counter-claim of the trustees of the Imperial, as against the society, with costs. If the Imperial seek to redeem the society, they will be entitled to do so in the usual way. There will be personal judgment on the counter-claim of the Imperial on the personal covenants of the mortgagors; and House

must also pay the costs of these counter-claims, as he put the Imperial to the proof of everything.

Solicitors, *Learoyd, James, & Mellor; Henry Kimber & Co.; Chamberlayne & Short*, for *Hyde & Hobbs*, Portsmouth.

Q. B. Div.
(Cave and Wright, JJ.) April 1.

REG. v. JUSTICES OF LONDON. (*a.*)

Metropolis—Management Acts—Land taken compulsorily by vestry—Compensation assessed by a jury—Costs of landowner—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix.*)—*Metropolis Management Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 73.

Where a vestry of a metropolitan parish acquires land compulsorily under Michael Angelo Taylor's Act for the purpose of widening a street, and the compensation to be paid by the vestry to the owner of the land is assessed by a jury, there is no power to order the vestry to pay to the landowner his costs of the proceedings.

Rule *nisi* for a *mandamus* to the justices of the county of London in quarter sessions commanding them to direct the clerk of the peace for that county to tax the costs of the applicant incurred by him in proceedings to assess the compensation to be paid for land compulsorily taken from him by the Vestry of St. Mary, Islington.

The Vestry gave notice to the applicant under Michael Angelo Taylor's Act (57 Geo. 3 c. xxix) of their intention to take land belonging to the applicant for the purpose of widening a street. A jury was summoned to assess the compensation, and the case heard was heard at the quarter sessions for the county of London.

The jury assessed the compensation at £75. No previous offer of compensation by the vestry was brought before the court of hearing. The applicant's costs amounted to more than £100. The court of quarter sessions refused to order the clerk of the peace to tax the bill of costs on the ground that the court had no jurisdiction to so order. The applicant then obtained this rule.

Macmorran, for the vestry, shewed cause against this rule.—The applicant is not entitled to these costs, for there is no provision in Michael Angelo Taylor's Act giving a right to costs to a person whose land has been compulsorily taken for the purpose of widening a street, and who has had the compensation assessed by a jury. The only provision as to costs is that contained in section 82, by which the vestry are entitled to costs if the jury award a sum not exceeding that offered by the vestry. (He was stopped).

Bosanquet, Q.C., and *Poley*, in support of the rule.—Previously to the Metropolis Management Act, 1862, Michael Angelo Taylor's Act did not apply to vestries. Section 73 of the Act of 1862 extended the provisions of Michael Angelo Taylor's Act as to street improvements to vestries so far as the Act was not inconsistent with the Metropolis Management Acts. Before 1862 vestries could only acquire land compulsorily under the Highway Act, 1635, which provides (s. 83) for the payment of the owner's costs, and it is therefore a reasonable construction to read into section 73 of the Act of 1862 the liability to pay costs in a case such as this.

They referred to *Back* v. *Holmes*, 56 L. T. (N. S.) 713, 36 W. R. Dig. 108.

CAVE, J.—It is somewhat unfortunate, but there does not appear to be any power to order these costs to be taxed. The vestry were acting under Michael Angelo Taylor's Act, which admittedly contains no such power; but it is contended that section 83 of the Highway Act, 1835, which does provide for the payment of costs where land is compulsorily taken, has, by section 73 of the Metropolis Management Act, 1862, been imported into Michael Angelo Taylor's Act. No authority has, however, been cited in support of that contention; and, there being no provisions entitling the applicant to costs in the statute under which these proceedings were taken, I am of opinion that this rule must be discharged.

WRIGHT, J.—I agree.

Rule discharged.

Solicitor for the appellant, *W. Lewis.*

Solicitors for the vestry, *Samuel Price & Sons.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Privy Council.

March 30.

(*On appeal from the Court of Queen's Bench for Lower Canada, Province of Quebec.*)

FORGET v. OSTIGNY. (*a.*)

Gaming—Civil Code, article 1927—8 *&* 9 *Vict. c.* 109—*Stockbroker.*

The articles of the Civil Code of Lower Canada against gambling are substantially the same as the English statute 8 *&* 9 *Vict. c.* 109. *Article* 1927 *of the Code is as follows:—"There is no right of action for the recovery of money or any other thing claimed under a gaming contract or bet."*

The respondent employed the appellant as his stockbroker to make certain contracts of purchase and sale on his behalf. The shares were purchased or sold, and delivery or payment made or received by the broker in each instance as the case required.

Held, that the appellant was entitled to recover the balance due from the respondent in respect of the contracts, the article against gaming not applying to such transactions.

This was an appeal from an order of the Court of Queen's Bench for Lower Canada, Province of Quebec.

The facts are set out in their lordships' judgment.

Fullarton, Q.C., and *English Harrison*, for the appellants.

Alexander Young, for the respondents.

The judgment of their lordships Lord HERSCHELL, L.C., Lords WATSON, HOBHOUSE, MACNAGHTEN, SHAND, and DAVEY, and Sir RICHARD COUCH, was delivered by

Lord HERSCHELL, L.C.—The appellant is a member of the Montreal Stock Exchange. The action which has given rise to this appeal was brought to recover a sum of 1,926dols. 87c., the balance alleged to be due from the respondent in respect of certain contracts entered into by the appellant on his behalf and by his directions for the purchase and sale of shares in various joint stock companies. The respondent pleaded first, that the claim was prescribed by lapse of time, and secondly, that the transactions were

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

gave rise to it were gambling transactions on the rise and fall of shares, and that, therefore, the action could not be maintained.

In view of this latter defence it is necessary to state the facts with some particularity. The transactions between the parties commenced with the purchase by the appellant in December, 1882, of twenty-five shares of the Montreal Street Railway Co. Additional shares were subsequently purchased in the same undertaking. Purchases were also made of the shares of other companies. The price paid for the shares purchased was debited to the respondent by the appellant with ¼ per cent. commission added. The shares so purchased were sold from time to time and the proceeds were credited to the respondent less a commission of ¼ per cent.

It is not in dispute that all these transactions were entered into at the instance and on behalf of the respondent. When a purchase of shares was to be made he furnished the appellant with a small portion of the purchase money which would be required—thus in the case of the first transaction to which allusion has been made he paid 62dols. 50c. In every case delivery of the shares was obtained by the appellant from the member of the Stock Exchange, from whom he purchased, and the shares were duly paid for. The money necessary for this purpose beyond that supplied by the respondent was raised by the appellant by means of loans from a bank, the shares serving as security. The loans needed for the respondent's transactions were not always raised specifically upon the shares purchased for him. The appellant acted as broker for many clients, and the advances which were required for the purpose of completing contracts entered into on their behalf were raised by hypothecating to a bank their several securities and obtaining the advance of a lump sum.

When the shares purchased for the respondent were sold they were redeemed from the bank and delivered to the purchaser. In respect of the advances obtained from the bank, the appellant charged the respondent 1 per cent. more than the interest for which he had made himself liable to the bank. If between the time of the purchase and that of the sale of particular shares dividends were paid upon them these dividends were credited to the respondent.

It should be added, as reliance is placed upon the fact, that the respondent was a bank clerk with a salary of 900 dols. to 1,000 dols. a year.

It is conceded that the only law prevailing in Canada upon which the respondent can rely for the purpose of establishing that the appellant is not entitled to recover the sum claimed is Article 1927 of the Civil Code of Lower Canada. It is in these terms:—

"There is no right of action for the recovery of money or any other thing claimed under a gaming contract or a bet."

In order therefore to sustain his defence it was incumbent on the respondent to show that the money sought to be recovered was claimed under a gaming contract or a bet. The learned judge who tried the case, and on appeal the Court of Queen's Bench for Lower Canada (Hall, J., dissenting), thought he had made this out—hence the present appeal.

The defence turning upon the question whether the claim is founded upon a gaming contract, it is essential to ascertain the exact nature of the obligation relied on by the appellant. Unless there was a gaming contract between the parties to this action so that the appellent in order to make good his claim must rely on such a contract, the defence obviously fails.

What then was the nature of the contract between these parties?

The appellant was employed by the respondent as his mandatary or agent to make certain contracts of purchase and sale on his behalf. The contracts made, which were unquestionably within the authority given by the respondent, were certainly not gaming contracts as between the parties to them. They were real transactions, the shares purchased and sold were in every case delivered and the price of them paid or received as the case might be. All this is not in dispute. The appellant having entered into these contracts as agent for the respondent the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect of them. He was on the other hand exclusively entitled to the benefit of them. If the shares purchased increased in value, the result was a gain to the respondent and did not involve any loss to the appellant. If on the other hand the shares decreased in value while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of ¼ per cent. It would be of course an abuse of language to apply the term "bet" to such a transaction. Their lordship cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

In the courts below much stress was laid on the fact that the respondent was known to the appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the respondent had in view not investment but gambling. The other circumstances mainly relied on were that the respondent never asked for nor received delivery of any of the shares purchased; that the purchase-money was raised by a loan procured by the appellant; that the respondent was not in a position to furnish the whole of the purchase-money and in fact only provided the appellant with a small margin.

It may well be that the appellant was aware that in directing a purchase to be made the respondent did not intend to keep the shares purchased but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as "gambling on the Stock Exchange;" but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale. Such dealings are of everyday occurrence in commerce. The legal aspect of the case is the same, whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint stock company. Nor again do such purchases and sales become gaming contracts, because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased. This also is an every day commercial transaction. For example: a merchant who has to pay the price of a cargo purchased before he re-sells it obtains in ordinary course the means of doing so by pledging the bill of lading.

Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is

intended to be executed by delivery according to the obligations expressed upon the face of it, is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.

In the Act passed by the Dominion Parliament in 1888 (51 Vict. c. 42) with a view of putting down what were then known as "bucket shops" it is provided (section 1) that:—"Every one who . . . with the intent to make, gain, or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, . . . or of any goods, wares, or merchandise makes . . . any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stocks, goods, wares, or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery; and every one who acts, aids, or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."

A proviso was however added in the following terms:—"but the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."

Their lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value, the loss was exclusively his.

It is unnecessary to inquire whether in pledging the securities of his clients for a lump sum to raise the moneys which he was authorized by them to raise, instead of obtaining separate loans on their several securities, the appellant was acting within the authority conferred upon him, for it does not seem to their lordships to have a material bearing upon the question whether the contract sued on was a gaming one.

The decisions in the English courts are of course not authorities upon the construction of the article of the Canadian Code. But the words of the English statute relating to gambling contracts (8 & 9 Vict. c. 109) do not differ substantially from those found in the Code. That statute renders null and void all contracts by way of gaming and wagering. The English authorities may therefore well be referred to as throwing light on the question what constitutes a gaming contract.

The case of *Thacker* v. *Hardy*, 27 W. R. 158, 4 Q. B. D. 685, in the Court of Appeal in England, was very similar to that under consideration. The plaintiff was a broker who purchased and sold stocks and shares on the Stock Exchange for the defendant by his authority. He sued the defendant for commission and for an indemnity in respect of certain contracts into which he had entered pursuant to the defendant's instructions. The defence was founded upon 8 & 9 Vict. c. 109, s. 18.

Lindley, J., held, and his judgment was affirmed by the Court of Appeal, that the plaintiff was entitled to recover.

Bramwell, L.J., said:—"The bargains made by the plaintiff upon behalf of the defendant were what they purported to be; they gave the jobber a right to call upon the broker or the principal to take the stock, and they gave the broker the right to call upon the jobber to deliver it."

He further said: "I will assume that that was the nature of the bargain between the parties, and that by its terms the principal would be entitled to call on the broker to resell the stock, so that, instead of taking and paying for it, the principal would have to pay only the differences. In my opinion that bargain does not infringe the provisions of 8 & 9 Vict. c. 109, which was directed against gaming and wagering; for the principal might take the stock which has been bought for him, and hold it as an investment."

He points out too that there is no gaming and wagering in a transaction of the kind now in question. The passage is as follows:—"The broker has no interest in the stock, and it does not matter to him whether the market rises or falls; but when a transaction comes within the statute against gaming and wagering, the result of it does affect both parties. In the case before us, the broker does not wager at all."

Cotton, L.J., laid down what in his view was of the essence of a gaming contract in these terms:—"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties."

Even where a person is employed to enter into gambling contracts upon commission, it has been held by the courts of this country that if he makes payments in pursuance of such employment, he can recover such payments from his principal, that the implied contract of indemnity is not, in such a case, in itself a gaming or wagering contract and is therefore not null and void. The intervention of the Legislature was considered necessary in order to invalidate such contracts, and by the Gaming Act 1892, any promise express or implied to pay any person any sum of money paid by him in respect of a contract rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum by way of commission or reward for any services in relation thereto is rendered null and void.

With regard to the plea of prescription the facts stand thus. After the transactions which gave rise to the debit balance against the respondent were closed, he, in October 1885, sent to the appellant 100dols. as margin for the purchase of ten shares in the Bank of Montreal. He received notice in February 1886 that these shares had been sold at a profit of 150dols., and he acquiesced in this sum as well as the 100dols. which he had sent in the previous October being placed to the credit of his general account. The learned judge who tried the case came to the conclusion that under these circumstances the plea of prescription could not prevail. This view was concurred in by the Court of Queen's Bench, and their lordships see no reason to differ from the decision thus arrived at.

For the reasons which have been given their lordships think that the judgments of the courts below ought to be reversed, and that judgment should

entered for the appellant for the sum claimed, with costs in both the courts below.

As regards the costs of this appeal, inasmuch as the appellant was allowed to prosecute it, notwithstanding the small amount at stake, upon the ground that it involved a question of wide general interest, especially to those following the appellant's calling, their lordships think that the appellant should, under the peculiar circumstances, bear the costs of the appeal on both sides.

They will humbly advise Her Majesty in accordance with the opinion they have expressed.

Solicitors for the appellant, *Budd, Johnsons, & Jecks.*

Solicitors for the respondent, *Simpson & Co.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Rigby, L.J.) — May 30.

BAERSELMAN *v.* BAILEY AND OTHERS. (*a*.)

Ship—Bill of lading—Exceptions—Injury to cargo—Negligence "in navigating the ship or otherwise."

A bill of lading contained a clause exempting the shipowners from liability "for any act, negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise." A quantity of eggs were negligently stowed by the shipowners' servants in contact with hay, whereby the eggs were damaged.

Held, that the words "or otherwise" in the bill of lading included any negligence of the shipowners' servants, and that therefore the shipowners were not liable for the damage so caused.

Norman *v* Binnington, 38 *W. R.* 702, 25 *Q. B. D.* 475, *commented on.*

Appeal from the decision of a divisional court (Cave and Lawrence, JJ.) upon a point of law raised on the pleadings.

The statement of claim alleged that certain cases of eggs were shipped on board the defendant's steamship Rexer at St. Petersburg in good order and condition for carriage to London under a bill of lading, and that the eggs were delivered in a damaged condition owing to the negligence of the defendants in stowing and carrying the eggs in the same hold with and next to a cargo of hay which was in a wet condition, whereby giving the eggs a bad flavour, and the plaintiff claimed damages. The statement of defence, so far as material, alleged in paragraph 4, that if the eggs were delivered in a damaged or otherwise deteriorated condition, the same was caused by and was within certain excepted perils in the bill of lading under which the eggs were shipped and for which the defendants were not liable, viz., any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise. The particulars delivered under the above paragraph stated that if there was any act of negligence, default, or error in judgment of the defendants' servants, the same consisted in storing and carrying the eggs in the same hold with a cargo of hay. The judge at chambers ordered that the question of law, whether the fourth paragraph of the statement of defence and the particulars thereunder disclosed any defence in law to the plaintiff's claim, should be set down for hearing before the issues of fact in the action.

The bill of lading stated that the eggs were shipped in good order and condition and were to be delivered in the like good order and condition in the port of London (the act of God, the Queen's enemies, fire, boilers, steam, and all and every other dangers and accidents of the seas and rivers, and steam navigation of whatever nature and kind soever excepted). By the marginal note it was provided that the shipowners were "to be in no way liable for any consequences or any accident of navigation, &c., nor for any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise. . . . Ship free of rust, leakage, breakage, or torn wrappers, broken cords or hoops, and incorrect delivery of goods from insufficiency of marks or numbers."

The Divisional Court gave judgment for the plaintiff, holding that the case was not distinguishable from *Norman* v. *Binnington*, 38 W. R. 702, 25 Q. B. D. 475. The defendants appealed.

Bucknill, Q.C., and *T. F. D. Miller*, for the defendants.—The words "or otherwise" are perfectly general, and cover negligence of the shipowners' servants in stowing the cargo. The limited meaning placed upon those words in *Norman* v. *Binnington*, 38 W. R. 702, 25 Q. B. D. 475, cannot be supported.

They also referred to *The Duero*, L. R. 2 A. & E. 393, 18 W. R. Adm. Dig. 19, and *Hayn* v. *Culliford*, 27 W. R. 541, 4 C. P. D. 182.

Joseph Walton, Q.C., and *H. F. Boyd*, for the plaintiffs.—If the words "or otherwise" are construed as having a general meaning, the prior words, "in navigating the ship," are unnecessary. The words "or otherwise" refer to excepted perils in the body of the bill of lading besides perils of navigation, and exempt the shipowners from liability for those perils brought about by negligence. This is the view adopted in *Norman* v. *Binnington*, and that case should be followed. Further, if the language in the bill of lading is ambiguous, it must construed against the shipowner who prepared it.

Cur. adv. vult.

May 30.—Lord ESHER, M.R.—A cargo of eggs was shipped in Russia for England under a bill of lading. It must be taken for the purpose of the argument before us that the shipowners' servants negligently stowed the eggs in too close contact with some hay, in consequence of which the eggs were damaged. The question before us is whether that negligent act comes within the exceptions in the bill of lading. The bill of lading is in the ordinary form. It is obvious that the negligence was not in the navigation of the ship. The sole question is, does it come within the words "or otherwise." This is not an instance of the enumeration of a class with general words following. The negligence intended to be covered by the words "or otherwise" is not something like negligence in navigating the ship. It is something beyond that. The ordinary meaning of the words is, negligence in navigating the ship or negligence otherwise than in navigating the ship. The act of negligence relied upon in this case is negligence otherwise than in navigating the ship. Has any limitation been placed upon the meaning of those general words? The Divisional Court held that they were bound by the decision in *Norman* v. *Binnington* to give the words a limited meaning, and Cave, J., who concurred in the judgment in that case, now says that upon reflection he is not satisfied with it. For my part, I cannot agree with the latter part

(a) Reported by W. F. BARRY, Esq., Barrister-at-Law.

of the judgment in that case. I agree with the result of the judgment, and therefore I do not differ from the decision in that case. A. L. Smith, L.J., who delivered the judgment of the court, said that "to read the words 'or otherwise' as including everything besides navigating the ship is to render the words 'in navigating the ship' inoperative." That is the part of the judgment which I am unable to follow. He goes on: "But to read the words, 'whether in navigating the ship or otherwise' as meaning an absolution from liability to damage brought about whether in negligently navigating the ship or in negligently bringing about those other losses or damages from which the shipowner has exempted himself in the bill of lading is, in my judgment, the true reading of this bill of lading. By this means the true canon of construction is followed." In truth, if the clause in this bill of lading is read as including absolution from liability for the negligence of every servant of the shipowner in connection with the voyage, there still remain many things not covered by the exemption. For instance, if the ship is unseaworthy and the cargo is damaged in consequence, the shipowner is not absolved. If, again, the shipowner orders a deviation, and the cargo is damaged, that does not come within the exemption. If the words are construed as widely as possible, all the bill of lading does is to absolve the shipowner from liability for the negligence of his servants. That is not contrary to natural justice, but is merely bringing back the law applicable to the case to what, in my opinion, it ought to have been from the beginning. Shipowners have, by successive steps, been endeavouring to limit their liability in this respect, and they have now inserted a clause that they will not be liable for the negligence of their servants. There is nothing in the English law to prevent them doing so, if the cargo-owner chooses to agree to it. The shipowners here have in plain language absolved themselves from liability for the negligence of their servants, and this appeal, therefore, must be allowed.

RIGBY, L.J.—I am of the same opinion. During the argument I was disposed to place the same limited meaning on the words "or otherwise" as was adopted in *Norman* v. *Bennington*. I have since then read most carefully the judgment in that case, and I agree with what the Master of the Rolls has said about it. If there is any ambiguity in the language it must be construed against the framers. But we must see whether any ambiguity exists. We know what the history of the matter has been. The shipowners first excepted the negligence of the master and mariners. It was then found that that did not cover a wide enough field, and the negligence of the servants of the shipowners was then excepted, followed by the words "in navigating the ship or otherwise." Those words mean whether the negligence be in navigating the ship or not. I agree with the Master of the Rolls that, when properly looked at, there is no ambiguity in the words, and we must give them their ordinary meaning.

Appeal allowed.

Solicitor for the plaintiff, *R. Greening*.

Solicitors for the defendants, *Downing, Holman, & Co.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 6, 7.

In re HODGKINSON.
HODGKINSON *v.* HODGKINSON. (*a.*)

Trustee—Costs—Order making no order as to costs—Effect of on trustee's right to retain—R. S. C., 1883, *ord.* 65, *r.* 1.

Upon an originating summons in which the testamentary guardian and next friend of an infant beneficiary under a will was plaintiff, and the executor and trustee of the will was defendant, an order was made containing the words, "and the judge doth not think fit to make any order as to the costs of this action." The defendant, notwithstanding that order, claimed to retain his costs out of the estate.

Held, that the words in the order negatived the primâ facie *right of the trustee to retain his costs.*

James Hodgkinson, by his will dated the 15th of November, 1878, gave his residuary, real, and personal estate to his wife, Lavinia, during her life, with remainder to his daughter, Florence Mary, and if his wife should die before his daughter attained her age of twenty-one years, he directed that the income should be applied to her maintenance during her minority, and on her attaining twenty-one the worth of the property should be paid to her by the surviving executor in portions at the periods mentioned in the will, and he directed that if she died under twenty-one unmarried and without issue the property should go, subject to certain legacies, to his nephews and nieces, and he appointed his wife and S. Hodgkinson, his executors and trustees, and Sarah Bennett guardian of his infant daughter.

The testator died in March, 1880, and his wife died in June, 1890.

His daughter, Florence Mary Hodgkinson, attained the age of twenty-four years in July, 1894.

After the death of the testator's widow, Sarah Bennett, the testamentary guardian, became dissatisfied with S. Hodgkinson's management of the estate, and a question arose as to whether certain payments for repairs and other matters should be made out of capital or income, and Sarah Bennett, as guardian and next friend of the infant daughter, took out a summons against the trustee calling upon him to render his accounts, charging him with wilful default, and asking for the appointment of two new trustees of the will.

The summons was heard on the 15th of May, 1893, by Kekewich, J., who gave directions as to certain payments, and ordered the defendant to bring in his accounts, with liberty to apply, but no order was drawn up. The accounts were brought in and vouched.

On the 7th of August, 1893, the summons was brought on again before Kekewich, J., who made an order by which, after stating that several questions arising upon the defendant's accounts had been brought before the judge in chambers, and directions had been given thereon and the plaintiff, Sarah Bennett, by her counsel, admitting that the defendant in accordance with such directions had paid to her as testamentary guardian of the infant plaintiff, the income accrued down to the present time in respect of the residuary, real, and personal estate of the testator, it was ordered that the defendant should pay the future income to the plaintiff, Sarah Bennett, as such testamentary guardian as aforesaid, and the order concluded thus: "And the judge doth not think

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

fit to make any order as to the costs of this action."

On the 24th of October, 1894, Florence Mary Hodgkinson, being then of age, took out a fresh originating summons against the defendant, S. Hodgkinson, asking for the opinion of the court upon the construction of the will, upon which Kekewich, J., made an order, on the 12th of November, 1894, declaring that the whole residuary estate of the testator belonged to the plaintiff absolutely, and directing the defendant to account for a sum of £58, which he had received for sale of stock, and to be at liberty to retain the costs, charges, and expenses of the application out of the estate to be taxed as between solicitor and client, with liberty to apply.

The defendant, S. Hodgkinson, claimed to retain out of the estate the costs, charges, and expenses incurred in the previous proceedings commenced by Sarah Bennett against him, and with regard to which the learned judge had declined to make any order as to costs on the 7th of August, 1893. A summons in the second action was accordingly taken out, under the liberty to apply, for the purpose of obtaining the opinion of the judge upon this point. The matter was adjourned into court, and on the 9th of February, 1895, Kekewich, J., made an order declaring that the defendant had no right to retain and pay the costs of the previous action out of the estate of the testator, and that he must pay the costs of the present application.

J. M. Stone, for the appellant.—The order of the 7th of August, 1893, is not inconsistent with the trustee's right to retain his costs. [The court suggested that the trustee might take out a summons asking that, in the circumstances, he should have the costs notwithstanding the order.]

J. W. Manning, for the respondent. The learned judge intended, by his order, to deprive the trustee of costs, and he had jurisdiction to do so: *In re Medland Eland* v. *Medland*, 37 W. R. 753, 41 Ch. D. 476. The words in the order of the 7th of August, 1893, mean that the judge had given his attention to the question of costs and had decided to deprive the trustee of them: *In re Beddoe, Downes* v. *Cottam*, 41 W. R. 177, [1893] 1 Ch. 547, is distinguishable.

He also referred to *In re Love, Hill* v. *Spurgeon*, 33 W. R. 449, 29 Ch. D. 348.

J. M. Stone, in reply.—The order shows no such active exercise of discretion as to deprive the trustee of his right to costs. So far as the trustee is concerned, it is the same as if the words were left out.

He referred to ord. 65, r. 14*a* (Rules of 1893), to the judgment of Cotton, L.J., in *In re Love, Hill* v. *Spurgeon*, and to Lewin on Trusts, 8th ed., p. 636.

LINDLEY, L.J.—I do not think that there is any real difficulty in this case. I think that Mr. Stone is quite right in his general proposition as to a trustee being entitled to his costs, which right is preserved to him by ord. 65, r. 1.

That rule provides that "the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge. Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted, or carried on, or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

What took place was this—[His lordship stated the facts, and continued:—] It seems that there was a controversy between the guardian of the infant, who was in the position of a tenant for life, and her trustee as to whether the costs of certain repairs should come out of capital or income. They entertained different views of the matter. The guardian accordingly took out a summons to have the question determined. The proper parties to the summons were the person in the position of the tenant for life and the trustee. Such a summons would not be launched against all the *cestui que* trusts. Kekewich, J., settled the point in controversy in favour of the infant, and declared that the expenses of the repairs were to come out of the capital, and directed the trustee so to pay them. The order concluded with these words: "And the judge doth not think fit to make any order as to the costs of this action." What does that mean? The appellant's counsel says that it means nothing, and that it means neither more nor less than the same order with that passage left out of it. I cannot take that view. It seems to me that this is a common form of order, perfectly familiar to all of us, and that it means that the judge, having had his attention called to the matter and being asked to make an order that some one shall pay the costs, declines to do so. It is not that he does not mean to make any order as to the costs. The effect of it is that each party has to pay his own costs.

If so, is that consistent with the retainer by the trustee of his costs out of the estate? I cannot think so. We must remember that this was an action between a trustee and his *cestui que* trust, and if the judge says, "I do not think fit to make any order as to costs," that negatives the *primâ facie* right of the trustee to take his costs out of his estates. Moreover, the judge says that he meant that to be the effect of the order. Whether the order disallowing costs was in itself right or wrong we cannot now enquire. That being so, the trustee said that he should retain his costs out of the moneys in his hands, and the *cestui que* trust took out a summons asking for a direction that he should not do so. Kekewich, J., has made an order negativing his right. I think that that order is correct, and that the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. I am not able to appreciate the argument of the appellant's counsel. The question turns on the proper construction of the words of the order: "The judge doth not think fit to make any order as to the costs." I should have thought that clear. The judge says that he does not think fit to make any order as to costs, and that can only mean one thing—viz., that each party is to pay his own costs. The form is well known and has been frequently used by all of us to mean what I have said.

The appellant's counsel says that that is not the true meaning, and that it is just the same as if the words were not in the order, and that the trustee may retain his costs out of the estate notwithstanding the words in question. It seems to me that that cannot be so. It must have been intended that the words should have some effect. I think, therefore, that that contention cannot for a moment be maintained. I suppose that the judge who used the words knew the meaning of his words, and when the words were brought to his attention he said that he did mean that the trustee should not retain his costs.

I think, therefore, that the appeal must be dismissed, with costs.

KAY, L.J.—The order of the 7th of August, 1893, contained the words: "And the judge doth not think fit to make any order as to the costs." What is the effect and meaning of that? It is necessary to see

what power the judge had to make the order as to costs at that time in that proceeding. [His lordship stated the facts of the case, and continued:—] The estate was sufficiently represented upon the summons for the judge to be in a position to say, if he liked, one of three alternatives, either that the trustee should have his costs out of the estate, or that the plaintiff should pay them, or that the trustee should pay them. What is the effect when the judge did none of these three things, but said that he did not see fit to make any order as to costs? What does it mean but that it left the trustee to pay his own costs? I should have no doubt at all about it, except that the apellant's counsel contended that the order was made in this form because the judge thought the estate was not sufficiently represented. I do not agree that the estate was not sufficiently represented to enable the judge to make that order, and when we look into the matter we find that that was not the reason. The judge considered that the trustee had not behaved in a reasonable manner in paying the expenses out of income instead of out of capital. So I should say it is not possible to come to the conclusion which was urged upon us by the appellant's counsel that the estate was not sufficiently represented. It was represented by the tenant for life and the trustee, and it would have been in the power of Kekewich, J., to say that the costs should come out of the estate. But he did not do that. Then the new summons was taken out to prevent the trustee from retaining his costs out of the estate notwithstanding the first order, and the judge had to consider what he had meant by the words he had used. On the 9th of February, 1895, Kekewich, J., said that what he meant was that the costs should not come out of the estate. There is no appeal brought against the order of the 7th of August, 1893, nor could there be now. Under these circumstances we have to say what is the meaning of the order. In my opinion the trustee had clearly no right to retain his costs.

I will not go into the question whether the judge was right or wrong in making the order originally. In 1895 he did the only thing he could do when he refused to allow the costs to be retained.

The appeal seems to me to fail, and to fail with costs.

Appeal dismissed.

Solicitors, *G. F. Hudson, Matthews, & Co.*, for *John Bamford, Son, & Matthews*, Ashbourne, Derby; *C. E. Beal.*

High Court of Justice.

Chan. Div. North, J. March 29.

DICKSON *v.* LAW AND DAVIDSON. (*a.*)

Practice—Writ—Service out of the jurisdiction—Irregularity—R. S. C., 1883, *ord.* 11, *r.* 4; *ord.* 2, *r.* 5; *ord.* 70, *r.* 1.

On an application for leave for service of a writ out of the jurisdiction, the omission of an affidavit, in accordance with ord. 11, *r.* 4, *that there is a good cause of action is not material when the court is able to see that such is the case.*

The indorsement prescribed by Form No. 5 *in Appendix A to the Rules of the Supreme Court, for a writ to be served out of the jurisdiction, should be placed upon a writ amended so as to be served out of the jurisdiction. The omission of such an indorsement, however, is only an irregularity, in spite of which the service may be treated as valid under ord.* 70, *r.* 1.

Motion.

This action was commenced in August, 1894, against the defendant Law alone, asking for a declaration that the defendant was a trustee for the plaintiff of one-sixteenth of certain hereditaments in Ceylon, and to have the provisions of an agreement dated the 24th of December, 1886, and made between the plaintiff, the defendant Law, Davidson, and Hendry, carried into effect.

The defendant Law, who was in this country, applied for leave to serve a third party notice upon Davidson, who was bound to indemnify him against the plaintiff's claim. Upon the hearing of this application, North, J., gave leave to add Davidson as a defendant, and to serve the amended writ upon Davidson (who was in Ceylon), out of the jurisdiction. No affidavit was made as required by ord. 11, r. 4.

Davidson entered a conditional appearance and now applied to have the service of the writ upon him set aside for irregularity.

Vernon Smith, Q.C., and *aBeckett Terrell*, for the motion, said that Davidson was not a necessary or proper party within ord. 11, r. 1, and that the service was irregular as ord. 11, r. 4, had not been complied with. Moreover, the amended writ had not the indorsement required by ord. 2, r. 5

They cited *Kinahan* v. *Kinahan*, 38 W. R. 655, 41 Ch. D. 78; *Sedgwick* v. *Yedras Mining Co.*, 35 W. R. 780; *Societe Industrialle* v. *Companhia Portugueza*, 33 SOLICITORS' JOURNAL, 253, W. N., 1889, p. 32; *Keate* v. *Phillips*, W. N., 1878, p. 186; *Phillipson* v. *Emmanuel*, 56 L. T. N. S. 858, 35 W. R. Dig. 160.

Everitt, Q.C., and *Leck*, for the plaintiff, said there was enough to show the court that there was a good cause for action against Davidson and that the omissions were mere irregularities which did not render the proceedings void unless the court so directed.

Vernon Smith, in reply, said that he could not deny that Davidson was bound to indemnify Law.

W. H. Jackson, for Law, who had not been served with the notice of motion, was not heard.

NORTH, J. I do not think that the service ought to be set aside. No objection has been made upon the ground that Hendry is not a party to the action. Dickson asked for leave to serve a third party notice upon Davidson, to whom Law had sold his interest, and who had agreed to indemnify him. That was considered in chambers, and it was clear that Davidson was not merely a nominal defendant. I thought that he should be joined as a defendant instead of being sued as a third party.

It is said that there was no formal affidavit as required by ord. 11, r. 4. It was decided in *Fowler* v. *Barstow*, 30 W. R. 112, 20 Ch. D. 240, that where the defendant is resident in the Queen's dominions, the absence of a statement that he is a British subject is not material. Similarly, where the court is satisfied that there is a good cause of action, the absence of an affidavit that there is a good cause of action is not material.

Then it is said that the amended writ does not have the indorsement prescribed by Form No. 5. Strictly speaking, that does not apply, for this was an amendment. But I think that the indorsement ought to have been put on. The defendant, however, is not entitled to take advantage of a slip made by a clerk

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

and, under ord. 70, r. 1, I can treat the service as valid, notwithstanding the irregularity. I think that the order for service must stand, and the motion be refused with costs.

Solicitors, *Fladgate & Co.*; *Lowless & Co.*; *Jackson & Jackson.*

Chan. Div. } Kekewich, J. } April 5.

ALLIOTT v. SMITH. (a.)

Discovery — Interrogatories — Sufficiency of answer— Legal personal representative—Knowledge of solicitor and banker of testator—Inquiry of solicitor or banker.

In an action against an executor, to recover from the testator's estate moneys paid to the latter in alleged improper exercise of a power more than twenty years before action brought, the executor is not bound to make inquiry of the solicitor or banker to his testator as to the dealings of his testator with the moneys, where it does not appear that the inquiry will result in obtaining information with respect to which the executor is interrogated.

By a marriage settlement dated the 21st of July, 1863, F. J. Eaton and C. F. Alliott, the latter being a minor, covenanted to convey certain property to the trustees.

The settlement contained a power to the trustees for the time being "at any time or times during the life of the said C. F. Alliott upon the request in writing of the said C. F. Alliott and her said intended or any future husband to advance and pay to or for the use of such intended or future husband any part of the said trust funds and premises not exceeding in the whole one-fourth in value thereof for the advancement, either in business or otherwise, of such intended or future husband, and that in such case the receipt or receipts in writing of the said C. F. Alliott and her said intended or any future husband should be good and effectual discharges to the said trustees or trustee for the amounts or amount so advanced, and shall release the said trustees or trustee for any future liability in respect thereof."

The marriage between F. J. Eaton and C. F. Alliott was duly solemnized, and on the 17th of January, 1868, Mrs. Eaton, having previously attained her majority, confirmed the settlement by deed.

On the 7th of February, 1872, Mr. and Mrs. Eaton sent a letter to the trustees, requesting the trustees to exercise the power of advancement, with which the trustees complied by two payments on the 7th of February, 1872, of £2,832, and on the 21st of March, 1873, of £111 17s. 5d.

The present action was brought by the present trustees of the settlement against the executor of the husband to recover these two sums, which the statement of claim alleged had been improperly made.

In this action the plaintiffs delivered the following interrogatories:—(1) Did not F. J. Eaton in the months of February, 1872, and March, 1873, keep a banking account with a firm of bankers at Grantham whose business was subsequently transferred to, and is now being carried on by, Messrs. Hardy & Co., or with some other and what bank, and did not Messrs. Parr & Butlin during the years 1872 and 1873 act as his solicitors?; (2) Did not the said F. J. Eaton receive from the trustees of the settlement in the pleadings mentioned the two sums mentioned in paragraph 4 of the statement of claim or some other and what sums on or about the dates in such paragraph mentioned, and did he not pay such sums or some and what part thereof to the credit of his banking account, or to his said solicitors, or how did he deal therewith?; (3) Can you ascertain from an examination of the said banking account and of the account of the said F. J. Eaton with his said solicitors, or by inquiry of his said solicitors, or otherwise, and if so state what investments were made and in whose name or names by the said F. J. Eaton, shortly after the receipt by him of the said sums which were or may have been made with the moneys so received by him, or how were such moneys dealt with by the said F. J. Eaton, and so far as possible trace the subsequent dealings which were had with such investments and moneys down to the date of the death of the said F. J. Eaton; (6) Have you in your possession or under your control any of the pass books of the said F. J. Eaton for the years 1872 and 1873?

In answer to these interrogatories the defendant replied:—(1) I do not know and am unable to say whether F. J. Eaton in the month of February, 1872, and March, 1873, kept a banking account with a firm of bankers at Grantham whose business was subsequently transferred to, and is now being carried on by Messrs. Hardy & Co., or with some other or what bank, or whether Messrs. Parr & Butlin during the years 1872 and 1873 acted as his solicitors; (2) I do not know and am unable to say whether the said F. J. Eaton received from the trustees of the settlement in the pleadings mentioned the two sums mentioned in paragraph 4 of the statement of claim, or some other and what sums on or about the dates in such paragraph mentioned, or whether he paid such sum or any or what part thereof to the credit of his said alleged banking account or to his said alleged solicitors, or how he dealt therewith; (3) I have no knowledge as to any of the matters concerning which the third interrogatory requires a statement, and am unable to make such statement. I am unable to say whether I could acquire such knowledge from an examination of the said alleged banking account (if any) or of the account (if any) of the said F. J. Eaton with his said alleged solicitors, or by inquiry of his said alleged solicitors or otherwise. I have no such accounts in my possession or under my control, and I submit that I am in no way bound to make any such examination or inquiry; (6) I have not in my possession or under my control any of the pass books of the said F. J. Eaton for the years 1872 and 1873.

This was a motion to discharge an order made in chambers refusing an application for further answers to the interrogatories, and was heard for Chitty. J.

Henry Terrell, for the plaintiffs.—The defendant cannot shelter himself behind his own want of knowledge, if by inquiry of an agent he can obtain the necessary information to enable him to answer. The agents of the testator must be regarded as the agents of the defendant.

He cited *Stuart* v. *Bute* (*Lord*), 11 Sim. 442, *Attorney-General* v. *Rees*, 12 Beav. 50; *Bolckow* v. *Fisher*, 31 W. R. 235, 10 Q. B. D. 161.

Borthwick, was not called upon to argue for the defendants.

KEKEWICH, J.—If the case depended upon any alleged distinction between agents on the one hand and bankers and solicitors on the other, I should be disposed to follow Mr. Terrell's argument. I do not

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

see why a man should not be obliged to make an inquiry of his banker or his solicitor, if under similar circumstances, he would be compelled, to make inquiry of an agent or a servant working for him. The principle of the cases cited, including *Bolckow* v. *Fisher*, is neatly expressed in the reported language of North, J., in *Rasbotham* v. *Shropshire Union Railways & Canal Co.*, 32 W. R. 117, 24 Ch. D. 110. "Therefore, if a man is interrogated," he says, "about acts which are done in the presence of persons employed by him, their knowledge is his knowledge, and he is bound to answer in respect of that." It seems to me that principle is applicable directly to a solicitor or a banker, or any other man keeping his account. A solicitor does certainly do business for a client, and it is the client's duty to inquire of the solicitor as to the latter's knowledge for the purpose of answering an interrogatory. That does not seem to me to carry Mr. Terrell nearly as far as he requires.

The claim here is of an unusual character and perfectly good on the face of it, so far as the statement of claim is concerned, subject to one argument which may or may not be a good one, as one could say that a good equity is not set up or that the statement of claim is demurrable. The settlement, which carries us back to the 31st of July, 1863—and the dates are important—empowers the trustees at any time during the life of the wife, upon the request in writing of herself and her husband, to make an advance to the husband of one-fourth of the settlement funds "for his advancement in business or otherwise." Those words "or otherwise" will possibly have to be construed hereafter, but I leave the question open now. According to the allegations in the statement of claim, which I must take for the present purpose to be a statement of the plaintiff's case, the trustees improperly advanced, or at any rate in fact advanced, a considerable sum to the husband as long ago as the 7th of February, 1872. The suggestion is that it was not under the power, but merely with a view to take it out of the settlement, and to give it to the husband. What is alleged is that he invested the money in his own name, and that it so remained until his death. Now the alleged advance was made on the 7th of February, 1872. The husband lived until the 30th of October, 1893, and more than twenty years after the alleged advance, this case is launched against the husband's legal personal representative, and he is interrogated. He says, I do not know whether there was any banking account or whether certain solicitors knew what is alleged.

It is said he, the legal personal representative, is bound to make inquiry of the banker to his testator, and of the solicitor to his testator, to ascertain what was done by the testator twenty-five years ago. Of course he is bound to know what is the testator's estate, and is bound to see all document necessary for that purpose, to pass his residuary account, and if necessary to vouch his account, if the estate is administered by the Chancery Division. But surely it is a great hardship on a legal personal representative, if, finding his testator entitled to a sum of consols, he is bound to inquire who transferred those consols to his testator, or indeed, who transferred them to his transferror, and the circumstances attending the transfer. To my mind it would be a very great hardship on the legal personal representative, if he was bound to make these inquiries. There is nothing in the answer to show that those inquiries would result in anything. There is not a shadow of information that there is anything of knowledge, information, or belief, that anything would be obtained of the slightest relevancy or use if he made inquiries.

It would be an oppressive use of the engine of discovery if he was required to answer, first, making inquiries about matters relative to which there could be no result. The motion must be refused, with costs in any event.

Solicitor for the plaintiff, *J. Fawcett.*

Solicitors for the defendant, *Collinson & Pritchard.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) — May 17.

VESTRY OF ST. LEONARD'S, SHOREDITCH, v. LONDON COUNTY COUNCIL. (a.)

Poor rate—Land taken by promoters—Deficiency in assessment—Liability of promoters to make good deficiency—Deductions—"Compounding"—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.* c. 18), *s.* 133—*Poor Rate Assessment and Collection Act*, 1867 (32 & 33 *Vict.* c. 41), *s.* 3—*Housing of the Working Classes Act*, 1890 (53 & 54 *Vict.* c. 70), *s.* 20.

The promoters of an improvement scheme for the better housing of the poor in a metropolitan district purchased property situated in two adjoining parishes. A special case was stated to ascertain their liability to make good, during the carrying out of the scheme, the deficiency to the poor rate caused through the buildings taken by them ceasing to be rated, and also on what basis that liability, if any, was to be calculated.

Held, that as the promoters acquired the property solely under the powers given them by statute, under which section 133 *of the Lands Clauses Consolidation Act*, 1845, *was incorporated, they were liable to make good any deficiency as provided by that section; and the fact that the scheme was one for the benefit of the working classes did not affect their liability to contribute to the poor rate.*

Held, also, that the deficiency should be computed according to the rental at which the houses were valued or rated at the time of the passing of the special Act, and the fact that some of the houses acquired were then unoccupied, and that the owners of others had compounded, could not be set off from the amount to be made up by the promoters, as directed by the statute.

Special case.

In an action the plaintiffs claimed £398 17s. 1d. being the deficiency in the assessment of poor rates in respect of property situated in the parish of St. Leonard's, Shoreditch, taken by the defendants, the London County Council, under powers conferred on them by the Housing of the Working Classes Act, 1890, and other Acts incorporated therewith.

The following are the material facts stated by consent of the parties:

(1) The plaintiffs, by the St. Leonard's, Shoreditch, Act, 1858 (21 & 22 Vict. c. 132), have power to levy rates on the parish for the relief of the poor.

(2) The County Council of London, the defendants, are constituted by the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 73), the local authority in the county of London for the purposes of Parts I. and III. of the Act.

(3) The defendants, under the powers conferred by the Housing of the Working Classes Act, 1890, made an improvement scheme, called the Lord (Boundary-street, Bethnal-green) Improvement

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Scheme, 1890, for the purpose of reconstructing and rearranging the streets and houses in a certain unhealthy area, partly in the parish of St. Matthew, Bethnal-green, and partly in that of St. Leonard's, Shoreditch.

(4) In May, 1891, the Home Secretary made a provisional order authorizing the scheme. This was duly confirmed by the London (Boundary-street, Bethnal-green) Provisional Order Confirmation Act, 1891 (54 & 55 Vict. c. 60).

(5) The London County Council, under the powers conferred by Part III. of the Act, purchased by agreement certain lands, houses, and other buildings in Goldsmith's-row, for the purpose of erecting on the said lands buildings, suitable for lodging-houses for the working classes, and portions of such lands and buildings so taken were then liable to be assessed to the poor-rate. The defendants entered into possession on the 30th day of October, 1891, and have pulled down the houses and buildings; and the said lands, since the defendants took possession, have not otherwise been occupied, and there has in consequence been a deficiency in the assessment for the poor-rate, which deficiency amounted to £152 14s.

(6) For the purpose of carrying the said scheme into execution the defendants acquired certain other lands and houses in the said parish, and are using the said lands for the purpose of rearranging and reconstructing the said streets and houses. Portions of these said lands, at the date of the special Act and when so taken, were liable to be assessed to the poor-rate. Since these lands have been so taken there has been, by reason of the same being so taken, a deficiency in the poor-rate amounting to £246 3s. 1d.

(7) The plaintiffs contend that the defendants are liable to make good the deficiencies to the poor-rate mentioned in paragraphs 5 and 6.

(8) The owners of certain houses taken by the defendants (the rateable value of which houses did not respectively exceed £20) had agreed in writing, under section 3 of 32 & 33 Vict. c. 41, to become liable for the poor rates assessed in respect of the said houses until such agreement should be determined by either party to pay the rates, whether the hereditaments were occupied or not, and the plaintiffs had agreed with such owners to receive the rates from them, and to allow them a commission of 5 per cent. on the amount thereof. These agreements had not been determined, and were in force at the date when the houses in question were taken possession of by the defendants, and no agreement of a similar nature has been entered into between the defendants and the plaintiffs. But the defendants contend that if they are made liable to make good this deficiency they are entitled to make a deduction of 25 per cent. from the full amount of the assessments levied in respect of the properties in the same manner as the previous owners were entitled to. But the vestry contend that the defendants are not entitled to any such deduction, but are bound to make good the deficiency of the whole of the poor-rates levied on such property, according to the rental at which the lands were rated at the time of the passing of the special Act. The amount of the commission in dispute is £21 14s. and £46 9s. 2d.

(9) Demand has been made on the defendants for these various deficiencies, and they contend that they are not liable on the ground that section 133 of the Lands Clauses Consolidation Act, 1845, does not apply.

The defendants further say that by section 40 of the Local Government Act, 1880, they are in law the successors of the Metropolitan Board of Works, and that from time to time divers improvement schemes have been carried out by that Board or by themselves as their successors under the Housing of the Working Classes Act, 1890, or Acts previously in force, and no payment has ever been made by the board or by the defendants as their successors under the 20th section of the Land Clauses Act, 1845, to make good the deficiencies in any assessments to the poor-rate caused by any of these improvement schemes.

The questions for the opinion of the court were whether the defendants were liable to make good the deficiency in the poor rates (1) caused by their having taken possession of the property mentioned in paragraph 5; and (2) with regard to the property mentioned in paragraph 6; and (3) in the event of the court deciding (1) and (2) in the affirmative, then whether the defendants were entitled to the deduction claimed.

Poland, Q.C. (with him *C. E. Allen*), for the plaintiffs.—The London County Council, the defendants, are the "promoters" of the undertaking within the meaning of the Housing of the Working Classes Act, 1890, and are constituted for that purpose a local authority. Section 133 of the Land Classes Act, 1845, directs that if the promoters of the undertaking become possessed by virtue of this or the special Act of any lands charged with the land tax or liable to be assessed to the poor rates, they shall from time to time until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency. After the works are completed the vestry have to take over the new streets, and must then stand the risk of whether the improvements are a source of loss or profit to the rates. The land and houses mentioned in paragraphs 5 and 6 in the special case were respectively acquired under the powers given by Part III. and Part I. of the Act of 1890, and each of those parts incorporates section 133 of the Lands Clauses Act, 1845, which directs that the promoters shall from time to time be liable to make good any deficiency to the poor rate. The defendants are consequently liable to make good the gross loss to the rates. They are not in the same position as an owner who has agreed to pay the rates instead of the occupier, and is entitled to a reduction by way of commission under section 3 of the Poor Rate Assessment and Collection Act, 32 & 33 Vict. c. 41. One must pay the full rate in respect of the houses and lands they acquire as shown on the register: *Reg.* v. *Overseers of Bilston*, 14 W. R. 83, L. R. 1 Q. B. 18. It is immaterial that some of the houses were then and others were shortly to become unoccupied. In the case of the *Overseers of Putney* v. *London and South-Western Railway Co.*, 39 W. R. 291, [1891] 1 Q. B. 440, the court held that as the statute directed that the deficiency should be computed according to the rental at which the houses taken over were rated at the time of the passing of the special Act, the fact that some of them were then unoccupied was immaterial in estimating the amount of the deficiency.

Lawson Walton, Q.C., and *Ryde*, for the defendants.—It was never intended by the Legislature that the promoters of a scheme, such as this, for the better housing of the poor and one that will eventually materially assist the rates should be called upon to contribute to the poor rates. The court should place a wide construction on the powers incorporated into an Act from other Acts if, when construed strictly, they have the effect of making the incorporating Act unreasonable. The intention of the Act of 1890 was to give power to local authorities to sweep away unhealthy and non-rate paying areas, and to replace buildings unfit for human habitation with substantial dwellings and good rate producing property. Here the property acquired under the scheme had been con-

demned. It is absurd, therefore, that where you get one authority raising rates for the relief of the poor and another in the same district improving the dwellings of the poor, that one should be called upon to make a payment by the other to the poor-rate. If the defendants are held liable then at any rate all they can be made liable for is the actual net deficiency that has accrued to the rates, and in calculating that any compounding agreements should be allowed for. Moreover, the basis of the concession of twenty-five per cent. to a landlord who agrees to pay the rates for the occupier, is, that by such an agreement the local authority is thereby saved the cost of collecting, risk of non-payment, loss on empty houses, and the like. That is the case here, and why should not the defendants be entitled to a similar commission? The defendants pay the rates for the whole area in a lump sum, and I submit, stand in the same position as the landlord who has compounded so far as this, that they thereby save the cost of collecting and pay on all the property let or not let, and are therefore entitled to claim deductions.

Counsel for the plaintiffs were not heard in reply.

RUSSELL, C.J.—There are two questions of principle and one of amount in this case which arise in this way. The London County Council promoted a scheme for improving an area situated in two parishes, which received legislative sanction and Royal Assent in July, 1891. In order to carry out the scheme the London County Council acquired under the powers given to local authorities by Part I of the Housing of the Working Classes Act, 1890, the property mentioned in paragraph 6 of the special case and under Part III of the same Act, the property mentioned in paragraph 5. It will be more convenient if I take the two divisions of the property so acquired by the defendants in their inverse order. The provision of the Housing of the Working Classes Act, 1890, which applies here is contained in section 20. That section provides that the clauses of the Land Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement shall not, except to the extent set forth in the second schedule to this Act, apply to any lands taken in pursuance of this part of this Act, but save as aforesaid the said Lands Clauses Acts, as amended by the provisions contained in the said schedule, shall regulate and apply to the purchase and taking of lands and shall for that purpose be deemed to form part of this Act. The provisions for taking lands otherwise than by agreement are sections 16 to 68. My brother, Charles, J., pointed out that those clauses of the Lands Clauses Act, 1845, are a group of clauses and appear under a distinct heading in the Lands Clauses Act, 1845. And it would have made the section of the Act of 1890 clearer and altogether have simplified matters if that heading had appeared in capital letters in the incorporation Act showing that it referred to that particular group of sections in the incorporated Act.

In the schedule of the Act of 1890 there is substituted a new group of provisions more suitable to the schemes under that Act. Apart from the group of sections 16 to 68 inclusive of the Lands Clauses Act, 1845, which refer to the taking of lands "otherwise than by agreement," and which would not therefore apply to the present case, since the property was acquired by purchase, it is expressly provided that the provisions for acquiring land under the Lands Clauses Act are to apply to any scheme carried out under Part I. of the Act of 1890. Included in this proviso is section 133 of the Lands Clauses Act, 1845, which is as follows:—"If the promoters of the undertaking become possessed by virtue of this or the special Act or any Act incorporated therewith of any lands charged with the land tax or liable to be assessed to the poor rate, they shall from time to time until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax and poor rate by reason of such lands having been taken or used for the purposes of the works. And such deficiency shall be computed according to the rental at which such lands with any buildings thereon were valued or rated at the time of the passing of the Special Act." I think, therefore, that as to the property mentioned in paragraph 6 this liability to recoup the parish authority is thrown on the London County Council.

As regards the liability of the defendants to make good the deficiency falling on the rates from the property taken by them under Part III. referred to in paragraph 5, different sections apply, and this affords an apt illustration of the very objectionable scheme of legislation which has prevailed of late in matters of this kind—namely, that of incorporating in one Act the provisions of another Act which itself incorporates the provisions of a third. The Public Health Act, 1875, by sections 175 to 178 gives power to urban sanitary authorities other than those of the metropolis to acquire by purchase or otherwise land for certain purposes. The Housing of the Working Classes Act by section 57 provides that a local authority may acquire land for the purposes of carrying out any of the objects authorized by Part III. of the Act in like manner as if those purposes were purposes of the Public Health Act, 1875. It further goes on to say that the provisions of sections 175 to 178 shall extend to London as if the London County Council were a local authority in these sections referred to.

The Housing of the Working Classes Act, 1890, incorporates the powers for the purpose of acquiring lands set out in section 175 to 178 of the Public Health Act, 1875. These sections in turn incorporate section 133 of the Lands Clauses Act, 1845, which directs that the promoters of an improvement scheme shall be liable to make good the deficiency caused thereby to the rates. In regard to this part of the property acquired by the London County Council, I most hold that they are also liable.

On the other question raised I do not feel so absolutely free from doubt, but I think the judgment of the court must be against the defendants. The question depends upon what is the true construction to be placed on the latter part of section 133 of the Lands Clauses Act, 1845, which directs that the deficiency shall be computed according to the rental at which such property was assessed. It is clear from the section that the promoters are not merely to make good the actual loss, because, if that were so, as my learned brother Charles has pointed out, if the property were unoccupied at the time when the scheme came into operation, it could hardly be said that there was any loss caused by it to the rates at all. There is an express authority upon this point in the case of the *Overseers of Putney* v. *London and South-Western Railway Co.* There no beneficial occupation was existing when the scheme was promoted, and in that case there would not have been any loss at all. Bowen, L.J., held that the promoters were liable, and his language is wide enough to cover this case.

The Compounding Act, 1869, gives the vestry power to make a composition with those landlords who undertake to pay rates of a block of buildings instead of the occupiers, and for so doing they obtain a commission not exceeding twenty-five per cent. on the rateable value of the property. The

rateable value on the register remains the same, however, and is unaffected by any arrangement entered into by the landlord.

For these reasons I hold that the London County Council are liable to make good the deficiency, and that such deficiency must be calculated on the rateable value of the property as shown by the register.

Judgment must, therefore, be entered for the plaintiffs for £389 17s. 1d., the full sum claimed.

CHARLES, J.—I entirely agree with the judgment delivered, and I have nothing to add.

Solicitor for the vestry, *H. Mansfield Robinson.*

Solicitor for the London County Council, *W. A. Blaxland.*

Q. B. Div.
(Cave and Lawrance, JJ.) } April 9; May 17.

In re AN ARBITRATION BETWEEN THE KENT COUNTY COUNCIL AND THE SANDGATE LOCAL BOARD. (*a.*)

Local government—Difference between local authorities—Arbitration of Local Government Board—Obligation to state case for opinion of the High Court—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11 (3)—*Arbitration Act,* 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 19, 24.

Where, under the Local Government Act, 1888, *the Local Government Board are required to determine a difference by arbitration, they must proceed under section 63 of that Act, and are not entitled to proceed by means of a local inquiry under section* 87, *which section only applies in cases where a difference is to be determined by the board otherwise than by arbitration.*

In an arbitration held by the Local Government Board under section 63 *of the Local Government Act,* 1888, *the board can be required to state a case for the opinion of the court under section* 19 *of the Arbitration Act,* 1889.

Appeal from an order of Day, J., at chambers ordering that the Local Government Board or Thomas Codrington should state in the form of a special case for the opinion of the court the several questions of law which have arisen or may arise in the course of the reference therein.

The following statement of the facts is taken from the judgment of the court:—

On or about the 6th of April, 1883, a road in the district of the Sandgate Local Board, which is the urban authority for the urban sanitary district of Sandgate, became a main road.

On or about the 11th of March, 1890, the urban authority claimed under section 11, sub-section 2, of the Local Government Act, 1888, to retain the powers and duties of maintaining and repairing the said main road. In the result the county council and the urban authority failed to agree on the amount of the annual payment to be made by the county council to the urban authority towards the costs of the maintenance of such road, and in the absence of such agreement the amount of such payment came to be determined by arbitration of the Local Government Board, pursuant to section 11, sub-section 3, of the said Act.

On the 20th of September and the 18th of October, 1893, the county council and the urban authority respectively, at the request of the Local Government Board, executed a submission to arbitration. The Local Government Board, under section 87 of the said Act, appointed Thomas Codrington, C.E., one of the inspectors of the board, to hold a local inquiry with respect to the matter in dispute. In the course of the inquiry the counsel for the county council gave the inspector notice that they desired to have a case stated, under the Arbitration Act, 1889, upon certain questions of law which arose in the case, and ultimately they applied to the judge at chambers for the order which he made, and which now came before the court on appeal by the Local Government Board. The order was supported both by the county council and by the urban authority.

Sir Robert Reid, A.G. (*Henry Sutton* with him), for the Local Government Board.—This order ought not to have been made. The Local Government Act, 1888, provides three methods of settling differences and determining questions arising under the Act—namely (1) arbitration by the Local Government Board as in cases arising under section 11 (3) (4) (9); (2) arbitration under the Act, s. 11 (6), s. 12 (2), s. 46 (3), s. 64 (6); and (3) determination by a secretary of state, sections 34 (5), 47 (3), 48 (3). Arbitrations by the Local Government Board are regulated either by section 63 or by section 87. If the board proceeds under section 63 the provisions of the Regulation of Railways Act, 1868, as to arbitrations by the Board of Trade are to apply. These provisions again incorporate sections 18 to 29 of the Railway Companies Arbitration Act, 1859, s. 29 of which provides that a submission to arbitration may be made a rule of court, and that the matter may be remitted to the arbitrator with the direction of the court. But the procedure is different if the board act under section 87 of the Act of 1888 as they have done here. Under that section they may cause a local inquiry to be made, and sections 293 to 296 of the Public Health Act, 1875, are to apply. An order made upon such an inquiry is "binding and conclusive" (Public Health Act, 1875, s. 295). The report and the evidence on the inquiry is considered by the board, and an order is made thereon by the president or officer duly authorized under section 5 of the Local Government Board Act, 1871. In proceedings taken under section 87 the board exercises judicial functions, and the Arbitration Act, 1889, does not apply.

He cited *Newry and Enniskillen Railway Co.* v. *Ulster Railway Co.*, 4 W. R. 761, 8 De G. M. & G. 487; *Parsons* v. *Lakenheath School Board*, 58 L. J. Q. B. 371, 37 W. R. Dig. 72; and *Bexley Local Board* v. *West Kent Main Sewerage Board*, 31 W. R. 119, 9 Q. B. D. 518.

R. M. Bray (*Finlay, Q.C.*, with him), for the Kent County Council.—This proceeding is by the terms of section 11 (3) of the Local Government Act, 1888, an "arbitration." There is no distinction in principle between a reference to arbitration by the board and a reference to arbitration under the Act — the only distinction being that in the latter case the arbitrator is appointed by the parties (section 62 (2)). In both cases the Arbitration Act, 1889, applies, and under section 19 of that Act the arbitrator may be ordered to state a special case. One of the objects of that Act was to make all arbitrations subject to the process of the court, and it applies to all arbitrations under any Act except so far as the Arbitration Act "is inconsistent with the Act regulating the arbitration." There is no such inconsistency in the Act of 1888. In this case the board (according to their usual practice) required the local authorities to execute submissions—this is a clear admission that the proceeding was an arbitration. The cases cited were decided before the Arbitration Act, 1889, and have no application to this case.

) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

R. C. Glen, for the Sandgate Local Board.—If this proceeding were held not to be an arbitration the result would be that although the Local Government Act provides that a matter shall be determined by the "arbitration" of the board, the board may hold an inquiry under section 87 instead of an arbitration under section 63, and disregard the express provision of the Act that there is to be an arbitration.

Sutton, in reply.—The board may proceed under section 87 in any case where they are authorized to "determine any difference," and they were right in so proceeding in the present case.

Cur. adv. vult.

May 17.—The judgment of the COURT (CAVE and LAWRANCE, JJ.) was delivered by

CAVE, J., who, after stating the facts as above set out, said:—The Local Government Board was constituted by the Local Government Board Act, 1871. The present question arises, as has been already stated, under section 11, sub-section 3, of the Local Government Act, 1888. Certain differences likely to arise under that Act are to be settled in manner provided by the Act as follows:—

By section 2, sub-section 3 (*a*), the number of the county councillors and their apportionment between each of the boroughs which have sufficient population to return one councillor, and the rest of the county shall be such as the Local Government Board may determine.

By section 11 (3) already cited, the amount of such payment (to be made by the county council to the urban authority towards the cost of the maintenance and repair of a main road) shall be such annual sum as may be from time to time agreed on, or in the absence of agreement may be determined by arbitration of the Local Government Board. Section 11 (4) provides that a county council may require a district council to undertake the maintenance and repair, &c., of any main road in consideration of such annual payment by the county council for the costs of the undertaking as may from time to time be agreed upon, or in case of difference be determined by arbitration of the Local Goverment Board. Section 11 (6) provides that if any difference arise between a county council and any highway or sanitary authority as respects the authority in whom any drain used for any purpose in connection with the drainage of any main road is vested, or as to the use of any sewer or other drain the council or the highway or sanitary authority may require such difference to be referred to arbitration, and the same is to be referred to arbitration in manner provided by that Act. By section 11 (9), if any difference arises under that section between a county council and a district council as to the refusal of a county council to make a payment under that section to the district council in respect of any undertaking or road, or as to a road having been placed in proper repair and condition previously to its becoming a main road, or as to any notice given to the district council by the county council to place a road in proper repair and condition, such difference shall, if either council so require, be referred to arbitration of the Local Government Board. By section 12 (2) the sums to be paid by the county council for the county of Southampton to the Isle of Wight Highway Commissioners in respect of the repairs and maintenance of the Isle of Wight roads are to be such sums as may be agreed upon, or in case of difference, be settled by arbitration under that Act. By section 22 the shares of the different county councils to the probate duty grant are to be estimated in such manner as the Local Government Board direct. By section 24 (6) the guardians, authority, or officer to whom a sum is payable under that section, on the certificate of the Local Government Board are to submit to the board their claim to the payment in such manner and produce such evidence and comply with such rules as the board from time to time require or make. By section 26 (1) the Local Government Board is to certify the sum expended by the guardians of each poor law union on salaries, &c. By section 26 (2) the Local Government Board is to fix the day on which the rateable value of a poor law union situate in more than one county is to be taken. By section 32 (3) (*b*) the terms on which a borough to which a grant of quarter sessions is made is to redeem its liability to contribute to the costs of the county, quarter, and petty sessions may be agreed upon, or in default of agreement may be determined by arbitration under that Act. Section 32 (*c*) provides for reference to arbitration under the Act. By section 33 (2) where it is necessary to ascertain the rateable value of a county and a county borough it is to be ascertained by a joint committee, and the number of representatives for the county and each county borough respectively shall be settled by agreement, or in default of agreement by the Local Government Board. By section 50 (3) any difference as to the county which contains the largest portion of the population of such district as is referred to in that section shall be referred to the Local Government Board, whose decision shall be final.

It will be seen from the foregoing extracts that any difference which may arise, and which are not specifically provided for are to be settled first, by arbitration under this Act, second, by arbitration of the Local Government Board, or third, by the Local Government Board without specifying in what way. Subsequent portions of the Act appear to be devoted to specifying how these modes of adjusting differences are to be carried out.

By section 62 (2.) In default of an agreement as to any matter requiring adjustment for the purpose of the Act, or any matter which, in case of difference, is to be referred to arbitration, then, if no other mode of making such adjustment or determining such difference is provided by the Act, such adjustment or difference may be made or determined by an arbitrator appointed by the parties, or, in case of difference as to the appointment, appointed by the Local Government Board.

By section 62 (3.) An arbitrator appointed under the Act is to be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, and the provisions of these Acts with respect to an arbitration are to apply accordingly, and further, the arbitrator may state a special case, and notwithstanding anything in the said Acts, is to determine the amount of the costs, and to have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily.

By section 63. Where the Local Government Board are required, in pursuance of the Act, to decide any difference or other matter referred to arbitration in pursuance of the Act, the provisions of the Regulation of Railway Act, 1868, respecting arbitrations by the Board of Trade, the enactments amending those provisions, are to apply as if they were therein re-enacted, and in terms made applicable to the Local Government Board, and the decision of differences and matters under the Act.

By section 87 (1). Where the Local Government Board are authorized by the Act to make any enquiry to determine any difference, to make or cause

firm any order, to frame any scheme, or to give any consent, sanction, or approval to any matter, or otherwise to act under the Act they may cause to be made a local enquiry, and in that case and also in a case where they are required by the Act to cause to be made a local enquiry, sections 293 and 296, both inclusive, of the Public Health Act, 1875, are to apply as if they were therein re-enacted, and in terms made applicable to the Act.

It appears, therefore, that the Act specifically provides for the mode in which differences are to be settled. When they are to be settled by arbitration under the Act section 62 applies. Where the Local Government Board are to decide any difference or other matter referred to arbitration, section 63 is to apply. Now section 63 must be intended to apply to cases where the difference is to be determined by arbitration of the Local Government Board. This indeed was not disputed by the Attorney-General and Mr. Sutton, but they contended that section 87 also applied to such differences.

We are of opinion, however, that section 87 is confined to the cases of difference which are to be determined by the Local Government Board, otherwise than by arbitration, but that where the difference is to be determined by arbitration of the Local Government Board, the mode of so determining it is provided by section 63 and by that section only.

Some cases were cited which, however, have very little bearing on the point in dispute. In the *Newry and Enniskillen Railway Co.* v. *Ulster Railway Co.* it was held that the Board of Trade and Commissioners of Railways were not by the Act there in question placed in the position of private arbitrators. It is sufficient to say that that Act had no section equivalent to section 63 of the Act of 1888. It has not been suggested that if the Board of Trade appointed an arbitrator under section 63 and the regulation of Railways Act, 1868, he would not be governed by the ordinary legal principles which attach to private arbitrators.

The next case is *Parsons* v. *The Lakenheath School Board*, in which Lord Field, then Field, J., appears to have thought that under rule 20 of the Regulations as to Triennial Elections, 1886, the education department was entrusted with judicial duties which it must perform in the ordinary judicial way. The case has no bearing that I can see on the matter here in dispute. The third case, *The Local Board for the District of Bexley* v. *The West Kent Main Sewerage Board*, had still less to do with the matter in hand.

The only other question is whether the Arbitration Act of 1889 applies to arbitrations under section 63 of the Act of 1888. By section 19 of the Arbitration Act "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference and shall if so directed by the court or a judge state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." The power was new when the Act was passed but is most beneficial, and we can see no reason, and indeed none has been suggested, why it should not apply to an arbitration appointed by the Local Government Board under section 63. The only difficulty in the case is that the Local Government Board have purported to proceed under section 87, which in our judgment is not applicable, instead of under section 63 which is. Probably the best course will be that the Local Government Board should appoint Mr. Codrington an arbitrator under section 63, and that without going to the expense of taking the evidence over again, he should by consent (and the parties to the arbitration are, I understand, quite ready to consent) state the case as ordered by my brother Day.

Appeal dismissed.

Solicitors for the Local Government Board, *Sharpe, Parkers, & Co.*

Solicitors for the Kent County Council, *Palmer & Bull*, for *Brennan & Turner*, Maidstone.

Solicitors for the Sandgate Local Board, *Talbot & Tasker*, for *Brockman*, Folkestone.

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) — May 7.

REG. v. TITTERTON.
Ex parte QUELCH. (a.)

Food adulteration—Penalties—Application of in metropolis—Title of receiver of metropolitan police district—Metropolitan Police Courts Act, 1839 (2 & 3 *Vict. c.* 71), *s.* 47—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 26—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 11, 12.

Section 26 *of the Sale of Food and Drugs Act*, 1875, *which deals with the application of penalties recovered under the Act, is incorporated by section* 12 *of the Margarine Act*, 1887, *and the provisions, therefore, of section* 26 *of the former Act are applicable to the appropriation of penalties recovered under the Margarine Act.*

Such penalties, in the case of official prosecutions in the metropolis before a metropolitan police magistrate, must be paid to the official who prosecutes, to be by him paid over to the authority for whom he acts, and not to the receiver of the metropolitan police district, under section 47 *of the Metropolitan Police Courts Act*, 1839.

Rule for a mandamus directed to Harry Titterton, chief clerk at Worship-street Police Court, commanding him to pay over to Quelch (an inspector appointed by the Vestry of St. Leonard's, Shoreditch, to execute the Sale of Food and Drugs Acts, 1875 and 1879, and the Margarine Act, 1887), a penalty of £15, received upon an information laid by such inspector under the Margarine Act, 1887.

The rule was obtained at the instance of Quelch, and it was directed to be served upon the receiver of the Metropolitan Police District.

Quelch, acting as inspector for the vestry, laid a complaint against a certain person for having in the parish of St. Leonard, Shoreditch, within the metropolitan police district, sold to the prosecutor half a pound of margarine by retail in a package which was not duly branded or durably marked as directed by section 6 of the Margarine Act, 1887, and did not deliver to the prosecutor the said margarine in or with a paper wrapper on which was printed the word "margarine," as required by that section.

The complaint was heard and determined by the metropolitan police magistrate sitting at Worship-street Police Court, who convicted the defendant and ordered him to pay a fine of £15, and £5 costs.

The fine of £15 was paid to Mr. Titterton, as chief clerk of such police court, and on the 4th of March, 1895, an application was made for payment of the fine to the prosecutor, as such inspector, but the chief

(a.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

clerk refused, in the absence of an order under section 11 of the Margarine Act, 1887, to pay it over to him, on the ground that he was bound to pay this fine to the receiver of the metropolitan police district under the provisions of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), ss. 46 and 47.

The above rule was then obtained, and the question now was, Who is entitled to receive this fine, the receiver of the metropolitan police district under sections 46 and 47 of the Metropolitan Police Courts Act, 1839, or the inspector acting for and on behalf of the vestry under the Sale of Food and Drugs Acts.

H. Sutton, for the receiver of the metropolitan police district, showed cause.—Under sections 46 and 47 of the Metropolitan Police Courts Act, 1839, the receiver is entitled to this penalty. Two points arise here: First, whether section 26 of the Sale of Food and Drugs Act, 1875, excludes section 47 of the Metropolitan Police Courts Act, 1839; and, secondly, whether section 12 of the Margarine Act, 1887, incorporates section 26 of the Sale of Food and Drugs Act, 1875. As to the first point, the provisions of section 47 of the Act of 1839 are prospective and cannot be excluded by section 26 of the Act of 1875; *Wray* v. *Ellis*, 7 W. R. 91, 1 E. & E. 276. [He also referred to the cases of *Receiver for the Metropolitan Police District* v. *Bell*, L. R. 7 Q. B. 433, 20 W. R. C. L. Dig. 50, and *Attorney-General* v. *Moore*, 26 W. R. 366, 3 Ex. Div. 276.] The provisions, therefore, of the Act of 1839, so far as they relate to the recovery of these penalties, are still in force and are unaffected by section 26 of the Act of 1875. As to the second point, section 12 of the Act of 1887 says that all "proceedings" under this Act shall be the same as prescribed by sections 12 to 28 of the Sale of Food and Drugs Act, 1875; but section 26 of the Act of 1875 does not deal with "proceedings," but with penalties. Therefore section 12 of the Act of 1887 does not incorporate section 26 of the Act of 1875. The provisions, therefore, of sections 46 and 47 of the Act of 1839 apply, and the receiver is entitled to this fine.

Willis, Q.C. (*A. Macmorran* with him), in support of the rule, was stopped.

Lord RUSSELL, C.J.—The question in this case is whether the applicant, Mr. Quelch, or the receiver of the metropolitan police district is entitled to a penalty imposed by one of the metropolitan magistrates under the provisions of the Margarine Act, 1887. We are to assume upon the admission of the parties that Mr. Quelch was an officer and acting in the execution of the Act of 1875, and coming within section 26 of that Act. The title put forward upon the part of the receiver of the metropolitan police is based solely upon section 47 of the Act of 1839 (2 & 3 Vict. c. 71). That section provides that "where by any Act any penalty is or shall hereafter be recoverable in a summary manner before any justice or justices of the peace, and by such Act the same penalty shall be limited and payable to Her Majesty or to any body corporate or to any person or persons whomsoever save the informer who shall sue for the same or the party aggrieved, then in every such case if recovered or adjudged before any of the said magistrates" (meaning any of the metropolitan magistrates) "such penalty is to be paid to the receiver." If the legislation in the matter had rested there, it would be quite clear that the title of the receiver to the penalty in question would be good. But it does not rest there. That statute is followed after a long interval by the Sale of Food and Drugs Act, 1875, and we have mainly to deal with sections 20 to 28, but in order to understand the scheme of the Act it is necessary to refer to the earlier provisions. For the purpose of guarding the public against adulterated articles there are various provisions creating penalties for the infringement of the provisions directed to that object. Section 10 of the Act enjoins upon vestries and district boards in the metropolis the duty of appointing analysts and of paying to such analysts such remuneration as may be agreed upon. Then there are provisions enabling the purchaser of any article of food to have it analized, paying certain fees. Then the proceedings against offenders are regulated by the sections, beginning with section 20. When the analyst having analized any article shall have given the certificate of the result, then the person causing the analysis to be made may take proceedings for the recovery of the penalty before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, and the justices having considered the matter and having arrived at the conclusion that it is a case for the imposition of a penalty, then follows section 26 dealing with how a penalty is to be applied. "Every penalty imposed and recovered under this Act shall be paid in the case of a prosecution by any officer, inspector, or constable of the authority who shall have appointed an analyst . . . to such officer, inspector, or constable, and shall be by him paid to the authority for whom he acts, and be applied towards the expenses of executing this Act, any statute to the contrary notwithstanding." So far, therefore, the statute in clear and unambiguous language, provides in the case of official prosecutions that the penalty recovered shall be paid to the authority whom the prosecutor represents, and there seems an excellent reason why it should be so. A new obligation is cast upon the local authority; they are to aid in the execution of this Act, and the Act requires them to take upon themselves the burthen and duty of appointing and paying an analyst, and the Act provides a means by which that local authority may be put at least in part in funds for the effective execution of this important Act.

It is exceedingly difficult to suppose that the Legislature, while it intended that that provision should have effect throughout the whole of the rest of the kingdom should not have that effect and advantage in the case of local authorities in this great metropolis, where undoubtedly the execution of the Act would be more urgently called for than in any other community. But the Act does not stop there. So far it deals with what I have called official prosecutions, but in the case of any other prosecution, and also in the case of any other prosecution not official but instituted by any one of the public, then the penalty is to go according to the existing law, that is, in the case of the imposition of penalties by the metropolitan magistrates they go to the receiver of police, and in the case of boroughs having quarter sessions they go to the treasurer of these boroughs according to the general existing law. That is the state of the legislation up to the passing of the Margarine Act, 1887, which is entirely connected with the offence of fraudulently selling margarine and is supplemental to the Act of 1875 dealing with the sale of food and drugs. Section 11 of this Act of 1887 provides that "any part of any penalty recovered under this Act may, if the court shall so direct, be paid to the person who proceeds for the same to reimburse him for the legal costs of obtaining the analysis and any other reasonable expenses to which the court shall consider him entitled." The object of that is clear enough.

Under section 26 of the Act of 1875, in the case of

official prosecutions the penalties evidently went to the authority whom the official prosecutor represented, but in the case of non-official prosecutions they went according to the general law. Therefore there did not appear to have been any power in the case of a non-official prosecution for the magistrates to do more than award costs against the persons upon whom the penalty was imposed, and, apparently, no power for the court to re-imburse the non-official prosecutor for any extra expense to which he might have been put. Therefore, quite fitting in with the statute of 1875 is the provision in the statute of 1887, providing that part of the penalty recovered under that Act may be paid to the person who proceeds in order to reimburse him for the legal costs. I do not think that there is much in the second point raised by Mr. Sutton, that appropriation of penalties is not a 'proceeding' within the meaning of section 12 of the Act of 1887; in other words that section 12 of the Margarine Act does not incorporate section 26 of the Act of 1875. I think it very clearly does. It enumerates the sections by numbers—from 12 to 18 inclusive—and even if there were not that enumeration expressly of those numbers which include section 26 it would not not be straining the language of the Act to say that the appropriation of the penalty, which the magistrate is called upon to make after his adjudication, is a part of the proceeding within the meaning of the Act. But the main question which Mr. Sutton has argued is that section 47 of the Act of 1839 still stands good and operative law, and in support of this contention two principal cases have been cited.

With regard to those cases I conceive the observation pointed out to me by my learned brother, in the judgment of Lord Campbell, C.J., in *Wray* v. *Ellis*, is most apposite to the consideration of the true construction of Acts of Parliament. He there says (1 E. & E., at p. 288): "There can be little use in referring to cases where a similar question has arisen on Acts of Parliament differently framed, for they only illustrate the general principle which is not in dispute."

I think the first duty of the court in construing an Act of Parliament is to read the Act and consider the entire provisions of the Act itself, and if its language be clear and unambiguous to give effect to what the Legislature has said. I think it is proper to refer to the history of legislation, to Acts *in pari materiâ* with that which is under consideration only when there is ambiguity or doubt in the language of the Act.

In this case I can see no manner of doubt. I think the scheme of the Act is intelligible, coherent, and entirely free from ambiguity, and if we seek for a justification and principle for what the Legislature has chosen to do, I think the explanation is in every way complete. The case of *Wray* v. *Ellis* was decided by a very strong court, and this court would be bound to act upon it if it applied, even if the court did not agree in the decision arrived at. But while I do not hesitate to say, speaking for myself only, that I should have found the greatest possible difficulty in arriving at the conclusion at which the court there arrived, and I should not have arrived at it, I think that it is distinguishable from the present case upon several grounds. The words in the Act with which we are now dealing—namely, "any statute to the contrary notwithstanding," are not to be found in the Act upon which that case was decided. But I confess I lay much less stress upon the presence in this case of those words and their absence in the previous case than I do upon the elaborate and careful provisions of the section of the Act with which we are now dealing, provisions which make it clear, to my mind, that the Legislature did intend unmistakably to do what they have dome—namely, to give in the case of official prosecutions the penalty to the authority which the official prosecutor represented. In all other cases of non-official prosecutions they have to allow the penalty to go as the law directs. I do not think it necessary to refer to the case of the *Attorney-General* v. *Moore*, beyond saying that the observations I have made in distinguishing *Wray* v. *Ellis* apply equally to that case.

I therefore come to the perfectly clear conclusion that in this case the receiver of the metropolitan police is not entitled to the penalty in question.

CHARLES, J., concurred.

Rule absolute.

Solicitor for the applicant, *H. M. Robinson*.

Solicitor for the respondent, *The Solicitor to the Treasury*.

IN BANKRUPTCY.

Q. B. Div. (Vaughan Williams, J.) — May 20.

In re CAREY.

Ex parte JEFFRIES *v.* CAREY CYCLE CO. (LIMITED). (*a.*)

Bankruptcy—Conveyance with intent to defeat and delay creditors—Conversion of bankrupt's business into a limited company—Respective rights of creditors of the bankrupt and of the limited company.

The bankrupt, when insolvent, had converted his business into a "one-man" company, limited.

Held, that the trustee in the bankruptcy was entitled to a declaration that the conveyance of the bankrupt's business to the company was void against him, and that he was entitled to take the assets of the company; but that he must pay the new creditors of the company in full, in priority to the creditors of the bankrupt, upon the principle that the bankrupt had used the company as his agent, and was bound to indemnify it.

Motion by the trustee in bankruptcy of Edward Carey for a declaration that the transfer by the bankrupt of his property and business to the Carey Cycle Co. (Limited), and the assignment by the liquidator of the Carey Cycle Co. (Limited) of the property and business of the company to Messrs. Edwards & Flaxman, were fraudulent and void, or void as against the trustee, and for an order that the company or the liquidator should hand over the said property and business, or the proceeds thereof, to the trustee.

The bankrupt had originally carried on business in his own name, but in July, 1894, he was very much pressed by his creditors, and seized the idea of turning his business into a limited company. In August, 1894, the company was formed, the signatories of the memorandum and articles of association being all relations or servants of Carey. On August 16 he executed the agreement by which he purported to convey to one Charles May, as trustee for the company, his business, stock-in-trade, and effects in consideration of £1,500 in cash and £1,500 in shares. No cash was ever handed over to him, but only bills of the company. The business continued to be managed by him in the same way as before, and the company even used his banking account down to the 11th of September. Carey tried to satisfy his old creditors with the bills given to him by the company,

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

but being unsuccessful in this attempt, he filed his own petition, and the company went into liquidation on the 4th of December.

The liquidator sold the business of the company to Edwards & Flaxman, Edwards having been a clerk of the bankrupt, for £370, of which he stated, upon the hearing of the motion, that he had £200 still in hand.

Herbert Reed, Q.C., and *Carrington*, for the trustee, applied that the transfer of the business should be declared a sham, and for the assets to be handed over to the trustee. [VAUGHAN WILLIAMS, J.—You say this company is a sham; unfortunately these shams contract debts, and their creditors have certain rights which I have to regard.]

Wildey Wright opposed the application.

VAUGHAN WILLIAMS, J.—This company was a legal corporation incorporated in accordance with Companies Acts; but, although Carey's business was sold to this company, it continued, notwithstanding the form of sale to be a business under the control of Carey and for his exclusive good, and he sold it to the company because he was in a situation of embarrassment. When there is such a conversion into a company as this it is not true to say that there are two contrary interests. It is true that there is a buyer and a seller, but the vendor is in the position of principal, the company in that of agent. Therefore, as between the trader and the company, one ought to treat the agreement to sell as a nullity—that is, alone between the vendor and the company as his agent; because really there is only one person—the trader himself. The company is merely another form he has assumed, a mere *alias*.

But it would be wrong that third persons who were not parties to the agreement should suffer thereby, and, as far as they are concerned, I ought to treat this sale to the company as a reality. I see no difficulty in treating it as real for one purpose and not for another. In equity, if not in law, a sale is often treated as good for some purposes if not for others, and in law bills of exchange and bills of sale are often so treated.

Here I think that although this transfer to the company is a sham as far as the bankrupt is concerned, yet it is a reality as far as the creditors of the company are concerned. I therefore do not put the creditors of the company *pari passu* with the creditors of the bankrupt. I think they have a right to be paid first out of the company's assets. The bankrupt has allowed it to trade as if separate from himself, and it seems to me that his creditors take his estate subject to this estoppel, which would prevail against the bankrupt himself. The bankrupt could not deny the rights of the creditors of the company, and neither can his trustee.

I declare that, although the assets of the company form part of the general estate of the bankrupt, they are subject, in the first place, to the creditors of the company being paid in full out of them. The bankrupt used the company as his agent, and must therefore indemnify it, and I must hold that his trustee can only take its assets subject to this obligation to indemnify.

Solicitors, *Arthur Pyke; Bassett & Co.*

House of Lords.

From C. A. (England). March 14, 15.

BROCKLESBY v. TEMPERANCE PERMANENT BUILDING SOCIETY. (a.)

Mortgage—Redemption—Principal and agent—Deposit of title-deeds—Agent intrusted with title-deeds with authority to raise money on them—Agent exceeding authority.

Where a principal employs an agent to raise a definite sum of money, entrusting him with the possession of certain title-deeds for that purpose, and the agent obtains a loan in excess of the amount authorized from a bonâ fide *lender who has no notice of the limitation, then the principal is only entitled to redeem upon payment to the lender of the full sum advanced by him on the security of the deeds.*

Decision of the Court of Appeal, 42 *W. R.* 68, [1893] 3 *Ch.* 130, *affirmed.*

Perry-Herrick *v.* Attwood, 6 *W. R.* 204, 2 *De G. & J.* 21, *approved.*

This was an appeal from the Court of Appeal (Lindley, Lopes, and A. L. Smith, L.JJ.), 42 W. R. 68, [1893] 3 Ch. 130.

The facts as stated by Lord Herschell, L.C., in his judgment were substantially as follows:—

The appellant, a solicitor in partnership with his son, owed the Union Bank of London £750, for which the bank held as security a mortgage of freehold property at Wimbledon from Corke to the appellant, and the title deeds of a leasehold house in Holloway belonging to the appellant. Being desirous to pay off this debt, and also to borrow £1,500, he was advised by his son that Ashby & Co.'s Bank would lend the required amount upon the securities held by the Union Bank and upon easier terms. Thereupon the appellant gave his son documents as follows:—

"9, Walbrook, London, E.C.,
"30th May, 1891.

"The Manager, Union Bank of London, Chancery-lane,

"Dear Sir,—Please permit the bearer to see my securities, and oblige,

"Yours truly,
"GEO. J. BROCKLESBY."

On the 3rd of June he gave his son the following:—

"9, Walbrook, London, E.C.,
"3rd June, 1891.

"The Manager, Union Bank of London, Chancery-lane.

"Please to hand to the bearer of this (on payment of the balance of my loan and interest) the deeds deposited by me with you as security for the loan.

"Yours truly,
"GEO. J. BROCKLESBY."

The next day he gave him the following:—

"9, Walbrook, London, E.C.,
"4th June, 1891.

"To the Manager, Union Bank of London, Limited, Chancery-lane.

"Dear Sir,—Please give bearer (Ashby's Hampton Court Bank) inspection of my deeds, and on their paying the amount due thereon hand the securities over to them, they having arranged to lend me a

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

entitled to the security which the London and South-Western Bank held for the amount which was so paid to them.

The point has been urged on behalf of the appellant by one of his counsel at the very conclusion of his argument that the case is different, because a portion of the security representing £3,000 went to the Temperance Building Society and the other £600 went to the Nineteenth Century Building Society; and that therefore the loan, which was a single one from the London and South-Western Bank, was split up between the two building societies. It is a point raised in the House for the first time: it was not argued in the court below, and, whatever there may be in the point, it is in my opinion too late to raise it now. Therefore, I do not propose to say anything further with regard to it.

For these reasons I think that the judgment appealed from should be affirmed and the appeal dismissed with costs.

Lord WATSON.—The facts of this case are not in dispute, and the principles of law which must be applied to them are to my mind very plain.

A principal employs an agent to raise money on certain securities, and at the same time directs him not to borrow more than a specified sum. The agent goes into the market, and, in exchange for the securities, obtains a loan in excess of the amount prescribed, from a *bonâ fide* lender who has neither notice nor knowledge of the limitation. The agent, instead of accounting to his principal, applies the excess to his own purposes, and absconds. Does the loss in these circumstances fall upon the principal, or upon the lender?

I entertain no doubt as to the answer which must be made to that question. I think the principal, who gave him the means of committing it, must bear the consequences of his agent's fraud; it appears to me to be just and reasonable that, the agent having the control of the securities, for the purpose of borrowing, with the consent of the principal, a lender, who has no notice to the contrary, should be entitled to deal with him on the footing that he had authority to pledge the securities to the full amount of their value. That such is the rule in equity appears to me to be a corollary from the judgment of Lindley, L.C., in *Perry-Herrick* v. *Attwood*.

The London and South-Western Bank, as against their advance of £3,500, got the title deeds, and thus obtained an equitable charge not, as was suggested by the appellant's argument, upon the documents of title, but upon the land which they represented. The two companies who are respondents in this appeal advanced the money required to pay the claim of the bank, and the title deeds held in security by the bank were handed over to them. Any equitable interest in the land which had previously pertained to the bank, in respect of its possession of the title-deeds, thus passed to the respondents.

It is true that the agent forged a number of documents, which he delivered to the respondents, and by which he probably induced them to advance their money. The respondents can take no benefit from the documents which are tainted with the vice of forgery; but that circumstance can afford no reason for depriving them of any right in security which is not affected by that taint.

I concur in the opinion delivered by the Lord Chancellor, and in the judgment which his lordship has moved.

Lord MACNAGHTEN.—I entirely agree. The case is reduced to a very simple proposition. A person leaves his title-deeds under the control of an agent and instructs the agent verbally to procure for him a certain sum by means of those deeds. The agent then obtains from a banker, on the security of the deeds, an advance in excess of the amount which the principal directed or intended him to raise, and misappropriated the difference. Who is to bear the loss? Is the principal to suffer for the fraud of his agent, or the banker, who, on the invitation of the principal, has dealt in good faith with the agent in the very matter intrusted to his agency? It would seem to be in accordance with common sense that the loss should fall upon the principal. No authority has been produced to the contrary; and the judgment under appeal is in accordance with the principle of the decision in *Perry-Herrick* v. *Attwood*, though the facts of the two cases are different. The principle laid down in *Perry-Herrick* v. *Attwood* seems to be this: that if a person permits title-deeds, which belong to his security, to be dealt with for the purpose of creating a preferential charge of a definite amount and the limit is exceeded, he cannot, as against innocent third parties who have advanced their money without notice of the limit, complain that the authority which he gave has been exceeded.

Perry-Herrick v. *Attwood* was not a case of agency, but it seems to me that the principle is equally applicable in a case of that sort.

I cannot understand the grounds on which it was argued that the two building societies, whose money went to pay off the charge of the London and South-Western Bank, are not entitled to stand in the place of the bank as regard the title-deeds and the security created by the deposit of those deeds.

I think the judgment of the Court of Appeal is right and ought to be affirmed.

Lord MORRIS.—I concur.

Order of the Court of Appeal and judgment of Stirling, J., affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *G. J. Brocklesby.*

Solicitors for the respondents, the Temperance Permanent Building Society, *Shaen, Roscoe, Massey & Co.*

Solicitors for the respondents, the Nineteenth Century Building Society, *Griffin, Hoofe, & Brewster.*

Court of Appeal.

From Q. B. D. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 17.

Ex parte SPELMAN. (*a.*)

Liverpool Court of Passage—Rules of Supreme Court, 1875, *ord.* 14—*Application—Passage Court Rules,* 1876, *r.* 1.

By rule 1 *of the Passage Court Rules,* 1876, *the provisions of the Supreme Court of Judicature Acts,* 1873 *and* 1875, *and such orders and rules as are made, or may hereafter be made in pursuance thereof, shall extend and be applied to all causes and actions in the Passage Court, but so far only as such provisions, orders, and rules respectively are or may be applicable thereto.*

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Held, that, as there was no machinery in the Passage Court for administering the provisions of order 14, that order was not "applicable to" the Passage Court within the meaning of the above rule.

Application *ex parte* for a rule *nisi* for a *mandamus* to the registrar of the Liverpool Court of Passage to hear and determine a summons for judgment, under order 14, in an action of *Spelman* v. *The Empire, Liverpool (Limited)*.

The registrar held that he had no jurisdiction to entertain the summons. The Divisional Court (Pollock, B., and Wright, J.) having refused to grant a rule *nisi* for a *mandamus*,

Rutherford moved, by way of appeal, for a rule as above, contending that by rule 1 of the Passage Court Rules, 1876,* order 14 of the Rules of the Supreme Court, 1875, had been adopted in the Court of Passage.

He referred to *Speers* v. *Daggers*, 1 Cab. & Ell. 503; *King* v. *Hawksworth*, 27 W. R. 660, 4 Q. B. D. 371; 2 & 3 Vict. c. 27, s. 1; Judicature Act, 1873, ss. 89, 91; Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), ss. 6-9).

Lord ESHER, M.R.—The question depends upon the true construction of rule 1 of the Passage Court Rules, 1876. If that rule does not give the jurisdiction under order 14, then the jurisdiction does not exist. When the Court of Passage was first constituted there was no appeal from its decisions. The mayor and two bailiffs, and subsequently the mayor and one bailiff, or the mayor alone, were the judges of the court. Then an assessor was appointed for the purpose of trying causes, but he had nothing to say to the preliminary steps in the action before the trial. He merely sat as assessor to try causes. Therefore, in *King* v. *Hawkesworth*, it was held that he had power to deal with the costs at the trial as a judge of the High Court. But he had no jurisdiction at chambers, no jurisdiction over the preliminary steps in an action. The provisions of order 14 are not applicable to the trial of an action; they are intended to do away with the necessity for a trial. The jurisdiction under that order is to be exercised in the first instance at Chambers. In the High Court it is exercised by a master, with an appeal to the judge in chambers, and then with an appeal to this court.

Before the Passage Court Rules of 1876 it is clear that it was impossible for the Passage Court to exercise jurisdiction under order 14, because the court had no means of administering that order. Nor, in my opinion, have the rules of 1876 altered the jurisdiction of the judge in that respect. The rules have not given him any jurisdiction in chambers. The same difficulty of administering order 14 remains after the rules of 1876 as before. The judge has no chambers, and there are none of the safeguards by which the powers conferred by order 14 are surrounded in the High Court.

Therefore rule 1 of the Passage Court Rules, 1876, does not confer on the Passage Court jurisdiction under order 14. As regards the Passage Court Act, 1893, the judge must get the consent of the Rule Committee to make rules under that Act if he desires to apply the provisions of order 14, and that consent, we are told, has been asked for and refused. The application must therefore be refused.

KAY, L.J.—I am of the same opinion. The case as put before us is this: Section 1 of 2 & 3 Vict. c. 27, gave power to the judge of any borough court (which included the Liverpool Court of Passage) to make rules for regulating the forms and manner of proceeding, the process, appearance, practice, and pleadings in such court subject to their being allowed and confirmed by three judges of the superior courts of common law. Under the power so conferred the assessor of the Court of Passage made the rules of 1876, and those rules were confirmed by three judges of the High Court. It is contended that rule 1 gave the Passage Court the same powers as the High Court had under order 14.

Now by section 39 of the Judicature Act, 1873, any judge of the High Court may exercise in court or in chambers all or any part of the jurisdiction by that Act vested in the High Court, in all such matters as before the Act might have been heard in court or in chambers by a single judge. When we look at the Rules of the Supreme Court we see the words "court or a judge" used, and they mean respectively a judge or judges sitting in court, and a judge sitting in chambers. At that time the Court of Passage had no chambers, and the registrar was not for this purpose in the position of a master of the High Court who acts as a judge in chambers, and from whose decision an appeal lies to the judge in chambers, with a further appeal to this court. The applicant in this case did not appeal to the judge of the Passage Court for the simple reason that the judge has no chambers in the sense that a judge of the High Court has. Upon the very terms of rule 1 of the Passage Court Rules, 1876, this application breaks down. How can the provisions of order 14 be applicable to the Court of Passage? This is not a merely technical objection because order 14 gives great powers to the judge in chambers, and it would be a strong thing to say that those powers were given to the registrar of the Court of Passage with none of the safeguards attaching to the exercise of those powers in the High Court. The application therefore fails on this ground. Reference has been made to the Liverpool Court of Passage Act, 1893, where by section 6 the judge is to have the same powers as a judge of the High Court sitting in chambers or at *nisi prius*, and by section 7 the position of the registrar is altered accordingly. But by section 8 the judge has power to make rules, with the concurrence of the Rule Committee, for adopting and applying to the Court of Passage any of the Rules of the Supreme Court, and the judge evidently is of opinion that he has no jurisdiction under order 14, because he has been applying to the Rule Committee to sanction rules giving him that jurisdiction, which the Rule Committee have refused to do. It is now said that the judge is already possessed of that jurisdiction by virtue of a rule which he himself made in 1876, and which he has ever since misconstrued. It would be very strange if we were to say, under those circum-

* Rule 1 of the Passage Court Rules, 1876: "The provisions of the Supreme Court of Judicature Acts, 1873 and 1895, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being by virtue of the said Acts, shall (except as is hereinafter excepted or otherwise provided for) extend and be applied to, and the forms therein mentioned shall be adopted and used in all actions, causes, and matters which at or after the time of the coming into operation of these rules shall be within the cognizance of the Court of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules, and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the character of the parties, or the circumstances of the case may render necessary."

stances, that he has that jurisdiction. In my opinion he has not, and this application must be refused.

A. L. SMITH, L.J., concurred.

Application refused.

Solicitors, *Norris, Allens, & Chapman*, for *J. M. Quiggin & Brothers*, Liverpool.

From Q. B. Div.
(Lord Esher, M.R., and A. L. Smith and Rigby, L.JJ.) May 23.

STRACHAN v. UNIVERSAL STOCK EXCHANGE. (a.)

Stock Exchange—Transactions in stocks and shares—Deposit of securities as cover—Gaming and wagering contract—Right to recover securities—8 & 9 *Vict. c.* 109, *s.* 18.

The plaintiff deposited with the defendants, who were outside brokers, certain securities as cover in respect of transactions in stocks and shares. The transactions resulted in a loss to the plaintiff. In an action by the plaintiff to recover his securities, the jury found that the transactions had been gambling transactions.

Held, that section 18 *of the Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *did not prevent the plaintiff from being entitled to recover his securities.*

Application for judgment or a new trial.

The action was brought to recover certain securities, valued at £2,500, which the plaintiff had deposited with the defendants as security or cover in respect of transactions in stocks and shares. The defendants were dealers in stocks and shares, not being members of the Stock Exchange, and they dealt with their customers upon certain printed "terms of business," which each of their customers, including the plaintiff, signed. The "terms of business" stated, among other things, that the company's contracts were not contracts of gaming and wagering. In September, 1893, the plaintiff opened an account with the defendants in buying and selling stocks and shares, and in the course of a few months the total transactions amounted to £3,500,000. The defendants from time to time sent the plaintiff bought and sold notes, but no shares or stock were ever delivered. In April, 1894, the account was closed by the defendants, and upon a balance being struck a larger amount was found to be due to the defendants than the value of the securities. The plaintiff sued to recover the securities upon the ground that the transactions were gaming transactions. At the trial of the action before Cave, J., the jury found that all the transactions were gambling transactions, and the learned judge gave judgment for the plaintiff. The defendants now applied for judgment or a new trial.

Lawson Walton, Q.C., and *Pollard*, for the defendants.

Bigham, Q.C., and *Muir Mackenzie*, for the plaintiff.

The following cases were cited:—*Thacker* v. *Hardy*, 27 W. R. 158, 4 Q. B. D. 685; *Hampden* v. *Walsh*, 24 W. R. 607, 1 Q. B. D. 189; *Varney* v. *Hickman*, 5 C. B. 271; *Hill* v. *Fox*, 4 H. & N. 359.

Lord ESHER, M.R.—In this case the plaintiff claims to recover certain valuable documents which he has put into the hands of the defendants. He alleges that the intention was that the documents should still remain his property, but that on certain conditions they were to become the defendants' property. The defendants say that they were deposited as security for the performance of a contract made between the defendants and the plaintiff, and that the plaintiff has made default in the performance of that contract. The plaintiff's answer to that is that in truth there never was a contract between them, that the pretended contract was a contract of betting and wagering, that by virtue of the statute 8 & 9 Vict. c. 109, s. 18, such a contract is null and void, and that therefore the defendants have no excuse for refusing to hand the documents back.

The first question is whether the contract between the parties was a wagering contract. [His lordship went through the facts of the case, and continued:—] In my opinion the jury were justified in disregarding the bought and sold notes which had passed, and in finding that the written agreement under the heading of "terms of business" was a sham, and that the real contract between the parties was a contract for the payment of differences, no delivery of shares being contemplated. Such a contract is a wagering contract, and the statute says that it is null and void.

But then secondly, the defendants say that, assuming the contract to be null and void, the plaintiff is not entitled to recover these securities. They argue that the effect of section 18 is that the man who has deposited securities with another in the way in which these securities were deposited cannot bring an action to recover them, but that the other may keep them.

I am of opinion that the documents in this case were not deposited in the way described in the section. The section says that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing which shall have been "deposited in the hands of any person to abide the event on which any wager shall have been made." That means a deposit made on condition that the property in the thing is to pass on the happening of the event. Here the deposit was not made on any such condition, but merely for the purpose of relieving the defendants from loss in case the transactions should result in the plaintiff being indebted to them and he should fail to pay.

Therefore, I think this was not a deposit within the meaning of the section. But even if it were, it has been held that, if such a contract of deposit is annulled before the securities are realized, they can be recovered back. Here, the plaintiff, by bringing his action before the securities have been dealt with, has put an end to the contract of deposit.

The defendants, therefore, are not entitled to keep these securities, but the plaintiff is entitled to recover them. The appeal must be dismissed.

A. L. SMITH and RIGBY, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Theodore Allingham.*

Solicitors for the defendants, *Last & Sons.*

(a.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) May 7, 8, 28.

BRODERIP v. SALOMON & CO. (a.)

Company—Company incorporated for benefit of one man—Indemnity to company in respect of debts of company—Principal and agent—Debentures.

The Companies Acts were intended to allow seven or more persons bonâ fide *associated for the purposes of trade to limit their liability under certain conditions on becoming a corporation. But where a company has been formed for the purpose of enabling a trader to carry on his own business with limited liability in the name of the joint-stock company, such company is entitled to treat the trader as its agent, and to be indemnified by him against the debts of the company.*

Appeal from a decision of Vaughan Williams, J.

Aron Salomon carried on business as a leather merchant and hide factor and wholesale and export boot manufacturer and Government contractor in Whitechapel. He was desirous of forming a company to take over this business, and on the 20th of July, 1892, an agreement was entered into with a trustee for the intended company. By this agreement the trustee agreed to buy the goodwill of the business for £7,500, to be paid for by the company when formed in fully paid-up shares. The fixtures, fittings, and effects were to be bought for £6,000, which was also to be paid for in fully paid-up shares. The stock-in-trade was to be bought for £16,000, to be paid partly in shares and partly in cash or debentures. The bills in hand and book debts were also to be purchased by the company at the figures at which they stood in the balance-sheet made out by the vendor on the 31st of May, 1892. These figures amounted to £6,782 19s. 7d.; this sum was to be paid in cash. The company was further to pay £2,500 in fully paid-up shares for the leases of the property on which the business was carried on. The vendor, on his part, agreed not to carry on business for ten years as a wholesale and boot export manufacturer within twenty miles of these premises. The vendor further agreed to pay and discharge all the debts and liabilities of the business subsisting on the 1st of June, 1892, from which time the purchase was to take effect. It was to be completed on the 4th of August, 1892. In framing this agreement and in arriving at the sums to be paid by the company for Aron Salomon's business, no one acted on behalf of the proposed company. Aron Salomon's books were made up by an accountant employed by him; and he, in fact, settled the figures and dictated the terms which are to be found in the agreement. The prices which the company was to pay were considerably higher than the amounts appearing in the balance-sheet.

On the 28th of July, 1892, the company was formed in order to carry out this agreement with such modifications, if any, as might be agreed to, and to acquire and carry on Aron Salomon's business. He was the promoter of the company. He and his wife and daughter and four sons signed the memorandum of association. The nominal capital of the company was £40,000 divided into 40,000 shares of £1 each. His wife and children held one share each. He signed the memorandum in respect of one share only; but he subsequently acquired 20,000 other shares. No one else ever had any shares in the company.

By the articles of association each member was entitled to one vote for every share held by him. By another article the first directors were to be nominated by a majority of the subscribers to the memorandum of association. The directors had the usual general powers of management, with large powers of borrowing money and with an express power to issue debentures for any debts of the company. At board meetings questions were to be decided by a majority of votes, but in the event of an equality of votes the chairman had a second or casting vote.

On the 2nd of August, 1892, the subscribers to the memorandum of association met and appointed Aron Salomon and his two sons—Emanuel Salomon and Salomon Salomon—to be the first directors. Aron Salomon was appointed managing director at a salary of £500 a year. The salaries of the two sons were £148 a year each. On the same day the three directors then appointed met. Aron Salomon was appointed chairman, and another of his sons, Asher Salomon, was appointed secretary; two directors were to form a quorum. The agreement for the acquisition by the company of Aron Salomon's business was adopted. It was further resolved that the stock-in-trade should be taken at the price of £16,000, and be paid for as to £6,000 in cash, and as to £10,000 in debentures, bearing interest at 5 per cent., and payable at the end of six years unless previously redeemed by the company. It was also resolved that a cheque for £6,782 19s. 7d. should be drawn in favour of Aron Salomon for the bills in hand and book debts, and that, upon his executing a declaration of trust of the leases of his business premises, £2,500 cash should be paid to him. It was also resolved to issue seven shares to the seven subscribers of the memorandum of association. On the 12th of August, 1892, a formal agreement for the acquisition of the business wes executed by Aron Salomon and the company. On the 5th of September, 1892, debentures were sealed and ordered to be given to Aron Salomon and on the same day 20,000 shares were allotted to him upon his application. The debentures here referred to appeared to have been issued to him on the 26th of January, 1893, but to have been cancelled on the 3rd of February, 1893, and instead thereof debentures to the extent of £10,000 were sealed and issued to one Edmund Broderip as a security for £5,000 lent by him to Aron Salomon, but which Aron Salomon himself lent to the company at 10 per cent. interest. Broderip, not being able to get paid interest upon his debentures, gave notice requiring payment of the principal, and on the 11th of October, 1893, he brought an action for the usual relief. This led to a winding-up petition, and on the 26th of October, 1893, an order to wind up the company was made.

Broderip had been paid off by the company, and the £10,000 debentures issued to him were claimed by Aron Salomon to be a first charge in his favour to the extent of £5,000 and interest on the assets of the company. The unsecured debts of the company amounted to over £11,000, and there was an estimated deficiency of assets of over £8,000. The company, however, by its liquidator, impeached the validity of these debentures, and sought to set aside the agreement under which the company acquired Aron Salomon's business and to compel him to refund to the company £29,257, which he had received in cash from the company under that agreement, or, in the alternative, the company, by its liquidator, sought to have it declared that Aron Salomon was bound to indemnify the company against its debts and liabilities upon the ground that the business carried on by the company was really his business carried on by him in its name.

The arrangement which the company and Salomon undertook to carry out by the formal agreement

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

of the 2nd of August, 1892, was based upon the preliminary agreement of the 20th of July, 1892, and except in one respect the two agreements were alike. By the preliminary agreement of the 20th of July, 1892, however, payment for most of the assets to be taken by the company was to be made in fully paid-up shares. This was modified by the formal agreement of the 2nd of August, 1892, into payment in cash and debentures. The effect was to avoid the necessity of registering any agreement for the issue of shares as fully paid-up as required by the Companies Act, 1867. The values set by Aron Salomon on his assets were not examined or checked by any one on behalf of the company after its formation any more than before. The liquidator alleged that the values were far too high, and were £8,000 or so higher than those shown in Aron Salomon's own balance-sheet of the 31st of May, 1892. With respect to the 20,000 shares allotted to Aron Salomon, he contended that he had paid for them, although no call was ever made upon him in respect of them. The liquidator, on the other hand, claimed £20,000 from Aron Salomon in respect of those shares.

Vaughan Williams, J., held that Aron Salomon was bound to indemnify the company against its debts and liabilities, upon the ground that the business carried on by the company was really his business carried on by him in its name.

Salomon appealed.

Buckley, Q.C., *McCall, Q.C.*, and *Muir Mackenzie*, for the appellant.—A person is entitled to trade with limited liability; there is nothing in any Act of Parliament to prevent this, so long as all the provisions of the statutes have been complied with. The Companies Act has nowhere provided that any of the signatories of the memorandum of association should hold more than one share. Even if there were seven members only, and six of them were trustees for the 7th, the Act of Parliament would be complied with, whether the Legislature contemplated such a state of things or not. The creditors gave credit, not to an individual, but to the corporation, whose circumstances could have been discovered at Somerset House. As between the company and the corporators, equitable rights must be disregarded.

Farwell, Q.C., and *Theobald*, for the respondents.—The question is one of fact. Was there a real sale, or was not the whole transaction an absolute sham? The judge found on the facts that this was so: it was in reality Aron Salomon carrying on his own business under the *alias* of the limited company; that is in no way different from an individual carrying on business. The point is one of principal and agent, and not corporator and corporation.

Buckley, Q.C., in reply.—There was a real contract of sale in the relevent and material sense, in that Salomon ceased to be the owner of the business and the corporation became the owners. It is perfectly competent to a trader to say, I propose to use the machinery of the Companies Acts and henceforth trade with limited liability.

Cur. adv. vult.

May 28.—LINDLEY, L.J., stated the facts at length, and continued:—I proceed to examine the legal aspect of this case, which is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it was never intended. The Legislature contemplated the encouragement of trade by enabling a comparatively small number of persons—viz., not less than seven—to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the Legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the Legislature clearly intended to prevent anything of the kind, for section 48 takes away the privileges conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members; and by section 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the Legislature intended not to be done; and, ingenious as the scheme is, it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams, J. The incorporation of the company cannot be disputed. (See section 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a *scire facias* the court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion; but, be that as it may, in such an action as this the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one £1 share each, Mr. Aron Salomon cannot be reached under section 48, to which I have already alluded. As the company must be recognized as a corporation I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity.

But it does not follow that the order made by Vaughan Williams, J., is wrong. A person may carry on business as a principal and incur debts and liabilities as such and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams, J., as the agent of Aron Salomon. I should rather liken the company to a trustee for him—a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with *In re George Newman & Co.*, *ante*, p. 483, [1895] 1 Ch. 674. In a strict legal sense the business may have to be regarded as the business of the company, but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company and on the way he formed it, and on the use he made of it. There are

many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them. It is idle to say that persons dealing with companies are protected by section 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered and entitles creditors to inspect the register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies, and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men.

Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance. If the Legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, as it may think necessary. But until the law is changed, such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times by perverting its legitimate use, and by making it an instrument for cheating honest creditors. Mr. Aron Salomon's scheme is a device to defraud creditors.

Agreeing, as I do in substance, with Vaughan Williams, J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard the *British Seamless Paper Box Co.'s case*, 29 W. R. 690, 17 Ch. D. 467, as an authority against a recission of such a transaction. We have carefully considered the proper form of order to be made on this appeal, and the order of the court will be as follows. This court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidator's cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim and give him those costs.

LOPES, L.J.—This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and so clearly detailed by Lindley, L.J. I shall content myself with shortly stating the impression they have produced on my mind. The incorporation of the company was perfect, the machinery by which it was formed was in every respect perfect, ever detail had been observed; but, notwithstanding, the business was, in truth and in fact, the business of Aron Salomon; he had the beneficial interest in it; the company was a mere *nominis umbra*, under cover of which he carried on his business as before, securing himself against loss by a limited liability of £1 per share, all of which shares he practically possessed, and obtaining a priority over the unsecured creditors of the company by the debentures, of which he had constituted himself the holder.

It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorizing a perversion of the Joint Stock Companies Act. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Stock Act to a state of things never contemplated by that Act, an ingenious device to obtain the protection of that Act in a way, and for objects, not authorized by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that the company to be constituted should consist of one substantial person and six dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent *bonâ fide* members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal. But to what relief is the liquidator entitled? In the circumstances of this case it is, in my opinion, competent for the court to set aside the sale as being a sale from Aron Salomon to himself—a sale which had none of the incidents of a sale, was a fiction and, therefore, invalid; or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the *cestui que trustee*, was bound to indemnify; or to declare the formation of the company, the agreement of August, 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement to be merely devices to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. I am inclined also to think that a *scire facias* would go to repeal the certificate of incorporation; but I express no decided opinion on the point. The appeal will be dismissed with costs.

KAY, L.J., stated the facts, and continued:—It has been argued that all this was a proper and legitimate proceeding under the Joint Stock Companies Acts, and that this result is strictly right and legal. Salomon wished to trade with limited liability, and the statutes enabled him to do so. It does not matter it is argued if the other six signatories of the memorandum were in fact trustees for him. The statutes do not prevent that.

I dissent from this view absolutely. The statutes were intended to allow seven or more persons *bonâ fide* associated for the purposes of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize

a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company. The question—as was put to counsel during the argument—is, whose was this business in fact after the formation of the company? There really was no attempt to deny that it was the business of Salomon. The pretended sale to the company was an utter fiction. The company had no funds or property whatever, except what it took under this alleged sale and £7 payable on the subscription shares. It borrowed no money. The £10,000 debentures were issued as fully paid in part payment of the nominal price. The only security for them was the value of the assets of this business. The company paid nothing to Salomon for the purchase; they had nothing to pay with. There was no pretence of a bargain between the company and Salomon as vendor. There was no independent director to protect the company in the transaction. In truth, there was no purchase and sale at all. The business remained Salomon's. He carried it on in the name of the company.

It seems to me that relief might be given under either alternative asked in the counter-claim.

If the sale is treated as void or formally set aside the debentures must be cancelled, and, as Salomon says he received £20,000 in cash from the company, that and any other sum, if any, which the company paid to him as part of the price must be repaid with interest at 4 per cent. That would amply provide for the outside creditors. It was faintly suggested that there had been delay and that there cannot now be a restitution of the property. I do not think delay can be alleged while the company was being altogether managed and dealt with by Salomon himself. Until a liquidator was appointed in the winding up the company had no independent existence. The point of restitution was guarded against by the sale of the assets being made by contract without prejudice.

Reliance was placed in argument upon *In re The British Seamless Paper Box Co. (Limited)*. That was a summons by the official liquidator against four of the seven directors of the company under section 165 of the Act of 1862 to make them liable for misfeasance and breach of trust in accepting respectively 35, 30, 15, and 15 shares and carrying out an agreement of the 27th of February, 1875. These directors seem to have given value for some of their shares. Some, and as I understand those in question, were allotted to them by way of bonus. The agreement mentioned in the summons of the 27th of February, 1875, was an agreement made before the formation of the company between three persons, owners of certain patents, and Bennett, as trustee for the intended company, for the sale to the company of the patents and certain machinery for £32,000. The company was afterwards formed. Eight persons signed the memorandum, including the three vendors, seven of these eight persons, including the vendors, were named directors. They all adopted the agreement and the allotment of shares which had been made. But those eight persons included some who were independent persons, and all eight ratified the proceedings which the judge found were perfectly *bonâ fide*. Some time afterwards other persons became shareholders. The Court of Appeal, agreeing with the late Master of the Rolls (Sir George Jessel) held that there was no misfeasance, and that the claim of the liquidator failed.

The case differs from the present materially. This is not a claim for misfeasance. The liquidator here is proceeding on behalf of the creditors in the name of the company. In this case there were no independent directors or independent shareholders. The wife and children of Salomon were mere trustees for him of one share each, and the question is whether the transaction can be supported so as to enable Salomon to defeat the creditors and appropriate under the debentures the assets to himself.

The learned judge has preferred the alternative of treating the company as agent for Salomon. This involves the invalidity of the sale, at least in equity. If it were valid the business would not belong to Salomon. If there is any difficulty in making Salomon directly liable to the creditors on the ground of the company being his agent the creditors would equally be secured by treating the company as trustee for Salomon. In either view Salomon must indemnify the company against the debts and costs. Or the Court might declare the sale invalid, set aside the agreement and debentures, and order Salomon to repay the £39,000 or that sum less the £10,000 debentures with interest. In one or other of these modes the company is entitled to be indemnified by Salomon against the debentures and the company's debts and the costs.

I agree to the form of order suggested by Lindley, L.J.

Appeal dismissed.

Solicitor for the appellant, *R. Raphael.*

Solicitors for the respondents, *S. M. & T. B. Benson.*

From Chan. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 23, 24.

In re WOODIN.
WOODIN *v.* GLASS. (*a.*)

Will—Construction—Specific contingent legacy—Right to intermediate income—Infant—Maintenance.

Where a legacy is severed from the residue for the benefit of a tenant for life and remaindermen, the residuary legatees cannot claim the income accruing after the death of the tenant for life, though the remaindermen have not yet attained vested interests in the legacy. Such intermediate income is applicable for the maintenance of the remaindermen.

Kidman *v.* Kidman, 40 *L. J. Ch.* 359, 19 W. R. Ch. Dig. 4, *approved.*

Furneaux *v.* Rucker, *W. N.*, 1879, *p.* 135, *overruled.*

Appeal from North, J.

By his will, dated the 12th of October, 1866, Joseph Stewart Woodin, after certain pecuniary legacies, gave and bequeathed to his trustees certain leasehold property upon trust to pay the rents to his daughter Emily during her life, for her sole and separate use, without power of anticipation, and after her death to assign and transfer the same to and amongst the child or children of his daughter as she should by deed or will appoint, and in default of such appointment equally amongst such children, the shares of sons to be vested at the age of twenty-one, and of daughters at that age or marriage. The testator further bequeathed certain other leasehold property to his trustees on precisely the same trusts for his daughter Sophia and her children, and continued: "Provided always that in case either of my said daughters shall die without leaving any child or children who shall live to acquire a vested interest in such messuages and premises, then I direct that the several messuages and premises hereby bequeathed

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

in trust for her and her children shall be held in trust for my surviving daughter and her children in equal shares in the same manner and with the same restrictions and limitations over as if the same had originally formed part of the messuages and premises hereinbefore bequeathed to my said surviving daughter."

After certain other specific devises and bequests, the testator gave the residue of his estate to his trustees upon trust for all his children (except his eldest son, who was provided for elsewhere) who should be living at his decease absolutely in equal shares, the share of sons to vest at twenty-one and of daughters at twenty-one or marriage.

The testator's daughter Emily died on the 23rd of October, 1889, leaving a husband, the defendant, H. A. Glass, and three infant children. His daughter Sophia died on the 27th of August, 1877, leaving a husband, the defendant, R. G. Marsden, and one son, an infant. Since the respective deaths of the two daughters the income of the trust funds had been accumulated, with the exception of £100 per annum, which in 1881 was ordered by Malins, V.C., to be paid for the maintenance of the infant son of Sophia Marsden. Neither Mrs. Glass nor Mrs. Marsden had exercised the power of appointment by deed given to each of them under the testator's will, but Mrs. Glass had exercised her power of appointment by will.

Doubts having arisen as to who was entitled to the intermediate income between the deaths of the tenants for life and the vesting of the children's shares, a summons was taken out to determine the question.

North, J., decided that the rents of the leaseholds bequeathed to Mrs. Glass and her children, with the accumulations, fell into the residue until a child of Mrs. Glass attained a vested interest, and were not applicable for maintenance. With regard to the leaseholds bequeathed to Mrs. Marsden and her children, he did not interfere with the existing order of Malins, V.C.

One of the infant children of Mrs. Glass appealed.

The defendant, H. A. Glass, also gave notice of appeal, and asked that the accumulations of the "Marsden" fund should fall into the residue, except so far as it was affected by the order of Malins, V.C.

Buckley, Q.C., and *John Chester*, for the appellant.—There is here a complete regregation of the leaseholds from the rest of the testator's estate. He has provided maintenance clauses for every other case except this.

They referred to *In re Dickson, Hill* v. *Grant*, 33 W. R. 511, 29 Ch. D. 331; *In re Holford, Holford* v. *Holford*, 42 W. R. 563, [1894] 3 Ch. 30; *Furneaux* v. *Rucker*, W. N., 1879, p. 135; *In re Jeffery, Burt* v. *Arnold*, 39 W. R. 234, [1891] 1 Ch. 671; *In re Adams, Adams* v. *Adams*, 41 W. R. 329, [1893] 1 Ch. 329; *In re Clements, Clements* v. *Pearsall*, 42 W. R. 374, [1894] 1 Ch. 665; *In re Burton, Banks* v. *Heaven*, [1892] 2 Ch. 38, 40 W. R. Dig. 97; *Holmes* v. *Prescott*, 12 W. R. 636; *Kidman* v. *Kidman*, 40 L. J. Ch. 359, 19 W. R. Ch. Dig. 4; *In re Medlock, Ruffle* v. *Medlock*, 55 L. J. Ch. 738, 34 W. R. Dig. 87.

Swinfen Eady, Q.C., and *Methold*, for the defendant Marsden.

Vernon Smith, Q.C., and *Rowden*, for the trustees of the will and a residuary legatee, argued that *Furneaux* v. *Rucker* was good law, and referred to *Hodgson* v. *Earl of Bective*, 12 W. R. 625, 1 H. & M. 376, 10 H. L. Cas. 656; and *Holmes* v. *Prescott*.

Eustace Smith, for the defendant Glass.

Buckley, Q.C., replied.

May 24.—LINDLEY, L.J.—In this case we have considered the will and the authorities that were cited to us yesterday, and the conclusion at which I have arrived is that Mr. Buckley's contention is well founded and ought to prevail. The question is whether some infants to whom some leaseholds were left are entitled contingently to the income of those leaseholds, so that the court can direct maintenance of those infants out of the income of that property.

Now the will in question is the will of Joseph Stewart Woodin, and he had several children for whom he provided by his will. His daughter Emily was provided for in this way. [His lordship read the will as above stated, and continued:—] Then he bequeaths other leaseholds to trustees for his daughter Sophia and her children in a similar way.

It appears that the daughter Emily died in October, 1889. She had three children, and by her will, which was dated in October, 1882, she appointed to such of her children as should attain the age of twenty-one or marry. So that the gift to the children, whether you look at the will in default of appointment or whether you look at the appointment itself, is contingent. Nothing is said here about the income of these leaseholds after the death of the tenants for life, that is to say, after Emily's death and Sophia's death, nor is there in the will any clause which in terms relates to the maintenance of the grandchildren. There is a clause in the will which refers to the maintenance of the children, but not of the children of these daughters.

Under those circumstances the trustees have applied for directions as to whether they can properly apply the income of those leaseholds to the maintenance of these children who are under age. It appears that Malins, V.C., by an order made in 1881 did direct the maintenance of one of the children of Sophia Marsden, and there is a point upon that as well as upon Emily's gift.

Now, North, J., has come to the conclusion that there is no gift of the income of these leaseholds to these children when they attain twenty-one, or marry in the case of daughters, and he has decided therefore that there can be no maintenance. He has relied very much apparently upon the case of *Furneaux* v. *Rucker*, W. N., 1879, 135, which we have had before us before. All I can say about it is that I do not understand it; it is not reported in such a way as to be intelligible to me. It was decided upon principles contrary to those which are supported by the cases to which I will presently allude. Then I think that *Furneaux* v. *Rucker* was wrong. Now, in dealing with personal property, whether leaseholds or not, there are three cases which are important—viz., *Kidman* v. *Kidman*, *Re Medlock*, and *Re Clements*. Now, those three cases would seem to me to lay down a principle which is perfectly intelligible, and which is applicable to this case. That principle is stated, I think, very accurately in Theobald on Wills, 4th ed. p. 153, and it runs thus: "Where a fund is directed to be invested and held by trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it carries the income." Then *Kidman* v. *Kidman* is abridged very accurately: "A fund which has been severed for the benefit of a tenant for life and remainderman carries the interest accruing between the death of the tenant for life and the vesting in the remainderman." Then *Long* v. *Ovenden*, 29 W. R. 709, 16 Ch. D. 691, is referred to as showing that an appointed fund carries the immediate interest. Now, that appears to me to be an intelligible proposition

The testator has taken these leaseholds, severed them from the rest of his estate, given them to trustees for the daughter and then to her children as she should appoint, in terms which would clearly authorize a payment of the income of those leaseholds to the children if she chose to exercise it in that way. In her appointment she has said nothing about a gift, but it does seem most extraordinary to say of a will constructed like this that it was not the intention of the testator that her children should have the intermediate income, but that the intermediate income must, by some rule of law, be treated as undisposed of and go into the residue until the children attain twenty-one. It appears to me that this case falls within the principle of those cases to which I have alluded, and which are based on good sense, and which, if they are contrary to *Furneaux* v. *Rucker*, must, I think, be preferred to *Furneaux* v. *Rucker*. I do not think that the cases referred to by Mr. Vernon Smith are opposed to this decision. *Holmes* v. *Prescott* and *Hodgson* v. *Earl of Bective*, when you come to look at them, do not fall within the category of cases to which I have been referring. It would be quite contrary to the intention of the testator, to be fairly gathered from the mode in which he has dealt with this particular fund, those leaseholds, to say that the children are not to have the income, and that the income cannot be applied to their maintenance so long as they are minors.

Therefore I think that the decision of North, J., in this case must be reversed, and the proper alteration must be made.

LOPES, L.J.—I entirely agree. We are dealing with leaseholds, and I know no ground on which, in a case like this, leaseholds stand in a different position from other personal property.

Then the question is, What principle are we to apply? I entirely agree that the proper principle to apply is the principle which is to be gathered from the three cases to which reference has been made, i.e., *Kidman* v. *Kidman*, *In re Medlock*, and *In re Clements*, and applying that principle I come to the conclusion that the decision of the learned judge below was wrong, and ought to be reversed.

In the present case I feel quite clear that by so doing we are carrying out the intention of the testator. The case of *Furneaux* v. *Rucker* was cited, and it is said that the principle involved in that case is different from the principle involved in the three cases to which I have referred. All I can say is that I have great difficulty in understanding the decision in *Furneaux* v. *Rucker*, and if the principle contained in that case is not reconcilable with the principle contained in the cases to which I have referred, I do not agree with the case of *Furneaux* v. *Rucker*.

KAY, L.J.—I have come to the same conclusion on this particular will. There is no doubt that a contingent specific bequest of chattels real or of personalty, not being residuary personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate will not carry the intermediate income. Those in effect are the words used by Mr. Theobald in the last edition of his book p. 146, and he cites *Holmes* v. *Prescott*, *Guthrie* v. *Walrond*, 31 W. R. 285, 22 Ch. D. 573, and the case of *Wright* v. *Warren*, 4 De G. & Sm. 367. Now *Guthrie* v. *Walrond* most certainly supports very distinctly that statement, and if we had got here nothing but a contingent bequest of chattels real which were not directed to be set apart from the rest of the estate, the intermediate income would not pass.

But it has been held for a very long time past that where a fund is directed to be invested and held by trustees upon certain trusts or otherwise directed to be set apart, it does carry income.

The real question is, What is the construction of this will? By this will are these leaseholds, which were given specifically to trustees upon trust, one set as to one of his daughters, and after her death as she should appoint among her children, and in default of appointment to the children, vesting at twenty-one, or in case of daughter's marriage, or are they not severed from the bulk of the testator's personal estate? If they are, the rule applies. If they are not then any intermediate income till the contingency arises between the death of the tenant for life and the vesting in the children of that tenant for life would fall into the residue.

Now what better indication could you possibly have of setting apart property, so as not to form part of the bulk of the testator's estate, than giving it specifically to trustees upon trust for one tenant for life, and then giving to that tenant for life power to deal with everything, principal and income, from the moment of her own death, and then, in default of her doing so, giving the capital to her children who shall attain twenty-one. True it is a contingent gift to these children, but if the whole thing has been separated from the bulk of the testator's personal estate, then there is no ground for saying that the intermediate income between the death of the tenant for life, and the vesting in the children of the tenant for life remains part of the residue.

The case of *Kidman* v. *Kidman* is valuable, because there the very same thing occurred, and it was held that a fund which had been severed for the benefit of a tenant for life and remainderman did carry the interest accruing between the death of the tenant for life, and the vesting in the remainderman. Here you have got exactly the same state of things. I cannot possibly see how this case can be distinguished from the case to which reference has been made, or from the principle which has been laid down for a long time as governing questions of this kind as to the disposition of the intermediate income.

Really the only case which strikes me as being contrary to this view is the case of *Furneaux* v. *Rucker*, which has been brought before us. Now I, speaking for myself, venture to protest against a case of that sort being treated as an authority. All I can say is that if it did decide something which goes directly contrary to the rule laid down in some of the previous cases it cannot be treated as a good authority. I therefore hope that *Furneaux* v. *Rucker* will not be cited again as an authority for anything, because I do not think anybody can, from the investigation which has been made of it really understand upon what principle that case was decided.

Therefore, I think, with deference to the learned judge in the court below he has followed what he supposed to be the decision in *Furneaux* v. *Rucker*, and has rather gone against the current of authority which has laid down very clearly an intelligible rule, and which applies to this case, and which would have led him to a different conclusion.

Therefore, I think that the decision of the learned judge in the court below must be reversed, and I agree in saying that is the proper conclusion to come to in this case.

LINDLEY, L.J.—The form had better be this: "Declare that the rents and profits of the testator's leasehold estate devised in trust for the testator's daughter Emily and her children from the death of the said Emily until a child should attain twenty-one, or being a daughter marries, are with the accumulations thereof applicable to the maintenance of the infant defendant Joseph Glass, and the other infant

children, if any." And the same with regard to the Marsdens.

Appeal allowed.

Solicitors for the appellants, *T. W. Mitchell.*

Solicitors for the respondents, *Torr, Gribble, Oddie, & Sinclair.*

High Court of Justice.

Chan. Div. North, J. } May 7, 8, 29.

HARLE *v.* JARMAN. (*a.*)

Married woman — Release of reversionary interest — Election.

A covenant, by a woman married in 1873, *to release a reversionary life interest under her marriage settlement is not binding even when contained in a separation deed; and the receipt by her of an annuity under the separation deed for a number of years does not raise any case of election.*

Greenhill *v.* North British and Mercantile Insurance Co., 42 *W. R.* 91, [1893] 3 *Ch.* 474, *discussed.*

Adjourned summons.

By a settlement dated the 6th of May, 1873, made before the marriage of Johnson Harle and Louisa Patrick, certain land, shares in ships and policies of assurance were conveyed and assigned to trustees upon trust for sale and conversion and to pay the dividends and income and the profits of the ships until sale to the said Johnson Harle during the joint life of himself and Louisa Patrick, and after the death of either of them to the survivor during his or her life with an ultimate remainder in the events that happened to the children of Johnson Harle by a former marriage who being sons or a son attained the age of twenty-one years or being daughters or a daughter attained that age or married.

The marriage was solemnized on the 7th of May, 1873. On the 8th of August, 1874, a petition for judicial separation was presented. On the 11th of March, 1875, an agreement of compromise was made in accordance with the terms of which a separation deed was executed on the 30th of June, 1875, by which Mrs. Harle covenanted to release her reversionary life interest under the settlement and any rights she might have in Mr. Harle's property, and Mr. Harle agreed to secure her an annuity of £220 per annum, to be reduced in certain events to £150. All the children of the former marriage of Mr. Harle attained the age of twenty-one years. On the 30th of July, 1875, the petition for judicial separation was dismissed upon the terms agreed. In June, 1880, Mr. Harle became bankrupt and on the 10th of August, 1891, he died. Until his death the income of the settlement funds was paid to Mrs. Harle in satisfaction *pro tanto* of her annuity.

On the 16th of October, 1891, a draft release was sent Mrs. Harle, but she refused to release her life interest under the settlement.

This summons was taken out by the children of the former marriage to decide whether Louisa Harle was bound by the covenant to release the reversionary life interest.

Gatey, for the plaintiffs, said that the covenant was binding: *Cahill* v. *Cahill*, 31 W. R. 861, 8 App. Cas. 420. Even if it was not binding at the beginning it became so owing to subsequent events: *Barrow* v. *Barrow*, 6 W. R. 714, 4 K. & J. 423. A married woman may elect, and that without a deed acknowledged. Until 1878 the lady received the whole annuity, and since that date she received the whole income of the trust funds. In 1881 the annuity became reduced to £150. The release was a proper one and in accordance with the covenant.

He cited *Wilder* v. *Piggott*, 31 W. R. 377, 22 Ch. D. 263, and *In re Hodson*, 42 W. R. 531, [1894] 2 Ch. 421.

Wheeler, for another of the children of the first marriage, cited *Wall* v. *Rogers*, 18 W. R. 203, L. R. 9 Eq. 58.

Archibald Brown, for the widow and the trustees of the settlement.—The interest of the widow was not extinguished. A wife's reversionary interest cannot be dealt with by her even with the sanction of the court: *Purdew* v. *Jackson*, 1 Russ. 1. The Divorce Court did not sanction the terms of settlement, but only the dismissal of the petition. [He referred to *Seaton* v. *Seaton*, 36 W. R. 865, 13 App. Cas. 61; *Stamper* v. *Barker*, 5 Madd. 157; and *Cahill* v. *Cahill*.] As the separation deed was never acknowledged it was void and could not be confirmed.

Gatey replied.

Cur. adv. vult.

May 29.—NORTH, J.—The real question between the parties is whether after the death of the husband his estate was entitled to the reversionary life interest of the wife. If the husband's estate was entitled it was said that life interest was charged by virtue of the deed securing the annuity. I do not think the life interest is within the terms of the deed, as it is entirely outside the settlement, and if the husband's estate is entitled at all it is in virtue of the execution of the deeds by the husband and wife. Then it was said that the life interest was continued for the purpose of giving a security to the wife for the annuity after the husband's death, but if this had been intended, nothing would have been easier than to say so; there would have been a declaration that after the death of the husband the trustees should stand possessed of the income in trust to pay the annuity to the wife during her life. Moreover, the wording of clause 6 of the separation deed as to the life interest of the wife being absolutely extinguished is inconsistent with any intention to keep it alive for any purpose whatever. It seems to me quite clear that the effect of what was done was to absolutely extinguish the life interest, even as between the husband and the children of the first marriage. The case of *Jull* v. *Jacobs*, 24 W. R. 947, 3 Ch. D. 703, has not been successfully distinguished by Mr. Brown. The case nearest to this is *Fuller* v. *Fuller*, Cro. Eliz. 422.

The next question is whether the wife could assign this reversionary interest in personalty. The cases cited on that point, subject to the question of election, seem to me to be conclusive. *Stamper* v. *Barker* was in its facts very like this case; *Wall* v. *Rogers* is very difficult to understand, for the husband having first of all refused to allow his wife to elect, afterwards consented to her doing so. The case of *Robinson* v. *Wheelwright*, 4 W. R. 427, 6 G. M. & G. 535, throws a great deal of light upon the point. Then there is in *Cahill* v. *Cahill* a very exhaustive judgment by Lord Selborne as to the position of husbands and wives as regards their power to contract with one another on a compromise upon a separation. There is the later case of *Seaton* v. *Seaton*, which shows that the approval of the compromise by the Divorce Court would not help the matter, although

(*a.*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

seems to me the court merely stayed proceedings on the petition by consent.

There are many cases in which it has been stated that a married woman might be bound, by reason of her having committed a fraud, but that is not suggested here.

As to confirmation, the interest was reversionary until the husband's death, and if the wife could not bind her interest by the separation deed she had no power to bind it during the husband's life. Since the husband's death in 1891 I cannot find any confirmation by her.

Then as to the alleged election by the wife, *Seaton* v. *Seaton*, as Lord Macnaghten pointed out in his judgment, was not a case of election at all. It was said that *Barrow* v. *Barrow*, *Wilder* v. *Piggott*, and other cases show that a wife can elect: *In re Hodson* has also been relied upon, and *Greenhill* v. *North British and Mercantile Insurance Co.*, 42 W. R. 91, [1893] 3 Ch. 1474, before Stirling, J., where, though the facts were very different, the learned judge does seem to have come to the conclusion that a woman by her acts bound a reversionary interest in personalty while covert.

In the present case I do not find that Mrs. Harle ever was in a position to elect according to the strict legal view of election—she never did choose between two different things, having the power to do either of them. She was clearly barred to the knowledge of all parties from dealing with her reversionary interest at that time, and therefore her reversionary interest is not bound by the agreement then made.

Solicitors, *Close & Co.*; *Creeke & Hornby-Pater*, for *Patrick & Son*, Durham.

Chan. Div. North, J. March 28; April 2.

HUNTER v. DOWLING. (a.)

Partnership — Assets — Interest of deceased partner— Goodwill.

One partner died while negotiations were pending for the sale of business premises to a railway company. By the partnership deed the share of a deceased partner was to be taken at the value put upon it by the last balance-sheet, and in the past balance-sheets there was no mention of goodwill.

Held, that in taking the accounts the deceased partner must be credited with a share of the premises, plant, &c., at the price subsequently paid for them by the railway company, but that his estate was not entitled to any share of the sum paid for goodwill.

Summons to vary chief clerk's certificate.

A partnership deed dated the 31st of March, 1884, and made between Edmund Dowling, Edwin Shelton Pinchin, Edward Arthur Johnson, and Charles Edward Dowling, provided for the taking of accounts on the 31st of March in each year, and that in the event of the death or retirement of any partner the amount of his share and interest should be taken at the amount standing to his credit in the last annual balance sheet which should have been signed before his death.

The material provisions of the partnership deed are fully set out in 41 W. R. 390.

On the 16th of June, 1890, notice to treat for part of the premises at St. George's-in-the-East was served on the partnership by the London and Blackwall Railway Co.

In August, 1890, notice was served on the railway company by the partnership requiring the company to take all those premises, which notice was acceded to by the company, and in December, 1890, a claim was made by the partnership on the company for £28,000. Negotiations ensued, which were not concluded at the date of the death of E. A. Johnson on the 10th of April, 1891. E. A. Johnson's will, appointing the plaintiff Hunter his executor was proved on the 6th of July, 1891. The negotiations finally resulted in the purchase of the whole of the premises at St. George's-in-the-East for £19,000.

By an agreement dated the 30th of July, 1891, the railway company agreed to purchase for £19,000 the leaseholds, together with all the machinery, plant, &c., and it was agreed that this sum should include compensation for all damage to industry which might be sustained by the vendors in respect of loss of trade and goodwill, expenses of removal, and for any other damage or injury whatsoever.

The plaintiff on the 8th of September, 1891, sued the surviving partner for an account of the partnership dealings down to the 31st of March, 1891, and claimed that in taking such account the £19,000 paid by the railway company should be included in the assets. Romer, J., held that the account for the partnership year immediately preceding the death must be taken, and the deceased partner's share determined thereby (41 W. R. 390, [1893] 1 Ch. 391), and his judgment was affirmed by the Court of Appeal (42 W. R. 107, [1893] 3 Ch. 212).

An order was made by consent on the 13th of June, 1893, to take the accounts in chambers, and the following October the defendants lodged their accounts, estimating the value on the 31st of March, 1891, of the plants, fixtures, &c., at £3,000 the leaseholds at £100, and making no allowance for goodwill.

In February, 1894, the plaintiff delivered a surcharge, claiming to have the leaseholds valued at £5,500, and the plant and goodwill at the amounts set against them respectively in the revised claims of the 16th of March, 1891.

The chief clerk allowed the surcharge of £4,904 in respect of the value of the leasehold premises, £3,744 6s. 8d. in respect of the plant, fixtures, &c., and £5,495 in respect of the goodwill.

Cozens-Hardy, Q.C., and *J. M. Stone*, in support of the summons said that nothing ought to have been allowed for goodwill: *Steuart* v. *Gladstone*, 27 W. R. 512; 10 Ch. D. 626. The leaseholds were held at a rack rent, and had never been treated by the partners as of any value. There was no binding contract with the railway company at the date of Johnson's death, and the price was not fixed until the 30th of July, 1891. The railway company was not bound to take over the plant and fixtures: *Stebbing* v. *Metropolitan Board of Works*, 19 W. R. 73, L. R. 6 Q. B. 37.

Swinfen Eady, Q.C., and *Eve*, for the respondent, said that in *Steuart* v. *Gladstone* the goodwill was not able to be realized as there was no sale. The notice to treat coupled with an agreement as to price constituted a contract: *Harding* v. *Metropolitan Railway Co.*, 20 W. R. 321, L. R. 7 Ch. App. 154. The company was bound to take the plant and fixtures: *Gibson* v. *Hammersmith Railway Co.*, 11 W. R. 299.

Stone replied.

NORTH, J.. said that the chief clerk was right as to the leasehold interest, plant, fixtures, &c., but wrong as to the goodwill. The question was, What was the portion of the parties on the 31st of March and the 10th of April, 1891? The negotiations would not

(a.) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

have gone off altogether because the firm could have compelled the railway company to take the premises under the counter notice. In April the parties had practically settled terms. It was known what would have to be paid on the one side and received on the other, and there was as good a contract as if one had been signed. The courts having decided that the account was to be made up as on the 31st of March, 1891, the value of the leasehold interest, having regard to the price agreed to be paid for it by the railway company, must be included. Similarly the plant, fixtures, &c., must be valued in the light of the amount realized for them, for *Gibson* v. *Hammersmith Railway Co.* showed that the railway company was bound to take plant, fixtures, machinery, &c., with the building.

The goodwill was on a totally different footing. Under the partnership deed the interest of a deceased partner was to be taken at the value put upon it in the last balance-sheet, and in none of the earlier balance-sheets was there any mention of goodwill. *Steuart* v. *Gladstone* showed that it was rightly excluded. It was said that there was a special reason for including it, because it had been sold to a railway company. The £19,000 had not been received at Johnson's death, but a value might be put upon the things agreed to be sold, having regard to the arrangement for sale. But for the purposes of a balance-sheet, the goodwill was not to be valued at all, and therefore its price could not be included. It was said that the value of the goodwill ought to be added to the value of the leaseholds, but the parties were bound by the apportionment of March, 1891. It was also contended that the deceased partner had an interest in the goodwill prior to the 31st of March, 1891, but under the partnership articles that interest passed to the surviving partners upon his death.

Solicitors, *Stones, Morris & Stone; Gush, Phillips, Walters & Williams.*

Chan. Div. }
Stirling, J. } June 20.

In re MASKELL AND GOLDFINCH'S CONTRACT. (*a.*)

Vendor and purchaser — Gavelkind — Enfeoffment by infant—Insufficient consideration.

Where a vendor's title to gavelkind lands is derived from a conveyance and enfeoffment of the said lands respectively made by adults and infants, and where the said transaction shows on the face of it that the infants did not receive a proper proportion of the purchase-money paid in respect thereof, a purchaser from the vendor cannot be compelled to accept such title.

This was a summons under the Vendor and Purchaser Act, 1874, to determine whether or not the vendor under a contract for the sale of certain real estate made between George Maskell of the one part and Edward Goldfinch of the other part, and dated the 24th of October, 1894, had shown such a title as the purchaser could be compelled to accept. The property, the subject of the sale, was situate in Kent, and was of gavelkind tenure, and was until the 28th of August, 1892, vested in one Richard Henry Carr, who died intestate on that date, leaving a widow and three sons him surviving. Two of these said three sons were infants.

According to the custom of gavelkind, the three sons, on the death of their father, became equally entitled to the property subject to the dower to the widow.

On the 20th of November, 1893, the widow and the eldest of the three sons aforesaid, as beneficial owners conveyed by deed their respective shares and interests in the property to the present vendor, and in the said deed it was recited that the widow and her three sons had agreed with the present vendor for the sale to him of the said property for the sum of £750, that two of the said three sons were still infants, and that it had therefore been agreed that they should convey their shares of the property by customary feoffments, that the purchase-money (*i.e.*, £750) had been apportioned as to £375 to the widow and as to £125 to the eldest son, and the said conveyance was expressed to be made in consideration of these said sums paid to the widow and the eldest son aforesaid. Of the two infants, one was over and one was under the age of fifteen at the date of the contract, and it was arranged that, as soon as the younger of the two attained that age, they should assure their shares to the plaintiff by feoffment, which was duly effected on the 5th of December, 1893, by charters of enfeoffment under the custom of gavelkind, the consideration-money in each case being £125.

On the 24th of October, 1894, the vendor agreed to sell the said property to the purchaser, who made the following requisition:—"Upon what basis was the purchase-money apportioned by the conveyance of the 20th of November, 1893, and the feoffments of the 5th of December, 1893? Mrs. Ruth Carr's dower would only consist of a moiety for life while chaste and unmarried. Upon what principle does she receive a moiety of the purchase-money?" The answer to this requisition was as follows: "It was so decided at the express desire of the sons who wished to deal liberally with their mother." The two younger sons were still infants at the date of the issue of the writ and would not be of age for some years. They and their mother had gone to Russia, where they resided. The purchaser refused to accept the vendor's title, on the ground that the widow had received more of the purchase-money than she was entitled to, and that the consent of the infants thereto was not binding and might be withdrawn on their attaining their majority.

This summons was taken out by the vendor, who sought a declaration that the fee simple in the shares of the two infants in the property in question had been conveyed to and absolutely vested in him (the vendor) by the charters of feoffment aforesaid and the liveries of seisin in accordance therewith.

Gatey, for the summons.—The infants were entitled by customary law to convey, and having done so submit the matter cannot now be questioned. The full value of the property was paid by the purchaser under the conveyance, and it is not the duty of the purchaser to see that the money is properly apportioned. The law on the subject is summarized in Davidson's Precedents in Conveyancing, 4th ed., vol. 2, pt. 1, pp. 244 and 245. Robinson on Gavelkind, 3rd ed., p. 277, suggests that an infant can convey otherwise than for value, but Wilson in a note on the same page doubts whether that view is correct. The court, however, ought not to inquire into the adequacy of the consideration where an infant has sold. [STIRLING, J.—It may be that the infants have a lien for the balance of the money which they ought to have received.] That is only an objection as to conveyance, not as to title. I say I have the legal estate, and can make a good title.

Tanner, for the purchaser.—This is a conveyance

(*a.*) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

under a custom, and must be construed strictly. The custom is based on commercial convenience, but the infant must not be imposed upon (4 Bac. Abridg., 7th ed., p. 49). Here, clearly, the infants have been imposed upon, as the mother took more than her share of the purchase-money. Hence I should be liable to a claim by the infants on their attaining their majority.

Gatey, in reply.—The books do not define the amount of the consideration to which the infant is entitled, they merely say that there must be valuable consideration.

STIRLING, J., after stating the facts, continued:—In my judgment the requisition of the purchaser is well founded. The question for me to decide is whether or not the purchaser's objection is valid, and it seems to me that it is. The question is one of gavelkind law, and such points do not arise very often. Counsel have put before me extracts from Davidson's Precedents in Conveyancing, which state the law applicable to the subject, and they have asked me to decide the matter on that basis, they being content to accept the statements in question as correct. I see no reason why those statements should not be accepted, so far as they are material, as a correct statement of the law. It is there laid down: "Every one of the age of fifteen years holding or claiming to hold any lands in gavelkind may give (by way of sale) his land of which he is seised as lawfully and freely as any other person of the age of twenty-one years his foreign tenures, which are held by knight's service." "The later resolutions and practice have added the following reasonable and proper restrictions to this customary alienation:—that it must be by feoffment, and the livery of seisin must be *propria manu* of the infant, and not by the letter of attorney, nor does the custom extend to any other conveyance or assurance, or it shall be taken strictly . . ." "It is said that the custom extends only to sales for a valuable consideration, it must be evidenced by a deed or writing signed by the infant's own hand, and at the time of the feoffment the infant must be in the actual possession of the land." "It would seem that an infant, as he cannot execute a release, cannot give a valid receipt for the purchase-money; for the general practice is to add to the memorandum of livery of seisin an attestation that the consideration-money was paid to the infant instead of indorsing a receipt for . . . . but although a purchaser may, without personal risk, pay the money to the infant, it is often advisable, for the infant's sake, that the purchaser should require it to be invested in the funds in the names of trustees, or even in the infant's name, until he attain twenty-one, and usually there is no difficulty in prevailing on the vendor to adopt this course." In this statement of the law must be added the statement in Bacon's Abridgement which has been read to us by the learned counsel. "The liberty of selling is allowed at the age of fifteen for the convenience and necessity of commerce, which, in these small divided shares, was absolutely necessary, yet it was allowed under such limitations and restrictions that the infant could not be wronged or imposed upon; therefore an infant that sells must have a valuable consideration, because otherwise it is a plain sign that he was defrauded."

Now it is contended that on the facts of the case there is evidence that the infants have been wronged and imposed upon. I think that that is established. The mother took one-half of the purchase-money, which, on the face of the matter, is clearly more than she was entitled to. It is further said that the mother was the guardian of the infants, and was in a fiduciary position in regard to them. That makes the matter worse. That being so, it seems to me that the infants are entitled under the contract to a greater share of the purchase-money than they have received, and they cannot release their rights thereunder until they are twenty-one and in full possession of all the facts. I think, therefore, that the vendor has not made out such a title as a purchaser can be compelled to accept, because it is possible that when the infants attain twenty-one they may assert some claim with respect to the purchase-money received by their mother. Therefore I think the requisition is well founded.

I make a declaration that the purchaser's requisition has not been sufficiently complied with, and I order the vendor to pay the costs down to the present hearing, but reserve liberty to him to apply in case he can make out a good title. I also give the purchaser liberty to apply, in all respects, as if he had taken out a summons himself.

Solicitors, *J. E. & R. Scott*, for *Scott & Warhurst*, Herne Bay; *Moon, Gibbs, & Moon.*

Q. B. Div.
(Day and Wright, JJ.) May 30.

WILSON (*Petitioner*) *v.* INGHAM AND OTHERS. (*a.*)

Election petition—Validity of election—Name on ballot-paper of person not a candidate—Sufficient votes given to influence result—Negligence of returning officer—Liability to costs—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *s.* 13.

The name of a person who had been duly nominated as a candidate at an election of urban district councillors, but who had withdrawn his candidature, was put on the ballot-papers by the mistake of the returning officer's clerk, and such person had received a number of votes sufficient, if given to the other candidates, to have influenced the result.

Held, that the election was void, as not being in accordance with the provisions of the Ballot Act, 1872. *In such a case there is no general rule exempting a returning officer from liability to pay costs for the consequences of his negligence.*

Case stated by order of Day, J.

On the 17th of December, 1894, an election of urban district councillors was held for the west ward of the urban district of Kirkleatham, in the county of York

On the 5th of December, 1894, the returning officer (the respondent, Matthew Dodds), pursuant to rule 8 of the Urban District Councillors' Election Order, 1894, caused to be made out and published a statement containing the names, places of abode, and descriptions of the persons nominated as urban district councillors for the east and west wards, which statement included the name of James Meek, who had been duly nominated both for the east and the west ward.

After the publication of this statement, and on the same day, Mr. Meek, within the time prescribed by rule 9 of the said order, withdrew his name as a candidate for the west ward, leaving his nomination for the east ward to stand.

Rule 10 of the first schedule of the Ballot Act, 1872 is not expressly made applicable to elections of urban district councillors by the Urban District Councillors' Election Order, 1894, and unless such rule is otherwise applicable, no duty was imposed by statute upon the

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

returning officer to give public notice of the withdrawal of any candidate.

On the 8th of December, 1894, pursuant to rule 15 of the said order, the returning officer caused to be published a notice of poll containing the names of the candidates for the east and west wards, in which the name of Mr. Meek appeared as that of a candidate for the east ward only. The names of the candidates for the west ward appearing on the notice of poll were those of the petitioner and the respondents Ingham and Hikeley, and also of Kyle, Robson, and Scott.

Printed copies of this notice of poll, to the number of about ninety, were posted up throughout the district, about twenty-four being posted up in the West Ward.

The name of Mr. Meek was inadvertably printed on the ballot paper used at the election for the west ward. The draft of the ballot papers was prepared by the managing clerk of the returning officer, who had had previous experience in election matters, from the nomination papers already published. The proof of the ballot papers when received from the printer was examined and approved by the clerk, who overlooked the fact that Mr. Meek had withdrawn his candidature. The returning officer was not aware until immediately before the commencement of the poll that the ballot-papers included the name of Mr. Meek.

The returing officer acted as presiding officer for the west ward at the election, and informed many of the voters when handing them their ballot papers that Mr. Meek was not a candidate for election, and that his name appeared on the ballot papers by mistake, but no further or other notice of the withdrawal of Mr. Meek was given to voters by the returning officer, and on counting the votes 34 votes were given for Mr. Meek.

The result of the polling was declared as follows:—Scott, 243 votes; Robson, 235; Ingham, 132; Hikeley, 129; Wilson (the petitioner), 128; and Meek, 34.

The returning officer declared Scott, Robson, and the respondents, Ingham and Hikeley, duly elected.

The petitioner then presented an election petition, alleging that the election was not conducted in accordance with the principles of the Ballot Act, 1872, and the Local Government Act, 1894, and the Urban District Councillors' Order, 1894, and that the respondents Ingham and Hikeley were not duly elected by a majority of lawful votes.

The question now was whether the election of the respondents Ingham and Hikeley was void.

S. H. Day, for the petitioner, was stopped.

L. Coward, for the respondents.—Even though there has been a mistake or non-compliance with the forms, such mistake or non-compliance did not affect the result of the election, and therefore, by section 13 of the Ballot Act, 1872, the election is not invalid. There was nothing to show that the result was affected by the mistake. The notice of poll was correct, and this was extensively posted up in the district. The returning officer had no duty imposed upon him of removing the name from the ballot paper of a candidate duly proposed, and his mistake does not render the election void, either at common law or under the Ballot Act: *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, 23 W. R. Dig. 78. What was done was a mere inadvertence, which did not affect the result and which consequently does not invalidate the election.

Bonsey, for the returning officer, one of the respondents.

DAY, J.—I am of opinion that this petition must be allowed, on the ground that this election has not been carried out according to the Act of Parliament. The name of a person who had withdrawn his candidature was put on the ballot papers, and the public were therefore invited to vote for him. I think therefore the election was void.

WRIGHT, J.—I am of the same opinion. The difference between the candidates was very slight; in one instance the difference is three and in another case one. It is impossible for us to say that the result may not have been affected if Meek's name had not appeared on the ballot papers. By the principles of the common law, as applied to the Ballot Act, the election was void, and was no election at all. There was no election at all at common law, and there was not a good election under the Ballot Act, which requires the ballot papers to contain the names of candidates only, and therefore the election was void.

On the question of costs.

Bonsey, for the returning officer.—The returning officer ought not to be made to pay costs here. The mistake was the mistake of his managing clerk, who had had an experience of over twenty years in such cases and was therefore a person fully qualified to deal with the matter. The returning officer ought not to have been made a party to the petition, as, under section 88 of the Municipal Corporations Act, 1882, he can be made a party only when his conduct is complained of, that is, where there is wilful misconduct: *Harmon* v. *Park*, 29 W. R. 750, 6 Q. B. D. 323. The returning officer gets no remuneration for services; he has a difficult position, and ought to be made liable only for actual misconduct. There is not a single case where an order has been made ordering a returning officer to pay costs: *Davies* v. *Lord Kensington*, 22 W. R. 707, L. R. 9 C. P. 720; *The Hackney case*, 2 O'M. & H. 77; *The Drogheda case*, 1 O'M. & H. 201.

DAY, J.—On general principles which apply not merely to private litigation but also to election petitions, the aggrieved person must, as a general rule, get his costs, and therefore the petitioner here is *primâ facie* entitled to his costs. Against whom is he to get them? If I were merely to consider the argument put forward for the returning officer I should give costs against him, as it would be of the greatest danger to society if it were believed that returning officers should never be liable to pay costs for their negligence. No such doctrine has existed, and I wish to protest against any such doctrine as that returning officers are not liable for the consequences of their negligence. The mistake, however, in this case arose without any gross carelessness. There was substantial negligence, but on taking into consideration how the mistake arose, that it was the mistake of a clerk who was perfectly trustworthy, I think that an order to pay costs ought to be made against the returning officer. The other respondents must pay costs.

WRIGHT, J.—I agree.

Petition allowed with costs; no costs against returning officer.

Solicitors for the petitioner, *Belfrage & Co.*, for *Bainbridge & Barnley*, Middlesbrough.

Solicitors for the respondents, *Sharpe, Parker, & Co.*, for *M. B. Dodds*, Stockton-on-Tees.

House of Lords.

From C. A. (England). Nov. 23.

GUARDIANS OF SCULCOATES v. HULL DOCKS CO.
HULL DOCKS CO. v. GUARDIANS OF SCULCOATES. (a.)

Poor rate—Rateable value—Docks—Docks in two or more parishes — Principle of assessment—Statutory prohibition as to use of part of undertaking.

Where a system of docks or other undertaking extends into several parishes, the proper method of ascertaining the rateable value is by the "parochial principle" whenever it can be applied—i.e., *by ascertaining what are in fact the profits earned by each part of the system by the particular hereditaments in each parish. The principle of first ascertaining the rateable value of the whole of an undertaking and then dividing that value among the several parishes in proportion to the area in each parish is only to be resorted to in cases of necessity.*

Decision of the Court of Appeal, 42 *W. R.* 595, [1894] 2 *Q. B.* 69, *affirmed.*

Should an undertaking be forbidden by statute from receiving certain tolls for the use of a portion of its property, it should only be assessed in respect of that portion having regard to the existence of the statutory prohibition: London County Council *v.* Erith, 42 *W. R.* 330, [1893] *A. C.* 562, 63 *L. J. M. C.* 9, *explained on this point.*

Decision of the Court of Appeal *reversed.*

Original and cross-appeals from the Court of Appeal (Lord Halsbury, and Lopes and Kay, L.JJ.) reported 42 W. R. 595, [1894] 2 Q. B. 69, where the special case is set out. The facts are given in Lord Herschell's judgment.

In the second appeal Lord Halsbury had dissented.

Balfour Browne, Q.C., and *R. Cunningham Glen*, for the appellants to the original appeal.—A rateable property must be assessed as a whole. The parochial principle cannot be applied: *Reg.* v. *Hull Dock Co.*, 18 Q. B. 325; *Reg.* v. *South Staffordshire Waterworks Co.*, 34 W. R. 242, 16 Q. B. D. 359; *North and South-Western Junction Railway Co.* v. *Brentford Assessment Committee*, 35 W. R. 640, 18 Q. B. D. 740; *Mersey Docks and Harbour Board* v. *Overseers of Liverpool*, 20 W. R. 827, L. R. 7 Q. B. 643, and 21 W. R. 913, L. R. 8 Q. B. 445, were cited or referred to.

Bosanquet, Q.C., and *J. R. V. Marchant*, for the respondents, were not heard.

Bosanquet, Q.C., and *J. R. V. Marchant*, for the appellants in the cross appeal.—The case is governed by *Altrincham Union* v. *Cheshire Lines Committee*, 15 Q. B. D. 597, 34 W. R. Dig. 136.

Balfour Brown, Q.C., and *R. Cunningham Glen*, for the respondents.

Lord HERSCHELL, L.C.—These are two cross appeals, the parties to the appeals being the Guardians of the Poor of the Sculcoates Union and the Dock Company of Kingston-upon-Hull. The first appeal raises the question as to the principle which ought to be applied in the assessment of docks belonging to and occupied by the Kingston-upon-Hull Dock Co., which are in different parishes. The dock company are the owners and occupiers of a number of docks. Some of these docks, and some only, are in the appellants' parish. The appellants maintain that the proper method of ascertaining the rateable value of the docks in their parish is to ascertain what are the earnings of the whole dock system, what is the expenditure necessary to produce those earnings, then having arrived in that way at the profits earned by the dock company upon the whole of their system, to distribute those earnings amongst the different docks in proportion to the water area in the particular parishes. The respondents assert that this is not the proper mode of arriving at the rateable value, that the proper method is to ascertain what are, in fact, the profits earned by each part of the system, by the particular hereditament in each parish, and that the profits thus earned by the hereditament in the particular parish enable you to arrive at the rateable value.

The only question left to the court is the choice between those two methods. I say this because there have been some criticisms addressed to your lordships upon the details of the method adopted and contended for on the part of the respondents. I do not think that your lordships are in a position to deal with such questions as those, because really the form in which the case is stated, and the question left for the court leaves only a choice between the appellants' method or principle, and the respondents' method or principle. If the respondents' method or principle, speaking broadly, be the correct one, then it seems to me to be impossible to give judgment for the appellants, even if there has not been complete accuracy or propriety in the working out of that method. No doubt some of the criticisms upon the method employed by the respondents were properly addressed to your lordships by the learned counsel for the appellants, because they were designed to show that it was impossible to arrive at any satisfactory result by the adoption of the respondents' principle or method, and that therefore you were driven to adopt the appellants' principle or method.

Looking at the matter, apart from any authority, I take certain propositions to be absolutely clear. First, that you are to ascertain the rateable value of a hereditament in a particular parish by regarding that hereditament, and ascertaining what that hereditament would let for in its then condition, such as it then is, to a tenant from year to year. There are no doubt cases in which it is impossible to deal with the hereditament found in a particular parish by itself. It is not such as to be capable of being let to anybody by itself; its only value is as part of a system or undertaking. In that case, although of course you have to ascertain the rateability of that particular hereditament in that parish, it is impossible for you to arrive at its true rateable value, except by regarding the entire system and asking what a tenant from year to year would give for it, considered as a part of that system. Of course the question what he would give for it from year to year as a part of that system involves the consideration of the whole system, and the earnings and profits made by the whole system, and some distribution of them among the various parts which make up that system. But the present case is really not one of that description at all. The question is as to the amount at which certain docks ought to be rated, which would have a rateable value, if the whole of the rest of the dock system were extinguished to-morrow, they would still be docks, and be capable of being used as docks; and certainly a tenant from year to year would be willing to pay a rent for them as docks. They are capable of consideration, and their rateable value is certainly capable of conception without any reference to the general undertaking, as a part of which in fact they are at present used.

What has therefore to be determined is what a tenant from year to year would give for these particular docks, and the parishes are no doubt

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

entitled to insist that in making that inquiry you have here a subject-matter which has an enhanced value by reason of its adaptation to a commercial purpose, that you are not merely to rate it as so many square feet of water or land, but that you are to rate a dock, and the question is what a tenant from year to year would give for that dock. Now I cannot think that where you have a system of docks of different dimensions, adapted to different purposes, in a different local situation, although the distance between them may not be great, they are to be regarded as a homogeneous whole, such as that the earnings of the whole if distributed according to the water area will properly give the earnings of every part. It does not follow that the larger the dock the greater would be its profits, because you cannot consider the matter independently of all the considerations to which I have alluded, in adaptability to a particular trade, its local situation, and other circumstances.

It seems to me, therefore, that theoretically the method contended for by the appellants is the wrong one. I quite feel the force of the arguments they have addressed to your lordships—very able arguments—with a view of showing that although it may not be theoretically accurate, it is the best practically measure of the value of a dock in a particular parish. That was the conclusion arrived at by the Court of Queen's Bench in *Reg.* v. *Hull Dock Co.*, but there all the learned judges admitted that it was not the plan which ought to be adopted if you were able to ascertain what were the earnings of the docks in the particular parishes, that you only resorted to it from necessity because it was not possible to ascertain the earnings of the particular docks and so arrive at the rateable value.

At a later date the case of the *Mersey Docks* v. *Liverpool* came before the courts, and the Court of Queen's Bench, differently constituted, no doubt, from the court which decided the *Hull Dock case*, held that the method which had been sanctioned in the *Hull Docks case* was not to be applied in the case of the *Liverpool and Birkenhead Docks*. The learned judges there came to the conclusion that the method which the Queen's Bench had pronounced theoretically incorrect, but only practically employed because it was impossible otherwise to arrive at the rateable value, was a wrong one: and they considered that there was no real difficulty in arriving substantially at the true result by looking to see what proportion of the dock earnings was attributable to a particular part of their dock system, dependent as that would be upon the amount of traffic which went to one set of docks as compared with another. In the *Hull case* Lord Campbell, in the course of the argument, suggested that the question would have been the same if the docks had not been altogether on the Humber, but had been some on the Humber, and some on the Tyne. That was the very question or the sort of question which had to be considered in the *Mersey Docks case*, except that the docks were on the same river, but the river there was a mile broad. But between the *Mersey Docks case* and the case now before your lordship, I am unable to see the slightest distinction. If we decide this case as the appellants ask us to do we inevitably overrule the *Mersey Docks case*. I am not prepared to do so. I think the decision in the *Mersey Docks case* was right, and I am quite ready myself to adhere to it in all respects.

It is argued that in the present case the vessels pay the dock company for the use of the whole docks, because they may go into any dock they please; and in many cases they go into more than one dock, namely into one to load and in another to unload. That is perfectly true, but it seems to me none the less that you do substantially arrive at what is earned at a particular dock by ascertaining what vessels go there whether it be to load or to unload. No doubt it is perfectly true that if the business of the dock company were so conducted that they purposely diverted traffic into one dock which otherwise would have come, were the convenience of the ship alone considered, into another dock, and so centralized the traffic in one or more docks and denuded the others of the traffic, then the number of vessels loading or unloading in particular docks would no longer indicate the capacity for earning of the various docks. To follow the method adopted by the respondents would, no doubt, then lead to a wrong result. But there is no such case made here at all. There are no facts found in the case pointing to the conclusion that the distribution of the traffic amongst the docks is regulated by anything else except the convenience of the public and the suitability of the docks to the particular traffic; whether by reason of locality, appliances or otherwise. Therefore I see no reason to suppose that the distribution of the traffic is not really, as matters at present stand, an indication of what is the earning capacity of the docks respectively.

That being so, I do not think there is any difficulty in applying the principle which, even in the *Hull case*, was said to be the sound principle if it were capable of application. No doubt you cannot arrive at an absolutely accurate result whatever principle you adopt; that I freely admit; you can only, at the utmost, roughly approximate to it; but I think that you are more likely to approximate to it and that you can feel confidence that you will approximately reach the true result by adopting the method contended for by the respondents; whilst, on the other hand, the method contended for by the appellants seems to me to have an inherent vice which will almost inevitably lead you wrong in the great majority of cases, though, in a certain number of cases no doubt, you might thereby reach the same conclusion.

It was said that one of these docks was partly in one parish and partly in another, and that there you were driven to take the water area. I quite agree that there are some other cases where either the water area or some method of that sort must be applied, because you are dealing with expenditure or receipts which cannot be attributed to a particular part of the system, but which must, in some way or another, be spread over the whole.

There is one other point which I ought to notice. It is said that the method employed by the respondents takes no account of the use of some of these docks as means of passage from one dock to another, which is part of the facility of the dock for which the total payment by a vessel which uses two docks, and a third for the purpose of passing from one to the other, is made. No such point seems to me to be raised in a manner which will enable it to be decided in this case. That is what I have called one of the details connected with the respondents' method of proceeding, but it involves no principle. There is no doubt that in such a case a part of the payment made by the vessel is made for the convenience of passing through the intermediate dock; but, of course, if you were to take from the payment a certain sum in respect of that passage you would would diminish *pro tanto* what would be alloted to the docks in which the ship loaded and unloaded, and it is by no means clear that by omitting this altogether you do not arrive, having regard to the chances of traffic, at much the same result as you would if you were to take it into account. That depends upon the extent to which the vessels go from one dock to

another, and between what docks that traffic flows. But I think it unnecessary to say more upon that point, because it is not really now before your lordships. All that this House has at present to do is to decide between two rival methods, and to determine which of them is the correct one. I do not think I need trouble your lordships further upon this point. For the reasons which I have given I think the judgment appealed from must be affirmed.

CROSS APPEAL.

The point raised in the cross appeal is an entirely different one. Along the wharves of the dock company there run certain tram or railway lines. They are, of course, part of the wharf or dock system, and being in the same occupation there has not to be a separate rating of the railway or tram line. The existence of that railway or tram line is simply an incident of the wharf or quay, and its existence is to be taken into account in rating the wharf or quay. You do not rate that piece or strip of land upon which the rails rest separately from the wharf or quay along which they run; it is all one rateable hereditament rated together. Now, of course, in taking into account the earnings of the dock company, the railway accommodation forms one of the elements from which those earnings proceed. But for those railway lines traffic would not come so readily to the docks; ships could not be so readily loaded or discharged, and fewer ships probably would come there. The consequence is that those railway lines no doubt, by their existence, promote and augment the earnings of the dock. Well, so far their enhancement of the value of the land, that is to say the increase of value which the wharves have in respect of those lines being upon them instead of their being absent, is taken into account, and is necessarily involved in the consideration of what the docks are earning.

But it is said that in addition to that these railways might earn for the docks a larger sum, and that all the earnings which now flow into that exchequer might be received, and in addition to that something more might be obtained by reason of these lines. The fact that the particular occupier chooses to forego a profit which he has only to hold out his hand to receive, of course cannot exclude that source of profit from consideration when you are asking what a hypothetical tenant would give. But in the present case the only company, so far as appears, that has a junction with these railways is the North-Eastern Railway Co., and by an Act passed by the Legislature, no tolls can be demanded by this dock company for the passage of traffic over their lines. The words are very general.

Now under these circumstances the finding by the arbitrator is put in this form: if tolls can legally be exacted, then some money might be received either from the North-Eastern Co. or from some other tenant; but if tolls cannot be legally exacted no such sum can be received. Then the question is, Supposing that no tolls could be got because they cannot legally be exacted, nevertheless are you to add something to the rating already arrived at, on ground that the railway demands some addition? I cannot myself think that it is possible, with all deference to those who have thought otherwise, to arrive at any but one conclusion upon the point, and I think that the view of the learned judges in the court below who have decided in favour of the respondents in this appeal has resulted from a misapprehension of the decision of this House in the *Erith case*, 42 W. R. 330, 63 L. J. M. C. 9, [1893] A. C. 562. I agree altogether with what Lord Halsbury said on this point in the court below. We are dealing here with a profit-bearing undertaking. The parishes do not ask that the land shall be valued merely as land, or land covered with water, but they say: "These are docks with wharves, railways, and all the adjuncts and appliances, and it is as docks capable of earning a profit that they ought to be rated. You are to find out what a tenant from year to year, in view of the profits earned, would be likely to give, and upon that principle they have been rated."

But then it is said: "But they could earn more profits than they are earning, and therefore you ought to suppose that a hypothetical tenant would give more." But if the Legislature have said they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that if you are to disregard such statutory restrictions as these, you might just as well say that a railway company ought not to be rated only according to the tolls which it receives—ought not to be rated even according to the tolls which it could by law receive within its maximum; but that you ought to disregard its statutory maximum, and ask what a tenant from year to year would give for the railway if he could charge any tolls which he pleased.

I do not think there is any foundation for such a proposition. It is supposed to be involved in the decision in the *Erith case*. The *Erith case*, and all the cases there dealt with, were cases of a totally different character. They were cases in which the argument had been used that inasmuch as the particular occupier, who was the only person who would give anything considerable for the land, could not make any profit out of it, from the very nature of the circumstances under which the hereditament was employed, therefore either it had no rateable value or in estimating its rateable value you were bound to regard the actual tenant as not being within the category of hypothetical tenants. That was the question raised there, and all that was said about the profits and about the land being "struck with sterility" by the statute, and so on, was said in relation to a case of that description where the argument was either that the land was not rateable, or that you were to exclude from amongst the possible tenants the actual tenant. I took care to guard myself, as I thought, in the opinion which I delivered, against being supposed to deal with the class of cases now before your lordships, because I said ([1893] A. C., at p. 592): "There is, no doubt, a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-earning undertaking, the profits earned and the shares of those profits attributable to any particular hereditaments have to be taken into account, and in such cases as these" (that is, wherever profits have to be taken into account) "any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must, of course, be considered."

The present case, I agree with Lord Halsbury in thinking, comes exactly within the class of cases which I had in view when I used those words, in which I expressly said that in my opinion any restrictions put by the Legislature on the profit-earning capacity of the undertaking were to be taken into account. Now the present is just one of those cases. For the reasons which I have given it is clear that there is no question about taking into account the

dock company as one of the hypothetical tenants; there is no question of excluding the dock company because it cannot become a tenant. In the present case the dock company is taken into account, and its earnings are taken into account in considering hypothetical tenants and what a hypothetical tenant would pay. But the question is whether, having taken it into account, and having considered it, you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn profit at all. It seems to me that the latter is the state of things which must be taken into account, and that any other cause would lead not only to absurdities, but to the gravest injustice as regards the rating that is imposed. In the *Erith case* I pointed out that where you came to the conclusion that the actual owner or occupier would pay a higher rent than anybody else was likely to pay, even there, taking the occupier into account in considering what a hypothetical tenant would give, you were not to fix the amount higher than you thought that tenant would pay.

It has been ingeniously pointed out that, although it may be that the dock company could not charge tolls to the North-Eastern Railway Co., they did, in fact, receive a sum of money from them for a considerable time. Well, during that time it may be that it would have to be taken into account. But the case finds that for a year or two before this question arose they had not been receiving it, and the question left to us is, What is to be the case where toll cannot be legally exacted?

Then it is further suggested that there might be other railway companies who might have running powers over the North-Eastern system, but would not be the North-Eastern Railway Co., and that the 53rd section of the Act is confined to a prohibition of requiring tolls from the North-Eastern Co.—that, therefore, tolls could be required from these other companies if they ran on to these dock lines, and that therefore this is a matter which ought to be taken into account. Well, if all those facts could be established, very likely the contention of the respondents might be well founded. But the question does not really arise here. In order to ascertain whether there were any foundation for it one would have to see under what circumstances other companies could come over these lines, and one would then have to consider whether, under those circumstances, the prohibition of section 53 would apply. But we have not to consider any such point; the only question left upon this point of the case, as I understand it, being whether, supposing the dock company cannot exact tolls, nevertheless you are to take into account, as adding to the rateable value, the sum which might be obtained by letting this railway.

For these reasons I think that in this case the appeal must be allowed, with the usual result.

Lord MACNAGHTEN.—I concur.

Lord DAVEY.—I agree that the first appeal entirely fails. Speaking for myself, I do not see any great question of principle which is involved in this appeal. What your lordships have to ascertain, in the best way you can, is the rent which a hypothetical tenant from year to year will pay for the rateable hereditament. The profits or earnings of the occupier who carries on a valuable business on that hereditament only come as a measure, a more or less accurate measure, of what you, after all, have to ascertain, namely, the rent which the premises would command from a hypothetical tenant. But those profits or earnings must be the profits or earnings of the rateable hereditament. It may be that in some cases the profits or earnings of the rateable hereditament are so mixed up with profits derived from the beneficial use of other hereditaments from trade carried on upon other hereditaments in common with the rateable hereditament, that is is impossible to separate the rateable hereditament, which has no profit-earning value apart from other hereditaments, and that in those cases it may be proper, as affording the best estimate you can make, to take the profits of the whole undertaking and then apportion them according to the respective areas of the hereditaments in question or according to some other principle. But, it is obvious that you are only using what has been called in the present case the "water area principle" as a means of ascertaining the profits or earnings which are attributable to the particular rateable hereditament, as having been earned from the beneficial occupation of the rateable hereditament and the trade carried on upon it.

Now not only in the *Mersey Docks case*, to which the Lord Chancellor has referred, but also in the *Hull Dock case* itself we are told that you are not to resort to the proportional, or what has been described as the water area method of ascertaining the profits of the rateable hereditament, unless it is necessary to do so. The proper mode is, so far as you can, to ascertain the rateable value by means of what is called the parochial system inaccurately, I think; for the reason which I have already mentioned, that what you have to ascertain is the profits or earnings derived from the beneficial occupation of the hereditament itself; and the proportional method is only a means to that end.

But upon the facts which are stated in the present case, I am wholly unable to come to the conclusion that there is such necessity as should compel the court to adopt the proportional or water-area methods in this case; and in my opinion it would be extremely unjust to do so, because it may be that the docks in one parish, either from their superior situation or from their superior appliances, or from their situation relatively to the requirements of some particular trade, or for some similar reason, are more resorted to, and therefore have a greater profit-earning capacity than the docks forming another part of the undertaking of the dock company; and it seems to me that where such is the case, where there is an inequality in profit-earning capacity between different docks forming part of the undertaking, it would be unjust to increase or to diminish the rates of either parish by the mere proportional method. I am therefore of opinion that the first appeal fails.

CROSS APPEAL.

With regard to the second appeal I will only say this, that Mr. Balfour Browne in his arguments seemed to me to wish to have it both ways. He desires and he is entitled to have the rateable value of the hereditaments within his union enhanced by the fact that they are capable of being employed, and are employed, for the purpose of carrying on a beneficial business. But on the other hand he desires to ignore and altogether repudiate the statutory conditions upon which alone that business can be carried on by the dock company upon the premises.

But it is not necessary to say much upon this appeal, because it is obvious from Lopes, L.J.'s judgment that the learned judges who formed the majority in the Court of Appeal would not have decided in the way they did had they not felt themselves bound by something which was said in the course of the judgment delivered in the *Erith case*. I am of opinion that the learned judges misunderstood what was said by the Lord Chancellor in that

case—that they overlooked the passage in the *Erith case* to which Lord Halsbury referred, and which has now been referred to by the Lord Chancellor, and that that being so we are only deciding in accordance with their own opinion, which they would have expressed had they not laboured under this misunderstanding, when we decide that the second appeal should succeed.

The original appeal dismissed, and the order of the Court of Appeal affirmed, with costs here and below.

The order of the Court of Appeal upon the point raised by the cross-appeal reversed, and the order of the Queen's Bench Division restored here and below; cause remitted to the Queen's Bench Division.

Solicitors for the guardians, *John W. Sykes*, for *Chatham & Son*, Hull.

Solicitors for the dock company, *Chester & Co.*

Court of Appeal.

From Q. B. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 17; June 17.

CHASTEY *v.* ACKLAND. (*a.*)

Easement—Right to undefined passage of air—Implied grant—Prescription—Injunction.

The plaintiff alleged that the defendant, by increasing the height of his buildings, had obstructed the current of air passing over the plaintiff's premises, and had thereby prevented their proper ventilation; and he claimed an injunction in respect of the alleged nuisance.

Held, that though a right might be acquired to have air pass through some definite channel, the plaintiff's claim to have a current of air passing over the whole of his property was too vague, and could not be maintained.

The decision of Cave, J., *reversed.*

Appeal from the decision of Cave, J., at the trial of the action at Exeter. The action was transferred from North, J.

The following statement of the facts is taken from the judgment of Kay, L.J:—

The back windows of the plaintiff's house in the city of Exeter look into a yard 28ft. wide. The house is in a row of houses, which have similar courtyards behind them, the yards together forming a space of some length, and of the width above mentioned. In these yards are low buildings, including a urinal, opposite to the plaintiff's house, belonging to a drill-hall, which is on the opposite side. The series of yards run north and south. On the same side as the plaintiff's house is the house of the defendant. It is the last house northwards in the row, and is three houses distant. The defendant had a low building which closed his yard at the northern end. He has raised this building 16ft. Also the defendant has built another lower building within his courtyard, and opposite to a passage 4ft. wide between another low building and the eastern wall of the drill-hall. The plaintiff complained of these erections on the ground that they diminished the air and light coming laterally to his back windows.

The case was tried by agreement by a judge without a jury, and, by consent of all parties, the judge personally inspected the premises. He found that there was some obstruction to light by the building which has been raised 16ft., and he estimated the damage thus occasioned to the plaintiff at £10. But he found that the interruption to the air was serious, and occasioned a nuisance, and, putting the two together, on the ground of this interference with the light and the air, he granted a mandatory injunction, in effect ordering the defendant to take down the buildings which he had recently erected, and to restore the condition of the premises to what it had been before that erection. The plaintiff's windows are more than twenty years old.

There was a conflict in the sworn evidence as to the effect of the buildings upon the plaintiff's house. The learned judge apparently agreed with those witnesses who said that the air in the plaintiff's yard had become more stagnant, and that the basement of his house had become damp, and the air in the rooms stuffy and unwholesome.

The defendant appealed against the injunction in respect of the alleged nuisance.

Cozens-Hardy, Q.C., and *J. A. Foote*, for the appellant.—The plaintiff is not entitled to relief. In *Bryant* v. *Lefever*, 27 W. R. 612, 4 C. P. D. 172, though nuisance and damage were proved, the action was held not maintainable. The question of obstructing the access of air was considered in *Dent* v. *Auction Mart Co.* (*Limited*), 14 W. R. 709, L. R. 2 Eq. 238; *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. App. 212; and *Harris* v. *De Pinna*, 33 Ch. D. 238, 34 W. R. Dig. 63, and the cases show that an injunction will not be granted to restrain a man from building, even though he thereby causes such a diminution of air to his neighbour as to be a nuisance and a danger to health. So long as a man does not send anything on to his neighbour's land, the obstruction which by building he causes to the access of air is not actionable.

Warmington, Q.C., *H. E. Duke*, and *H. B. Edge*, for the respondent.—The judge saw all the witnesses, and therefore his finding of fact has the same weight as the verdict of a jury: *Directors, &c., of Imperial Gas Light and Coke Co.* v. *Broadbent*, 7 H. L. Cas. 600, 8 W. R. H. L. Dig. 4; see the judgment of Lord Campbell, L.C., at p. 607. The plaintiff has proved the existence of a nuisance and is entitled to relief. See *Aldred's case*, Co. Rep., Part IX., 57*b*; *Ballard* v. *Tomlinson*, 33 W. R. 533, 29 Ch. D. 115; *Bryant* v. *Lefever*; *City of London Brewery Co.* v. *Tennant*; *Dent* v. *Auction Mart Co.* (*Limited*); see judgment of Wood, V.C., as reported in 35 L. J. Ch., at p. 565; *Gale* v. *Abbot*, 10 W. R. 748, 8 Jur. N. S. 987; *Hall* v. *Lichfield Brewery Co.*, 49 L. J. Ch. 655, 29 W. R. Dig. 75; *Moore* v. *Rawson*, 3 B. & C. 332; see judgment of Littledale, J., at p. 339. [LINDLEY, L.J., referred to *Bass* v. *Gregory*, 25 Q. B. D. 481, 39 W. R. Dig. 79.]; *Aldin* v. *Latimer, Clark, & Co.*, 42 W. R. 553, [1894] 2 Ch. 437. The plaintiff is entitled to an injunction: *Shelfer* v. *City of London Electric Lighting Co.*, *ante*, p. 238 [1895] 1 Ch. 287; see the judgment of Lindley, L.J., at p. 316.

They also referred to *Bland's case*, 2 Rolle's Abr. 140, cited in *Aldred's case* and in Gale on Easements, 6th ed., p. 579.

Cozens-Hardy, Q.C., in reply.—If the plaintiff's argument is right it is much easier to establish a right to air than a right to light. The Prescription Act does not apply: *Webb* v. *Bird*, 9 W. R. 899, 10 C. B. N. S. 268, 13 *ib.*, 841. [LINDLEY, L.J., referred to *Dalton* v. *Angus*, 6 App. Cas. 740, 29 W. R. Dig. 75.] The case must come within section 2 or section 3 of the Act. The alleged right is not an easement within section 2, and section 3 does not apply. *Aldred's case* was a case of foul air coming from the defendant's land. Where a right to access of air has

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

been successfully claimed the air has come through a definite aperture, as in *Bass* v. *Gregory* and *Hall* v. *Lichfield Brewery Co.*

Cur. adv. vult.

LOPES, L.J.—This case was heard by Cave, J., at Exeter, and resulted in a judgment for the plaintiff for an injunction restraining the defendant from maintaining certain new buildings beyond a certain height, on the ground that they obstructed the light to which the plaintiff was entitled in respect of certain ancient lights, and also on the ground that they obstructed the free passage of air over and above the plaintiff's premises, and thereby created a nuisance to him in his occupation of his said premises.

The learned judge held that, so far as the obstruction to light was complained of, judgment for £10 with costs would satisfy the plaintiff's claim. Against this determination of the learned judge there is no appeal.

The appeal is against the injunction which has been granted in respect of the alleged nuisance.

The evidence leads me to the conclusion that there is a want of ventilation and an absence of the means of carrying off bad smells on the plaintiff's premises, and that probably the interruption to the free passage of air over the plaintiff's premises caused by the defendant's new wall has aggravated the mischief which had previously existed. But nothing deleterious, nothing hurtful, nothing disagreeable is brought on the plaintiff's premises by anything which the defendant has done. The bad smell and the stuffiness which interfere with his comfort arise on the plaintiff's premises. Unless the plaintiff has against the defendant a right to get rid of this in the particular way which has been interfered with by the defendant he cannot sue the defendant for a nuisance, because the smell and stuffiness arising on his own premises, for which he has not provided any effectual means of escape, cause him annoyance. Every man has a natural right to enjoy the air pure and free from noxious smells or vapours, and anyone who sends on his neighbour's land that which makes the air impure is guilty of a nuisance, but a man must not impose an obligation on his neighbour by having a want of proper ventilation on his own premises. If any nuisance existed it was not a nuisance created by the defendant, and I am unable to agree with the learned judge in the court below in thinking that the plaintiff has any cause of action against the defendant on the ground of nuisance. The case of *Bryant* v. *Lefever* is directly in point, and the reasoning in that case applies here.

But it is contended on behalf of the plaintiff that independently of nuisance he has a right to the free passage of air over and above his premises—a right to have any disagreeable smell existing on his premises carried away by the current of air which would pass over his premises—which right the defendant, by his new buildings, has infringed. It becomes necessary to consider what legal right with regard to the free passage of air the plaintiff has against the defendant; what unlawful act the defendant has done which entitles the plaintiff to complain. By raising his buildings on his own land (which he had a perfect right to do) he has to some extent intercepted the free passage of air above and around the premises of the plaintiff. The current of air comes from the defendant's premises laterally to the plaintiff's premises, but through no defined aperture or passage. The air is at large and in no way confined within finite limits. The claim of the plaintiff is not to have the air pass through some definite channel constructed for the purpose of containing and communicating it, but it is to have the current of air float over the whole of the plaintiff's property—over the yard and the rest of his property at the back of the house. Such a right cannot be maintained. The plaintiff cannot in support of the alleged right rely on prescription at common law, because the houses have been built within legal memory, nor on prescription by statute, because the right to the passage of air is not a right to an easement within the meaning of 2 & 3 Wm. 4, c. 71, s. 2, nor on the presumption of a lost grant from long continued enjoyment, because such a presumption only arises where the person against whom the grant is claimed might have prevented or interrupted the exercise of the subject of the supposed grant. Such prevention or interruption is practically impossible here. Bowen, L.J., in *Harris* v. *De Pinna*, says:—"Then we come to air. It seems to me that the only claim for air which could be supported here is a claim to the passage of undefined air over the premises of the defendant until it reaches the plaintiff's property. It would be just like amenity of prospect, a subject-matter which is incapable of definition. So the passage of undefined air gives rise to no rights, and can give rise to no rights for the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."

But it was urged that the right to the access of air had been acquired by an implied covenant, an implied covenant entered into at the time the houses were built, that the owners of the adjoining houses would not do anything to intercept the free passage of air over his neighbours' property. The answer is that there is nothing from which such a covenant can be implied. *Hall* v. *Lichfield Brewery Co.* was a case where the plaintiff had for upwards of thirty years enjoyed a free access of air to his slaughter-house through two defined apertures, and there were circumstances in the case raising the presumption of an implied covenant. It was a user, too, which might have been interrupted. The law will not imply a grant except it is of something definite. The undefined passage of air is too vague. If the plaintiff has been inconvenienced by anything the defendant has done, it is *damnum absque injuria*, and affords no legal ground of complaint to the plaintiff. The appeal must be allowed.

KAY, L.J., stated the facts as above, and continued:—Lord Cranworth, in *Durell* v. *Pritchard*, 14 W. R. 212, L. R. 1 Ch. App. 244, said that the court will not interfere by way of mandatory injunction, except in cases in which extreme, or, at all events, very serious, damage will ensue from its interference being withheld. Applying this rule here, the learned judge seems to have thought that the damage done by interference with light would not alone have justified the granting of a mandatory injunction. The question is, whether the interruption of the current of air past the back windows of the plaintiff's house, in addition to the interference with the light, warranted the court in granting it. It is denied in argument that such an interruption of air constitutes a legal wrong. It is pointed out that there is no diminution of the quantity of air that would enter any window of the plaintiff's house. The defendant has not built anything opposite to any of those windows. All he has done is to prevent some of the current of air, which, before his buildings were erected, would pass through the series of back-yards including the plaintiff's yard, from passing the plaintiff's windows, and thus the air which enters the plaintiff's house by those windows is rendered less fresh and salubrious. The case is different from the act of a man who fouls the air on his own land, as by brickmaking, and allows that foul air to pass on to his neighbour's land. The

defendant here has not fouled the air. By diminishing the current over the plaintiff's yard he has rendered the air in that yard more stagnant, so that, if any foul exhalation mingles with it, that exhalation does not pass away so speedily as it would before. In *Webb* v. *Bird* very eminent judges agreed in deciding that building upon a man's own land so as to diminish or interfere with the air which came to the plaintiff's windmill was not a legal wrong, although the windmill had existed more than twenty years. They held that the right to the passage of the air was not an easement within 2 & 3 Will. 4, c. 71, s. 2, and that no presumption of a grant of such a right could be made, because it would have been difficult, if not impossible, for the owner of the adjoining land to interrupt it so as to prevent the acquisition of it by lapse of time. Lord Blackburn, in his judgment, guards himself against saying anything which would affect the common law right which may be acquired to the access of light and air through a window.

This was followed in *Bryant* v. *Lefever*, where the plaintiff complained that the defendant had raised his house, which adjoined the plaintiff's house, so as to make the plaintiff's chimney smoke. The jury found that this sensibly and materially interfered with the comfort of human existence in the plaintiff's premises. It is obvious that this was a mere interference with the direction of the current of air. Coming over the higher building, it would fall upon the top of the plaintiff's chimneys, and so check the upward draught. The alleged case of nuisance was answered by the learned judges, by saying that the nuisance was occasioned by the smoke generated in the plaintiff's own house, and was not caused by the defendants. But Bramwell, L.J., says that if the defendants did cause nuisance they had a right to do so. The decision had nothing to do with the question whether a man can stop or materially diminish the air coming over his land to a defined orifice for the admission of air, such as a window which has existed more than twenty years in his neighbour's house.

In *Harris* v. *De Pinna* the plaintiff had a structure for storing timber open at the sides abutting on the defendant's premises, and it was held that he could not maintain a claim of right to have all the air which came across the defendant's premises to this structure. On the other hand, there is authority for the proposition that the diminution of the quantity of air entering a house by a defined aperture which has existed for the admission of air for more than twenty years may be a legal wrong. In *Aldred's case* Wray, C.J., said that "for stopping as well of the wholesome air as of light an action lies, and damages shall be recovered for both of them, for both are necessary, for it is said, *et vescitur aura ætherea*, . . . but for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, . . . and if the stopping of the wholesale for gives cause of action, *a fortiori* an action lies . . . for infecting and corrupting the air."

In *Gale* v. *Abbot* stopping the air from coming to the defendant's house by the ancient windows of his back kitchen was held to be a nuisance, and an injunction was granted to prevent the continuance of the obstruction.

In the *City of London Brewery Co.* v. *Tennant*, Lord Selborne said: "It is only in very rare and special cases involving danger to health, or at least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air."

In *Hall* v. *Lichfield Brewery Co.* Fry, L.J., when a judge of first instance, decided that the interruption of the free access of air through two apertures to a slaughter-house, which had existed for thirty years, was an actionable wrong, and he gave damages. In his judgment the learned judge said that the right to have an access of air to an aperture in a dwelling-house undoubtedly existed at law; that it could not be claimed by grant, because it was not a thing which was to be used by the grantee on the soil of the grantor; that, therefore, it was not a subject of prescription, which is the implication of a grant, but that it was put by Littledale, J., in *Moore* v. *Rawson*, upon a covenant which the law would imply; and the nature and extent of such implied covenant in the case of a dwelling-house would be "not to interrupt the free use of salubrious air. Anything, therefore, which renders the air unsuitable, either in point of quantity or quality, for the purpose of a dwelling-house or the human beings who occupy it would be a breach of the implied covenant." From the report of the same case it appears that the defendant's building complained of was so near to the slaughter-house of the plaintiff that it materially diminished the draught of air through the aperture in question.

In *Bass* v. *Gregory* the plaintiff had for forty years enjoyed the passage of air from a cellar in his house through a tunnel which opened into a wall on his neighbour's land, and it was held that the neighbour could not stop up the wall so as to prevent the passage of air by this tunnel. Now, the question is within which of these two classes the present case comes. It was put in argument as an interference with the air coming to the plaintiff's windows. I have pointed out that the acts of the defendants have not diminished the quantity of air entering those windows, nor have they altered the quality of the air which passes from the defendant's land. The consequence of the air in the plaintiff's back-yard becoming more stagnant seems to me to be too remote to make what the defendant has done a legal wrong. But the learned judge in the court below seems to have found that the defendant's acts have occasioned a nuisance to the plaintiff. So far as that nuisance results from emanations from the urinals and other conveniences in any of the backyards, the reasoning of the judges in *Bryant* v. *Lefever* seems to apply. These are not caused by the defendant, and the remedy, if any, should be sought against the owners of the several erections which emit noxious odours. But can an interference with light or air which is not otherwise actionable be restrained on the ground of nuisance. Bramwell, L.J., as I have pointed out, says it cannot. Suppose a man were to build a house on the edge of his own land, with windows for the admission of light and air looking over his neighbour's land. Nothing could be a greater nuisance than completely to block such windows by building a wall immediately opposite to them. But it cannot be doubted that the neighbour might do this at any time within twenty years. It is quite right to say, as Lord Selborne intimated in the words I have quoted, that a diminution of the quantity of air coming to a defined aperture in a house which had existed for twenty years so considerable as to cause a nuisance may be actionable. But that is the only way in which the term can properly be applied to a mere diminution in the quantity of the air. Unless the right to have it come over the land of another has been acquired by lapse of time, the mere diminution of quantity is not a nuisance in law. The result is that the interference with the current of air in this case was not such as to cause an actionable wrong, and the injunction must be dissolved. The judgment should be for £10 damages and costs of the action, save so far as increased by the claim as to air, and the defendant must have the costs of the appeal.

LINDLEY, L.J., said:—I concur in the judgments which have been read; but I will add a few words to explain the view which I take of the case, which I regard as a extremely important one. It has been decided that the right to air is not an easement within section 2 of the Prescription Act: *Webb* v. *Bird*. Independently of the Act, everyone has a right to enjoy whatever air comes to him; but, speaking generally and apart from long enjoyment, or some grant or agreement, no one has a right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance. But, although the Prescription Act does not apply to air, a right to have it come over another's land, in some definite direction to some particular place, can, I apprehend, be established by what is called immemorial user, or by user which may have had for its origin some lost grant or agreement binding on the owners of the servient tenement. In the present case immemorial enjoyment is not alleged, no doubt because the plaintiff's house is not sufficiently old. Then, as to a lost grant or binding agreement to allow air to come freely to the back of the plaintiff's house over the defendant's land, the plaintiff does not prove enjoyment of air coming in any definite direction over the servient tenement, and to burden the servient tenement to the extent necessary to protect the plaintiff from the diminishing of the free passage of air to the yard at the back of his house is, I think, contrary to the authorities, and would be to stretch the doctrine of lost grant further than the principle warrants. The subject-matter of the grant is too indefinite. The doctrine, if applicable to one neighbour, would be equally applicable to all, both for better and for worse; and there are no grounds for benefiting or burdening all or any of them to the extent necessary to protect the plaintiff in the enjoyment of the right which he claims. The plaintiff did not prove the existence of any covenant or agreement binding the defendant not to build over his own back-yard so as to interfere with the comfort of the plaintiff, and there are no materials for holding that any covenant to that effect was ever in fact entered into. But in the absence of such a covenant, express or implied, the plaintiff's claim to relief in respect of air cannot, in my opinion, be supported. The appeal must therefore be allowed; the judgment must be reversed, and the plaintiff must have judgment for £10 for the injury done to his ancient light and for the costs of the action, except so far as they have been increased by the claim to air, which he must pay. He must also pay the costs of the appeal, and the costs must be set off against each other in the usual way.

Solicitors, *Torr, Gribble, Oddie, & Sinclair*, for *Roberts & Andrew*, Exeter; *Templeton & Cox*, for *G. Hirtzel*, Exeter.

High Court of Justice.

Chan. Div. Stirling, J. — June 15, 19.

In re DE HOGHTON. (*a*.)

Inland Revenue—Legacy duty—Annuity bequeathed by will—Charge upon real estate—8 & 9 Vict. c. 74, s. 4.

A testator devised all his real estate to trustees for a term of 500 years, and subject thereto he devised the same to the use of C. H. for life, with remainder (in the events that happened) to the use of R. H. for life remainder to J. H. for life with remainders over. The trusts of the term were out of the rents and profits to raise and pay certain annuities, and in particular to raise and pay to the person who for the time being should (subject to the said term) be entitled under the will to the possession or receipt of the rents and profits of the devised estates an annuity of £3,000, and subject thereto to accumulate the rents and profits during the period of twenty-one years from the death of the testator, and after the determination of the said period of twenty-one years to pay the rents and profits to the person for the time being entitled to the said hereditaments in reversion expectant upon the said term.

The testator died in 1876; *R. H. died in* 1892; *C. H. died in* 1893; *and thereupon J. H. became entitled to the* £3,000 *annuity.*

Held, that during the period of twenty-one years from the death of the testator, J. H. had a mere charge upon the rents and profits of the devised estates, and that therefore legacy duty, and not succession duty, was payable by J. H.

Attorney-General *v.* Jackson, 2 *Cr. & Jer.* 101, *followed.*

This was a petition by Sir James de Hoghton and Robert Ireland Blackburne, the present trustees of the will of the above-named, Sir Henry de Hoghton raising the question whether legacy duty or succession duty was payable in respect of an annuity of £3,000 to which Sir James de Hoghton had become entitled under the said will.

The said Sir Henry de Hoghton died on the 2nd of December, 1876, having by his will dated the 9th of February, 1875, appointed Sir Charles de Hoghton, Richard de Hoghton, and Richard John Flowerdew (all since deceased), to be executors and trustees thereof, and after a gift of an annuity to each of them the said Richard de Hoghton and Richard John Flowerdew, as therein mentioned, the testator gave, devised, and appointed all his freeholds of inheritance unto the said Sir Charles de Hoghton, Richard de Hoghton, and Richard John Flowerdew, their heirs and assigns, to the use of the same persons, their executors, administrators, and assigns for the term of 500 years, to commence from the testator's decease without impeachment of waste upon the trusts thereinafter declared concerning the same, and subject to that term and to the trusts thereof. To the use of the said Sir Charles de Hoghton and his assigns for his life without impeachment of waste with remainder to the use of his first and other sons, as therein mentioned in tail male with remainder, to the use of the said Richard de Hoghton, and his assigns for his life without impeachment of waste with remainder to the use of his first and other sons as therein mentioned in tale male with remainder to the use of the petitioner, Sir James de Hoghton, and his assigns for his life without impeachment of waste with remainder to the use of his first, and every other son successively according to their respective seniorities in tail male with divers remainders over, and the testator declared that the premises were limited to the said Sir Charles de Hoghton, Richard de Hoghton, and Richard John Flowerdew, for the said term of 500 years upon trust by and out of the rents and profits of the hereditaments comprised therein to raise and pay as therein mentioned the annuities or annual sums for the time being payable under the will now being stated or any codicil thereto, and in particular to raise and pay to the person who for the time being should (subject to the said term) be entitled under the will to the possession or receipt

(*a*.) Reported by W. SCOTT THOMPSON, Esq., Barrister-at-Law.

of the rents and profits of the said devised estates, provided that such person, if a male, should be above the age of twenty-one years, or if a female, should be above the age of twenty-one years or have married, the annuity following according to the age of the recipient—that is to say, if and while the recipient was under the age of twenty-five years £1,000, and if and while between the ages of twenty-five and thirty years £2,000, and if and when above the age of thirty years £3,000, the annuity of such person if a married woman, to be for her separate use without power of anticipation as therein mentioned, with a direction that after the death of the testator's wife the amount of such annuity of £1,000, £2,000, or £3,000, as the case might be, should be increased by the sum of £1,000 per annum, and a declaration that if any person to whom the testator had by his will or should by any codicil thereto have given any other annuity, should become entitled in possession to any such annuity of £1,000, or £2,000, or £3,000, or, after the death of the testator's said wife, to any such increased annuity as aforesaid, then his or her other annuities should thereupon cease. And the testator declared that, subject to the trust thereinafter declared, and to the costs and expenses of the trustees as therein mentioned, the trustees should, during the period of twenty-one years from his death, accumulate the rents and profits arising from the hereditaments and premises comprised in the said term as therein more particularly mentioned, and apply the same with the accumulations upon the trusts and with and subject to the powers, provisoes, or declarations thereinafter contained of and concerning the moneys to arise from a sale in pursuance of a power of sale thereinafter contained as therein mentioned, and after the determination of the said period of twenty-one years, subject as aforesaid, should pay the rents and profits to the person or persons for the time being entitled to the said hereditaments and premises comprised in the said term in reversion expectant upon the said term. And the testator empowered his trustees to make sales or exchanges, and to join in partition of any part of the hereditaments from time to time, subject to the limitations of his will as therein mentioned. And declared that his trustees should invest all moneys which might become payable upon any such sale, exchange, or partition as aforesaid in the purchase, as therein mentioned, of any freehold, copyhold, or customary hereditaments in Great Britain for any estate of inheritance to be conveyed or surrendered to and held by them or him to the uses and upon the trusts and with and subject to the powers, provisoes, and declarations of the will now being stated from time to time affecting the testator's real estates thereinbefore devised, or as near thereto as circumstances should then admit of as therein mentioned; and the testator declared that until the money to arise by such sale, exchange, or partition as aforesaid should be disposed of as thereinbefore directed, his trustees might invest the same or any part thereof as therein mentioned, and that the income should be applied in the same manner as the rents and profits of the hereditaments to be purchased therewith as aforesaid would be applicable in case such purchase as aforesaid was actually made. And the testator thereby devised all his copyhold and customary hereditaments unto and to the use of the said Sir Charles De Hoghton, Richard de Hoghton, and Richard John Flowerdew and their heirs upon such trusts and with and subject to such powers, provisoes, and declarations as were thereinbefore limited and declared of and concerning the freehold premises thereinbefore devised as nearly as the different tenure and quality of the premises and the rules of law and equity would permit. And the testator thereby devised and bequeathed his leasehold hereditaments to his said trustees upon corresponding trusts. And the testator thereby bequeathed his personal estate to his said trustees upon trust for conversion as therein mentioned, and to pay his funeral and testamentary expenses and debts and legacies, and the legacy duty in respect of all legacies and annuities given by that his will or any codicil thereto free from legacy duty, and to hold and apply all the residue of the said moneys upon the trusts and with and subject to the powers, provisoes, and declarations, and in the manner thereinbefore declared and directed of and concerning the moneys to arise from any sale of the real estates thereinbefore devised under the power of sale thereinbefore contained. And the testator directed that each of the said annuities given by his will should be free from legacy duty, and that the said annuities were to be paid out of the annual income only of his real estate and personal estate, and not out of capital or *corpus*.

The said Richard de Hoghton died without issue on the 17th of August, 1892.

The said Sir Charles de Hoghton died without issue on the 12th of April, 1893, whereupon the petitioner, Sir James de Hoghton, succeeded to the baronetcy, and became entitled to an annuity of £3,000 under the trusts of the said will.

No duty had been paid in respect of the said annuity of £3,000 to which Sir James de Hoghton so became entitled as aforesaid, and the Commissioners of Inland Revenue claimed that succession duty and not legacy duty was payable thereon.

In order to obtain the decision of the court upon the point the present petition was presented by the trustees of the will, asking that whatever duty the court might determine to be payable in respect of the said annuity of £3,000 might be ordered to be paid out of some of the funds or moneys forming capital or *corpus* of the estate of Sir Henry de Hoghton, deceased, or otherwise as the court might direct.

Hastings, *Q.C.* (*Ingle Joyce* with him), for the petitioners, referred to 8 & 9 Vict. c. 76, s. 4; and argued that the case plainly fell within that section.

He cited *Attorney-General* v. *Jackson*, 2 Cr. & Jer. 101; *Stow* v. *Davenport*, 5 B. & Ad. 359; and *Shirley* v. *Earl Ferrers*, 1 Ph. 167, and contended that the last-mentioned case did not apply. For that unless Sir J. de Hoghton lived until the determination of the twenty-one years term he would take no interest in the estate or the accumulations.

Buckley, *Q.C.* (*Method* with him), for the persons interested in remainder other than E. I. de Hoghton.

Rowden, for E. I. de Hoghton.

Vaughan Hawkins, for the Commissioners of Inland Revenue, argued that succession duty was payable; that the question put broadly was this: Was Sir James de Hoghton owner of the estate? The cases of *Attorney-General* v. *Jackson* and *Stow* v. *Davenport* went upon rent-charges given to persons not the owner of the estate. *Shirley* v. *Earl Ferrers* shows clearly that in such a case legacy duty is not payable.

He referred to section 21 of the Act of 1888 (51 Vict. c. 8.

Hastings, in reply.

STIRLING, J., stated the facts, and proceeded as follows:—Now the rents and profits largely exceed the annuities which are mentioned in the will, and the question has arisen whether legacy or succession

duty is payable upon the annuity to which Sir James de Hoghton is entitled during the term.

The statute on which the question depends is 8 & 9 Vict. c. 76, s. 4. That is in itself a re-enactment with some extensions of the statute 45 Geo. 3, c. 28, s. 4, which was itself a re-enactment of section 7 of the Act 36 Geo. 3, c. 52. Reading the Act now in force shortly, it runs thus: "from and after the passing of this Act every gift by any will of any person which is or shall be charged upon the real estate of such person shall be deemed a legacy within the meaning of the Acts relating to duties on legacies.

Now the corresponding clause in the Act 45 Geo. 3, section 4, was considered by the Court of Exchequer in the case of *Attorney-General* v. *Jackson*.

There the testator gave certain real estate to Charlotte Troughton for life, and, after her decease, and, in the event of her husband Joseph Troughton surviving her, he gave him an annuity or yearly rent-charge of £500, with such power and remedy of distress and entry and perception of rents in case the annuity should be in arrear as are reserved to lessors for the recovery of rents on leases for years, and subject to that annuity he gave his real estates in moieties as therein mentioned. It was held that legacy duty was payable upon this devise in favour of Joseph Troughton. The judgment was delivered by Lord Lyndhurst, who was then Lord Chief Baron, and he said "It appears to us that this clause comes precisely within the terms made use of by the Legislature—a gift by way of annuity out of or charged upon his or her real estate. We cannot therefore take upon ourselves to say, as this clause comes precisely within the terms made use of by the Legislature, that the Legislature did not intend that it should apply to a case of this description." Upon that ground it was held subject to legacy duty. The same point was considered by the Court of Queen's Bench in *Stow* v. *Davenport* when the decision in *Attorney-General* v. *Jackson* was followed, and that has never since been departed from. In the case of *Shirley* v. *Earl Ferrers* a decision was given which is said to qualify the rule laid down in *Attorney-General* v. *Jackson*. There the testator devised certain real estates to the use of trustees for the term of 500 years and subject thereto to the use of other trustees to preserve contingent remainders, with remainder to the first and other sons of C. S. (then an infant) with divers remainders over, and he directed that the trustees of the term should after paying certain annuities apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a certain amount) in aid of another fund to the maintenance and education of C. S. until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying they should, during her lifetime, pay the surplus rents, after the payment of the annuities, to her for her separate use. The decision was that of Lord Lyndhurst himself, who was then Lord Chancellor, and the case of *Attorney-General* v. *Jackson* was cited.

What his lordship said in giving judgment is very short, and it is: "The effect of the will is to give the petitioner (C. S.) a life estate subject to certain charges, and coupled with a direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attain the age of twenty-one or marry. The direction merely does what the court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true the trustees have a discretion to allow a portion of the rents not exceeding a certain amount for that purpose, but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that, as far as possible, we should avoid refinements in the construction of this Act. I am of opinion that no legacy duty is payable, and the stop must be taken off."

Now that case is relied on by the Crown in the present case. It said and I think truly said that two principles are laid down or implied in the in the judgment of Lord Lyndhurst. First that in considering the nature of the interests created by the will or other instrument for the purposes of this act the substance of the thing is to be looked at and not the mere conveyancing form, and that secondly the annuity within the meaning of 8 & 9 Vict. c. 76 s. 4 must be a charge upon the estate of another person, and not merely a portion of the estate of the same person. I propose to apply these two principles to the present case and to consider whether in substance what is given to Sir James De Hoghton during the period of twenty-one years from the death of testator is or is not a charge upon the estate of another person. Now let us proceed by steps. If the trust had been during the period of twenty-one years to pay Sir James De Hoghton say the sum of £3,000 a year for twenty-one years and to pay the residue of the rents and profits to a person whom I will call A., and then subject to the term to a third person whom I will call B., for life with remainders over, then it seems to me the case would plainly fall within the decision in *Attorney-General* v. *Jackson*. Does it make any difference that the person whom I have denominated A. is Sir James De Hoghton himself? I cannot see that it does. During the period of twenty-one years he does not take the income. He merely takes a portion of income and the residue or income is given away to another person A. and therefore during that period the annuity is charged upon the estate or interest of A. Then all that remains is to consider whether again it makes any any difference that in this case the person whom I have designated A. is a trustee directed to lay out the surplus rents which do not belong to Sir James during the twenty-one years. It is possible that if he survives the period he may take an interest, but if he dies during that period he takes no interest whatever. It seems to me that during the twenty-one years Sir James De Hoghton has a mere charge on these rents that are given beneficially to other persons, and that consequently legacy duty and not succession duty is payable.

Solicitors; *Rowcliffes Rawle & Co*; *Park Nelson & Co* (Solicitors to the Inland Revenue).

Chan. Div. Romer, J. } March 26, 27; April 2.

ROBSON v. SMITH. (a.)

Company — Debenture — Floating security — Charge — Garnishee order.

A debenture which creates merely a floating security on the assets of a company, and even though it contains a provision that the company shall not be at liberty to create any mortgage or charge upon its property in

(a.) Reported by J. W. GREIG, Esq., Barrister-at-Law.

priority to the debenture, does not, before a winding up or a receiver has been appointed, constitute a charge on specific assets such as a debt due to the company, and a creditor who has obtained a garnishee order absolute is entitled to priority over the debenture security. A garnishee order absolute does not come within the term "charge" in such a proviso as that in the debenture in question. A garnishee order absolute is a form of execution, not a charge.

Trial of action.

This was an action brought by the holder of a debenture for £3,000 issued by the Empire Printing and Publishing Co. (Limited) against Smith, Son, & Downes and others for an order (1) that the plaintiff was, by virtue of his debenture, the assignee in equity of a sum of £200 owing by the defendants to the company; and (2) that by virtue of a notice of October 10, 1893, the defendants, as from that date, became trustees for the plaintiff of, or otherwise liable to pay him, the said sum of £200; and (3) an order for payment accordingly.

The debenture was in the following form:—The company covenanted to pay the bearer on presentation, on the 4th of June, 1890, or at the expiration of six calendar months after the bearer should by notice in writing to the company, have required it to do so, or on such earlier day as the principal sum thereby secured should become payable in accordance with the conditions endorsed thereon, the sum of £3,000, and to pay interest in the meantime. And the company thereby charged with such payments "its undertaking and all its real and personal property (both present and future), including its uncalled capital for the time being."

The endorsed conditions were (*inter alia*) the following:

"(*a*) The charge created by the said debenture is to be a floating security upon the real and personal property (both present and future) of the company, but so that the company shall not be at liberty to create any mortgage or charge upon any such property in priority to the said debenture."

"(*c*) The principal sum secured by the said debenture shall immediately become payable (1) if the company makes default for twenty-eight days in the payment of any interest thereby secured, and the bearer, before such interest is paid, by notice in writing to the company, calls in the said principal sum; or (2) in case the company, before the said principal sum and all interest for the same shall be fully paid, shall, by reason of its inability to meet its engagements, suspend payment; or (3) if an order is made, or an effective resolution is passed, for the winding up of the company."

The company having failed to pay interest, judgment was, on the 23rd of August, 1893, recovered by Robson for principal and interest due to the 25th of July, 1893, on the debenture. The sheriff, under a writ of *fi. fa.*, levied on the company's property for £3,090 16s. 2d., but the levy realized only £1,000.

On the 21st of September, 1893, a creditor, Walker, recovered judgment against the company for £300, and on the 27th of September, 1893, obtained a garnishee order *nisi* against the defendants Smith, Son, & Downes for payment to him of the £200 due from Smith, Son, & Downes to the company. At that date (September 27, 1893) there was due to Messrs. Usher & Co. a sum of £140; they had recovered judgment two years previously, and they also obtained against Smith, Son, & Downes a garnishee order *nisi*. Both these garnishee orders were returnable for the same date—namely, the 4th of October, 1893. Robson, on the 28th of September, obtained also a garnishee order *nisi* against Smith, Son, & Downes returnable on the 5th of October, 1893. The garnishee orders *nisi* of Walter and Usher & Co. were made absolute on the 4th of October, and on the 5th of October Robson also obtained an order absolute directing Smith, Son, & Downes to pay Robson the balance of their debt to the company after satisfying the garnishee orders of Walter and Usher. Robson, on the 10th of October, 1893, gave notice in writing to Smith, Son, & Downes that he claimed payment under the debenture from them of all debts due to the company, and that they were not to pay what they owed the company to anybody but himself.

Shortly afterwards Smith, Son, & Downes paid Walter £200, Walter's debt having been decided to have priority over that of Usher & Co. This action was thereupon brought by Robson to recover £200 from Smith, Son, & Downes.

The company was not wound up until October, 1894.

Rowden and *Paice*, for the plaintiff.—Robson's debenture was a charge on all the company's assets including book debts owing to it, and he was an equitable assignee of those assets and cannot be displaced by subsequent garnishee orders. The debenture had ceased to be inchoate when the company failed to pay interest: *In re Standard Manufacturing Co.*, 39 W. R. 369, [1891] 1 Ch. 627; *In re Opera (Limited)*, 39 W. R. 705, [1891] 3 Ch. 260. A garnishee order absolute only gives the garnishee a lien on what is due the creditors less prior equitable charges. The garnishees need not have paid the debts to the garnishors as they had notice of Robson's equitable prior charge: *Wood* v. *Dunn*, 15 W. R. 180, L. R. 2 Q. B. 73; *Ex parte Whitehouse*, 34 W. R. 681, 32 Ch. D. 512.

Neville, Q.C., and *Eve*, for the defendants.—A floating security such as this does not become a specific charge until a winding up has taken place or a receiver has been appointed: *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434, 40 W. R. Dig. 33. *Wood* v. *Dunn* does not finally settle what the effect of payment under a garnishee order is where the garnishee has notice of a prior charge.

They also cited *In re Horne and Hellard*, 29 Ch. D. 736, 33 W. R. Dig. 234; *Mayor of London* v. *London Joint Stock Bank*, 29 W. R. 870, 6 App. Cas. 393; *Ex parte Whitehouse; In re Colonial Trusts Corporation*, 15 Ch. D. 465, 29 W. R. Dig. 40; and *Davis* v. *Freethy*, 24 Q. B. D. 519, 38 W. R. Dig. 193.

Rowden replied.

ROMER, J.—Debentures like the plaintiff's have been frequently considered by the courts. They constitute what is called a "floating security," that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up, or stops business, or a receiver is appointed at the instance of the debenture-holders, or as it has been said (see *In re Standard Manufacturing Co.*, [1891] 1 Ch., at p. 641) they constitute a charge, but give a licence to the company to carry on its business. So long as the debentures remain a mere floating security, or in other words the licence to the company to carry on its business has not been terminated the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security.

In the present case at the time that the defendants as garnishees under the order of the court paid the debt due to the company, the plaintiff's debenture

remained a floating security only. The company was not wound up until many months afterwards. No receiver had been appointed at the instance of a debenture-holder nor had the plaintiff taken any step as against the company to enforce his security or to prevent the company from carrying on its business. On the contrary, he had immediately before obtained a judgment against the company for the debt secured by the debenture and by way of execution of this judgment debt, and had obtained in the ordinary way an order against the defendants as garnishees for payment of the balance of their debt to the company remaining after payment to the prior garnishors under the above-mentioned prior order. In this way he recognized the fact that the company was carrying on its business and was entitled to deal with its property in the ordinary course. Nor had the company in fact even stopped business and still less had the defendants notice of any stoppage. An attempt was made by the plaintiff to prove that the company had stopped business before the defendants paid the prior garnishors, but this attempt failed. No doubt the company was in difficulties and executions on judgment debts against the chattels had been enforced and the chattels sold and the company had been obliged to change its registered address. But the plaintiff's own witness, Fraser, had to admit that a new address had been registered and that the company continued for some time afterwards to carry on business, for instance, it completed pending orders and had printing work done for it by third parties in order to enable such orders to be carried out. The licence to the company to carry on its business implied by debentures of this class had not been withdrawn at the time the defendants made the payments now impeached, nor had the plaintiff or anyone else taken any effectual step towards such withdrawal. The notice not to pay that the plaintiff sent to the defendants, after the first garnishee order, and before actual payment, was no withdrawal of the licence as between the plaintiff and the company, nor did the notice venture to inform the defendants that the floating nature of the security had been changed, or that any step had been taken to wind up the company, or to get a receiver appointed, or to prevent the company from carrying on its business. The notice sent would have been no justification or valid excuse to the defendants if they had refused to pay under the existing garnishee order, or if they had applied to the court to set aside or prevent the enforcement of that order. And if no garnishee order had been in existence, the notice would not have justified the defendants in refusing to pay their debt to the company on demand made by the company. The holder of a debenture constituting a floating security, only while the company is carrying on its business, and when no steps have been taken to wind up the company or to get a receiver appointed cannot single out a particular debt due to the company, and require by notice that debt to be paid to him or not to be paid to the company or to those validly claiming through the company (see the observations of Stirling, J., in *Hubbuck* v. *Helms*, 35 W. R. 574). For these reasons it appears to me that the payment by the defendants to the first garnishors was good as against the plaintiff, and that the plaintiff's action accordingly fails, and I need not consider the other grounds of defence raised on behalf of the defendants. I ought to say that the cases of *In re Standard Manufacturing Co.* and *In re Opera (Limited)*, relied upon by the plaintiff, are not in point. Those were cases of execution creditors, and in both the winding up of the company commenced before the sheriff sold, and therefore before the execution was completed—in other words before the assets seized by the execution creditors had been completely dealt with so as to give any rights therein to the creditors. I should perhaps add that in the present case the plaintiff's debenture contained the not unusual provision that the company should not be at liberty to create any mortgage or charge upon any property in priority to the debenture, but this provision is not material in this action, for garnishee proceedings are only a form of execution, and do not lead to any "charge" in the true sense being created by the company on the debt garnished. The word "charge" in a provision of this class is construed strictly, for instance, the provision has been held not to prevent the solicitor of the company from asserting his lien in priority to the debentures (see *Brunton* v. *Electrical Engineering Corporation*). The action must, therefore, be dismissed, and with costs.

Solicitors for the plaintiffs, *Paice & Cross*.

Solicitors for the defendants, *Van Sandan & Co.*

Q. B. Div.
(Wills and Wright, JJ.) June 11.

PLETTS (*Appellant*) v. CAMPBELL (*Respondent*). (a.)

Licensing Acts—Off-licence—Orders taken at one place executed at another—Payment for goods ordered on delivery—Sale of liquors at a place not authorized by licence—Licensing Act, 1872, *s.* 3.

P., holding an ordinary licence to sell intoxicating liquors, to be consumed off the premises, at his licensed premises in Stanley-street, Burnley, was in the habit of sending his carman round weekly to certain customers, who received their orders for beer sold by him in gallon jars. These orders were supplied from goods stored on the said licensed premises, and duly delivered by the carman on his next journey, who then received payment for the beer supplied, together with the empty jar.

Held, that the sale was not effected at the licensed premises at Stanley-street, but at the house of the customer.

Special case.

This was an appeal against a conviction of the justices of the petty sessional division of Blackburn, Lower, whereby the appellant was convicted under section 3 of the Licensing Act, 1872, of selling intoxicating liquor at a house situated at 142, High-street, Rishton, where he was not authorized by his licence to sell the same, he being licensed only to sell by retail intoxicating liquors in his house at 11, Stanley-street, Burnley. An appeal was heard at quarter sessions, where the magistrates allowed the appeal subject to a case to be stated for the opinion of the court.

The material facts set out in the case were as follows:—The appellant Jonathan Pletts is a brewer holding among other licenses one under the Beer House Act, 1830 (11 Geo. IV. and 1 Wm. IV. c. 64) to sell beer by retail at 11, Stanley-street, Burnley, to be consumed off the premises. On the 26th May 1894, a man named Greenwood in his employment as carman delivered in a cart driven by him a stone jar containing one gallon of XX beer to Mrs. Ann Moore at 142, High-street, Rishton, in payment for which he was to and did receive on behalf of the appellant one shilling, on or about the 2nd day of June. Evidence showed that a regular course of dealing had been carried on for eight months prior to that date, between the appellant and the

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Moores, by which Greenwood delivered from his master's cart, carriage free, one gallon of beer week by week in pursuance of orders given to him by Mrs. Moore from time to time. On the occasion of each delivery Greenwood received payment for the beer delivered the previous week together with the empty jar. On the week preceding May 26, 1894, Mrs. Moore gave an order for a gallon of beer. The order (together with others received on that day) was entered by Greenwood in an order book, and on his return to Burnley, he made out from his order book a list of the orders obtained which he handed to Pletts who examined it and directed that they should be executed. On the 26th of May, Greenwood selected from the licensed stores at Stanley-street the goods necessary to execute the several orders he had. These goods included a stone jar of XX beer for Mrs. Moore, but there was no mark placed on it to distinguish it from nine other similar jars of XX beer, which were required for other customers. Greenwood stated that he knew the order in which he would arrive at the houses of the customers for whom the goods were intended and he placed the jars and cases in his cart in similar order, so that when he came to Moore's house, the jar intended for her could be ascertained by its position in the cart. As a matter of fact Mrs. Moore being the last customer to be supplied with beer on that day, the jar intended for her was placed last in the cast.

It was contended for the appellant that the sale of the gallon of beer delivered to Mrs. Moore took place at 11, Stanley-street, Burnley. For the respondent Campbell—the police officer by whom the information was laid—it was argued that the sale or a transaction in the nature of a sale took place at Mrs. Moore's house at Rishton.

The magistrate at quarter sessions were of opinion that the sale took place on the licensed premises of the appellant, and that the delivery of the jar to Mrs. Moore at Rishton was not an offence within the meaning of the 3rd section of the Licensing Act, 1892. They accordingly quashed the conviction at petty sessions subject to the opinion of the court.

The question, therefore, for the court to decide was: Did the transaction set out in the case constitute a sale in law at Rishton where the appellant was not authorized by his licence to sell intoxicating liquors by retail or did the sale in law take place on his licensed premises at Burnley?

Bigham, Q.C. (with him *W. B. Ferguson*), in support of the conviction.—The appellant's whole authority to trade, as he claims to be able to, rests upon the retail license granted by the excise and which is commonly known as an "off licence." If the appellants contention is right, then every licensed victualler and every beer-house keeper holding such a license might go from house to house soliciting orders for pots of beer, take them from his licensed premises himself or by his servant, and deliver them to the customers at their own houses, receiving payment on delivery. The license is granted under the provisions of 32 & 33 Vict. c. 27, s. 4, as defined by section 74 of 35 & 36 Vict. c. 94. The present proceedings are instituted under section 3 of the latter statute, which directs "that no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale any intoxicating liquors at any place where he is not authorized by his licence to sell the same shall be liable to certain penalties." I submit that no sale takes place unless there is at the time of the transaction a transmutation of property. Until the goods are delivered there is nothing to show which specific article has been set aside for each customer, and therefore in law no sale took place before delivery.

Poland, Q.C., and *W. Mackenzie*, for the appellant.—I submit that the passing of the property in the article sold is not the test that should be applied here. In the face of rule 5, sub-section 1 and 2, under section 18 of the Sale of Goods Act, 1893, I admit I cannot argue that the property past in the jar of beer at the licensed premises so that if the jar had been stolen or broken on the journey out the loss would fall upon the customer. But I submit there was a good contract of sale to sell the beer to each customer from Pletts licensed premises sufficiently defined to satisfy the requirements of the statute. The case of *Stallard* v. *Marks*, 26 W. R. 694, 3 Q. B. D. 412, so far as it goes is in my favour. I rely, however, on the authority of *Stretch* v. *White*, 25 J. P. 485. There a farmer living without the limits of the market used to send all his butter to a shop within the limits, in the course of dealing being allowed the market price for it, and it was held that was not a selling by the farmer within the limits of the 13th section of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14). Blackburn, J., during the argument, is reported to have said: "There was no sale of the specific article, that is true. But still it is a good enough sale when one sends the specific article in course of trade and another accepts it and so converts it into a specific contract. It is not necessary to constitute a sale within the section that there should have been a transmutation of property." My client has executed orders received in this way for thirteen years and no objection has before been raised to his doing so.

Bigham, Q.C., replied.

WILLS, J.—I am of opinion that the decision of quarter sessions is wrong, and that the original decision, under which the seller of the beer was convicted, is correct. Indeed, except for the *dictum* of Blackburn, J., cited from the case of *Stretch* v. *White*, relied on by the appellant, I should have thought it was absolutely too clear a point for argument. In this instance, a person who is licensed to sell beer by retail on certain premises sends his carter to take orders at a distance. That is the same thing as if he went for those orders himself. On the man's return from his round he selects such goods as he thinks will be required to execute these orders. The goods are subsequently sent to the customer's house, and there the beer was delivered and there it was paid for. Everything material to constitute a sale takes place, it seems to me, at the house of the customer, and it makes no difference that a kind of selection to meet the order is made on the licensed premises or in the cart. All that was necessary to complete a sale was done by the delivery of the goods at the house of the purchaser. I agree with Mr. Bigham that a "sale" involves a transmutation of property, and that no transaction is a "sale" unless the property passes.

It seems to me that every material evidence that this transaction was a sale took place after the goods arrived at the customer's house, and not on the licensed premises at Stanley-street. The case of *Stretch* v. *White* is cited, which is unfortunately reported only in the Justices of the Peace. One would have expected that a case forming apparently so important an authority on the law of bargain and sale would have been found in the regular law reports; and I can hardly believe that if the decision had been what it is now contended by the appellant counsel that it was, it would have been omitted from

the reports. It is a singularly unsatisfactory report; I do not mean as to the statement of facts, but because there is a quantity of conversational matter introduced into the arguments, and no detailed judgment is given at the end. I believe that what the court then held—although it is not directly so stated—was that the sale was made by a transmutation of property at the time that the whole of the butter had been set aside in the dairy, and as the whole of the butter made was agreed to be taken, no selection of any particular number of pounds was necessary to determine the special article sold. If that was so, then that case is not authority on which the appellant can rely. I do not feel bound in any way to follow it, nor can I persuade myself, in face of the perfectly clear wording of the statute, to hold otherwise than that the appeal fails, and the conviction appealed from must be affirmed.

WRIGHT, J.—I concur. I wish to say that I do not go so far as Mr. Bigham, who argued that the word sale in the statute must be taken to mean "sale" in the strictly legal sense. It seems to me that it might very well mean also an agreement to sell under circumstances, of which, for example, the case cited from the Justices of the Peace is an illustration. I do not wish to express any opinion, nor do I, as to how far a slight change in the facts might make all the difference in the legality of such a transaction—if, for instance, the customer's name and address were affixed on the cask before the beer left the licensed premises—that would make the question a very different one from what we are now considering, but it might not alter in any way the legality of the transaction. In my opinion, upon the facts as stated in the case, we must hold that there was no sale until the article was delivered from the cart at the customer's door.

Conviction restored with costs both here and below.

Solicitors for the appellant, *Thairlwall*, for *Ainsworth; Sanderson & Howson*, Blackburn.

Solicitors for the respondent, *H. Clifford, Gosnell, & Tiernay*, for *Garnett & Jackson*, Burnley.

Privy Council.

Feb. 23.

(*On appeal from the Supreme Court of New South Wales.*)

TREW *v.* PERPETUAL TRUSTEE CO. (LIMITED). (*a.*)

Will—Construction—Substitution of trust by reference—Duplication of trust—Multiplying charges.

Where there is a trust by reference, then, in the absence of express intention by a testator, the court will not impute to him the intention of multiplying charges upon the trust estate; and, generally, it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated, and so to make a duplication of trusts, as it were, in the nature of charges.

This was an appeal from the Supreme Court of New South Wales.

The facts are given in their lordships' judgment.

Cozens-Hardy, Q.C., and *T. R. Warrington, Q.C.*, for the appellant.

Warmington, Q.C., and *Vaughan Hawkins.*

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The judgment of their lordships (Lord HERSCHELL, L.C., and Lords WATSON, HOBHOUSE, MACNAGHTEN, SHAND, DAVEY, and Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE.—This is a suit for the administration of the estate of Louis Samuel, who died on the 29th of November, 1887, having made a will on the day of his death. The appellant, now Mrs. Trew, was his wife. The respondents are his two children and a company appointed to be trustees of his will. The matter in question is the amount of interest given by the will to the appellant.

The testator first gave his whole estate to trustees upon trust to sell and convert it into money. It will conduce to clearness if his directions as to the application of the money, which in the will are written consecutively, are now quoted as separate clauses.

"(*a*) To pay the income of so much thereof as shall amount to the sum of £20,000 to my wife Mary Ruth Samuel during her life and so long as she shall remain my widow for her sole and separate use free from the control of any husband."

"(*b*) And from and immediately after her marrying again in trust to pay the income arising from £10,000 to my said wife for her life free from the control of any future husband as aforesaid."

"(*c*) And from and immediately after the death of my said wife to pay the income arising from the said £20,000 for the maintenance and education and advancement of all or any children of mine by my said wife whether born or to be born hereafter."

"(*d*) And in the event of my said wife marrying again, to apply the interest of the balance of the £20,000 upon the trusts last hereinbefore declared."

"(*e*) And I further declare that the trustees shall, subject to the aforesaid trusts, pay to each of my said children upon their attaining the age of twenty-one years, or upon their or either of their marriage one-half of the capital sum hereinbefore devised upon trust."

"(*f*) As to the residue of my said estate," he gives £10,000 to his brother Edward.

"(*g*) And as to all my residuary estate I give and bequeath the same upon the trusts hereinbefore declared with reference to the sum of £20,000."

The ultimate residue was large. It is stated by the appellant to amount to £34,000, or thereabouts. Her contention is that by virtue of clause (*g*) she is entitled for life to the income, either of the whole residuary estate, or at least of an additional sum of £10,000. For the children it is contended that on her second marriage she became entitled to no more than the income of one sum of £10,000.

The cause was heard before the Chief Judge in Equity, who declared that the appellant is entitled, in the events which have happened, to the income arising from £10,000, part of the estate of the said testator, during her life, and is not entitled to any further interest under the said will.

She appealed to the full court, who dismissed the appeal, Mr. Justice Manning dissenting from his colleagues. She now seeks to reverse those adverse decrees.

It has hardly been contended here that the lady is entitled to the first alternative of her claim, viz. to the moiety of the whole residue; but it is urged strongly that she is entitled to a second sum of £10,000 for her life. Their lordships pass over the conjectures made as to the intentions of the testator not expressed in words. The will shows marks of hasty construction; but it is consistent enough with itself, and upon the point in question its literal construction presents no great difficulty.

Upon the the literal construction the argument

pressed in favour of the appellant is, to use the words of Mr. Justice Manning, that where there is a trust by reference "the only safe course to adopt, is to re-write the words declaring such trust, merely substituting the second fund or property for the first." Then it is said that if the words "residue of my estate" be written in where the words "£20,000," occur, that will carry to the widow the income of the sum of £10,000 on her re-marriage.

But in the first place their lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges. Of course such may be the intention or effect of a particular will. But in the absence of anything in the will to show such an intention, the rule is that the court will not impute it to the testator. In the case of *Hindle* v. *Taylor*, 4 W. R. 62, 5 De G. M. & G. 577, Lord Cranworth held that in almost all cases it is not a reasonable way of reading a trust created by reference to other trusts, to consider everything as there repeated, and so to make a duplication, as it were, of trusts in the nature of charges. This opinion has been recognized as sound in subsequent cases. That in this case the widow's interest after re-marriage is in the nature of a charge hardly admits of dispute.

In the second place, even supposing the suggested process were applied to this will, their lordships cannot see how the appellant makes out her right to a second sum of £10,000. Let the residue be substituted for £20,000 as suggested, clause (*a*) would then carry the income of the residue to the widow, but only pending widowhood. Clause (*b*) does not relate to the £20,000, but to a substituted sum of £10,000. Clause (*c*) would give the income of the residue to the children at the death of the widow. Clause (*d*) would give the income of the balance of the residue to the children after the marriage of the widow. Clause (*e*) would give them at twenty-one or marriage one half of the capital of the residue. It is one of the inaccuracies of the will that there is no express gift of the other half. It has probably been assumed by everybody that the gift of the whole income and an accelerated gift of half the capital implied that the whole capital was intended to be given ultimately. In all these prior provisions there is no gift to the widow after re-marriage, except in clause (*b*), and that is not expressed to be one of the trusts of the £20,000. There is no trust declared of "the £20,000" as a whole in favour of the widow after her second marriage. For the appellant it is contended that such a trust is implied in clause (*d*) by the expression "the balance of the £20,000." No doubt the widow's £10,000 would have to be answered out of the £20,000, or out of the bulk of the estate before any residue could be ascertained. Her interest is made to come first, and "the balance of the £20,000" means that part as to which no direction was given after the direction regarding the £10,000. But it seems somewhat fanciful to say that the introduction of clause (*d*) into the residuary gift would amount to a direction that another sum of £10,000 is to be taken out of the residue and added to that which is alone given to the widow by clause (*b*) on her re-marriage.

This is what their lordships find to be the result of actual introduction of the prior clauses into the residuary gift. If on the whole will there were any sufficient indication of an intention that the widow should on remarriage take two sums of £10,000, effect could doubtless be given to it, though it might not be expressed in precise terms. But, as above observed, there is no such indication; the appellant is relying on the strictest literal construction, and that is found not to be in her favour.

The result is that the judgment below ought to be affirmed and the appeal dismissed. The courts below have thought fit to charge upon the estate the costs of the two former hearings. But it would hardly be right to burden the estate with the costs of a second fruitless appeal, and their lordships must order the appellant to pay the costs. They will humbly advise her Majesty accordingly.

Solicitors for the appellants, *Collyer Bristow*; *Russell, Hill, & Co.*

Solicitors for the respondents, *Want & Co.*

Feb. 2.

(*On appeal from the Supreme Court of Western Australia*).

SHENTON *v.* SMITH. (*a.*)

Crown colony—Colonial servants—Right of dismissal—Office held during pleasure—Prerogative of the Crown.

Except in special cases where it is otherwise provided, servants of the Crown hold their office during the pleasure of the Crown, for such are the well-understood terms of their engagement. This rule applies in a Crown colony.

Semble, *a Colonial Government stands, in this respect, on the same footing with the Home Government.*

The Colonial Office Regulations are merely directions given by the Crown to the Governments of Crown Colonies, and do not constitute a contract between the Crown and its servants.

This was an appeal from the Supreme Court of Western Australia.

The facts are set out in their lordships' judgment.

Finlay, Q.C., and *G. Lawrence*, for the appellant.

Channell, Q.C., and *Bray*, for the respondent.

The judgment of their lordships, Lords HERSCHELL, L.C., WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, was delivered by

Lord HOBHOUSE.—The substantial question in this appeal is the question on what terms was the respondent, Dr. Smith, engaged in the service of the Government of Western Australia. He claims damages on the ground that he was wrongfully dismissed contrary to the rules and regulations of Her Majesty's service and to the terms of his employment therein. The appellant, who represents the Government, contends that the respondent's employment was only temporary and during the pleasure of the Government; and that though in point of fact he was dismissed after hearing and for good cause, the right of the Government was to dismiss him at will.

It appears that in the month of April, 1887, Dr. Rogers, who was medical officer at Albany, obtained leave of absence, and the respondent was desirous of acting in his place. He was accepted, and in the *Government Gazette* of the 8th of June, 1887, it was notified that His Excellency the Governor had been pleased to approve of the "following temporary appointment—viz., Henry Lionel Smith, Esq., to act as medical officer at Albany during the temporary absence of Cecil Rogers, Esq., granted leave of absence."

About eight months afterwards the respondent asked to have his appointment made permanent, but was informed that the Government had decided not to interfere with the existing arrangement. So matters went on until the following July, when

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

events happened at the Albany Hospital which resulted in the death of a boy, and for which blame was attached to the respondent at the coroner's inquest.

On the 9th of July, 1888, an order was passed by the governor directing that the respondent should be informed that his tenure of office would cease at the close of the year, and the respondent was informed accordingly. He sent to the governor a statement of his case, and a request that the order should be reconsidered. His request was not granted, but the term of acting appointment was extended to allow time for appeal to the Secretary of State.

All the papers, including the correspondence and the proceedings at the inquest on the boy, with a further argument on the part of the respondent, were transmitted to the Secretary of State, who replied that he saw no reason to interfere with the governor's decision. This result was at once communicated to the respondent, in a letter dated the 8th of March, 1889, in which he was informed that his tenure of the acting appointment would cease on the 15th of that month.

In October, 1889, Dr. Smith presented a petition of right, making the Colonial Secretary defendant, and after the usual formalities the petition was permitted to proceed. No question of procedure arose upon it other than such as are common to an ordinary plaintiff and defendant. The trial of the cause took place before Stone, J., when that learned judge expressed an opinion that the plaintiff ought to be non-suited, but on the plaintiff objecting, he did no make an order of non-suit. So the trial proceeded, but it became abortive because the jury could not agree.

A new trial then took place before Onslow, C.J., who put several specific questions to the jury. The first was whether the plaintiff was led to believe that he would hold the office during good behaviour so long as the office existed, to which the jury answered, Yes. They then went on to find that the Government had not given reasonable notice to the plaintiff, and had no reasonable cause to dismiss him, and they assessed his damages at £200.

The defendant moved for a new trial or to have judgment entered up in his favour. That motion was refused, subject to the reservation of a question for the opinion of the full court, which the Chief Justice states thus: "Whether the plaintiff, though appointed temporarily, was still entitled to be treated in accordance with the procedure laid down in the Colonial Office Regulations with regard to the dismissal of public servants. It is agreed that the procedure in question was not followed.

On the argument of this question before the full court the Chief Justice took a view adverse to the defendant. Stone, J., who was the other judge, took the opposite view. The necessary result was that the verdict which the plaintiff had got remained undisturbed. Hence the present appeal.

The reasoning of the learned Chief Justice is not quite easy to follow. He says that the jury found as a fact that the plaintiff was led to believe that he would hold the office during good behaviour as long as the office existed. But it does not appear what weight he attached to that finding, because he allows that it was not strictly supported by the evidence, and his own finding is only that the plaintiff was to act during the absence of Dr. Rogers, a compact which he thinks was broken by the Government in dismissing him. There is not, indeed, a tittle of evidence to support the finding of the jury; and their lordships agree with the defendant's contention that the question ought not to have been put, or, if put, should have been answered in the negative. The only evidence on the point is that of the plaintiff, who merely says that he got the *Gazette* notice; that Mr. Loftie, the Government Resident at Albany, gave him a Colonial Office List which contains a copy of the regulations; and that he considered that he held his office subject to his good behaviour. He does not even state, to say nothing of proving, that any one led him to believe that he was to hold during good behaviour, or that the regulations would form part of his contract with the Government. There is, therefore, no special contract in the case. The contention on this point must be that in every case a Government servant, to whom the regulations are communicated, is entitled to keep his office until suspended or dismissed according to the procedure thereby prescribed to the Government. That is a legal inference depending on the nature of the regulations, and not for the jury to decide.

The learned Chief Justice, indeed, goes on to say that it is not necessary to decide whether the procedure of the regulations should have been followed, because the jury have found that there was no good cause of dismissal. But that finding is irrelevant unless the Government was bound to show good cause of dismissal; and that question must, except on one supposition, depend upon the former question which the Chief Justice declines to decide.

The supposition in question is that the Government had entered into an absolute unconditional engagement with the plaintiff to employ him during the absence of Dr. Rogers; and it may be that such was the view of the learned Chief Justice. But there is nothing in the case to support such a view. The plaintiff applied for the post, was gazetted as to a temporary acting appointment, applied to be appointed permanently, and was refused. That is positively all. How it is possible on that to contend that he has a firmer hold on his acting appointment than Dr. Rogers had on his permanent appointment? The defendant contends that the plaintiff had not so firm a hold; but that, even if it were decided that an official in the position of Dr. Rogers is entitled to hold during good behaviour, such a right would not extend to one who is appointed for a mere temporary purpose. That view appears to their lordships to be quite sound; but they do not further dwell upon it, because they prefer to rest their judgment on a broader ground.

It has been argued at the bar that a Colonial Government stands on a different footing from the Crown in England with respect to obligations towards persons with whom it has dealings. Their lordships do not go into the cases cited for proof of that proposition, for they are quite different from this case, and neither principle nor authority has been adduced to show that in the employment and dismissal of public servants a Colonial Government stands on any different footing from the Home Government.

It appears to their lordships that the proper grounds of decision in this case have been expressed by Stone, J., in the full court. They consider that unless in special cases where it is otherwise provided servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly his remedy is not by a law suit, but by an appeal of an official or political kind. Dr. Smith did in fact make such an official appeal to the Secretary of State, and the Colonial Government recognized his right to do so, and prolonged his tenure so as to allow time for the decision of that appeal, and to save him from injury if it should go in his favour. Where there is

representative Government, the other estates may, if they think fit, make themselves the mouth-piece of that sort of grievance against the Crown, as of any other. In a Crown colony, as Western Australia then was, this appeal to the Secretary of State exhausted the plaintiff's remedies within the colony.

As for the regulations, their lordships again agree with Stone, J., that they are merely directions given by the Crown to the Governments of Crown colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. In the heading they are stated to be "printed for the information and guidance of the governors of her Majesty's colonies, and of all her Majesty's officers subordinate to them." They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. On the face of them it is pointed out (see regulation 64) to be the general rule in Crown colonies that offices are holden during her Majesty's pleasure. The difficulty of dismissing servants whose continuance in office is detrimental to the State, would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that any person taking service with a Colonial Government to whom the regulations have been addressed, can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable, not to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case.

The result is that in their lordships' judgment the court below should have ordered judgment to be entered for the defendant. As regards the costs of a litigation below, the appellant's counsel has not pressed for them, but has preferred to leave the matter to this board. The respondent has made a wrongful claim, and has not acquiesced in the simplest method of bringing his claim to the test by means of a non-suit. On the other hand, the appellant has raised defences which have been decided against him. Under all the circumstances of the case, their lordships think that justice will be done by entering the judgment for the defendant without costs. They will humbly advise her Majesty accordingly.

The costs of this appeal stand in a different position. The verdict was for £200, which is under the amount for which an appeal lies in strict course of law. Special leave to appeal was granted because of the general nature of the question; but this board thought that it would be hard for the individual suitor to bear the costs of an appeal admitted on such a ground, and they therefore put the appellant under the obligation to pay costs in any event. The order will be according to that condition.

Solicitors for the appellant, *Sutton, Ommanney, & Randall.*

Solicitor for the respondent, *J. W. Sykes.*

Feb. 2.

(From the Court of Queen's Bench for Lower Canada, Province of Quebec).

HAMELIN *v.* BANNERMAN. (*a.*)

Riparian owner — Sale of water power — Navigable river.

The fact that a river is navigable will not prevent a riparian owner who buys an interest in its water power from acquiring such right as against the vendor, even assuming that a good title cannot be given as against the public.

(a) Reported by CHARLES H. GRAFTON, Esq., Barrister-at-Law.

This was an appeal from the Court of Queen's Bench for Lower Canada, Province of Quebec.

The facts are set out in their lordships' judgment.

Sir R. Webster, Mackay (of Canadian bar), and *Vernon Smith*, for the appellants.

Fullerton, Q.C., and *Beauchamp, Q.C.* (of Canadian bar), for the respondents.

The judgment of their lordships, Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, and Sir RICHARD COUCH, was delivered by

Lord WATSON.—The appellants Hamelin and Ayer were, in 1881, proprietors of land lying on both sides of the North River, within the town of Lachute. They were also owners of the whole water-power derivable from a pool or reservoir formed by the erection of a dam across the channel of the river.

By deed dated the 15th of July, 1881, the appellants sold and conveyed to the late Robert Bannerman for the sum of 1,000dols., a piece of ground on the south bank of the river "together with a quantity of water power equivalent to fifty horse-power, to be taken off from the water-power and dam of said vendors on the North River, and now in use to run their manufacture, said water power to be taken at a place convenient to run the wheels and machinery to be placed by said purchaser in his rope manufacture on the hereby bargained and sold piece or parcel of land." The sale and conveyance were made, with "promise of warranty against all troubles and hindrances generally whatsoever"; and it was agreed that the purchaser should have the option, at any time within five years, of acquiring any additional quantity of water-power, not exceeding fifty horse-power, which might be required in connection with the water power already sold, at the price of 25dols. for each additional horse-power.

The following condition, which is of some importance in this case, was inserted in this deed of sale:—"It is hereby further agreed by and between the said parties that should any accident or leakage happen to the dam of said vendors across said North River, or that said dam should require to be repaired from any cause or reason, the said purchaser or legal representatives shall have no right whatever of claiming any damages from said vendors for any loss of time or losses caused by such accident to said dam, or that it require repairing provided that the said dam be repaired or fixed in the course of the time reasonable and required for such repairs during which time the said vendors shall have the privilege of withdrawing the supply of water from said purchaser, if absolutely necessary."

In pursuance of the option reserved to him by the deed of 1881, the late Robert Bannerman, on the 2nd of April, 1886, obtained from the appellants a deed conveying to him an additional quantity of water from the dam, equivalent to fifty horse-power, to be held and used by him and his successors, in connection with, and upon the same terms and conditions as the supply he had already purchased.

Robert Bannerman, immediately after his acquisition of the land, established a ropework upon it, which continued in operation, at least until the date of this action. Upon his death, in July, 1887, his interest in the land and water-power connected with it passed to the respondents in this appeal. Before

the date of the first sale to Bannerman, the appellants had erected, and they have since maintained and works a woollen factory on the north side of the river, the machinery being driven by water-power from the dam. In the year 1883, a bobbin factory on the north bank of the river, a little way above their own works, was let by the appellants to one Hambleton, who continued to be their tenant until 1890, and during his occupation derived his motive power from the same source. The water supply does not appear to have ever been used for any manufactory other than these three.

The present suit was brought by the respondents in September, 1888, before the Superior Court. In their writ and declaration, they alleged that for years past the supply of water had generally been sufficient, at all seasons of the year, to furnish the amount of water-power to which they were entitled under their conveyances from the appellants; but that during several seasons of drought, whilst the whole supply obtainable was about or even less than 100 horse-power, more than half of it had been wrongfully appropriated and used by the appellants and their tenant; and they claimed (1) a declaration that they were entitled to a supply of 100 horse-power in priority to the appellants or their tenant; (2) an injunction against interference with their preferable right; and (3) decree for 1,000 dollars as damages in respect of their having been deprived of that right.

In answer to these claims the appellants put forward a great variety of defences, of which it will be sufficient to state the substance. They pleaded, in bar of the action, that, the North River being navigable, its waters could not be the subject of commerce; that, according to the spirit and sense of the deeds of sale, the respondents' right to 100 horse-power was not preferential, but without prejudice to the appellants' right to use the water for their factory; and that, according to law, the first use of the water belonged to the appellants as the oldest manufacturers. In answer to the respondents' pecuniary claim, they pleaded that if the respondents had suffered damage it was not due to any act or default of theirs, but was occasioned by the necessity of repairing injuries to the dam from ice or floods, or by defects in the respondents' machinery and arrangements for using the water.

The case went to trial on these pleadings before the Honourable Judge Taschereau, who, after a voluminous proof had been led by both parties, sustained the defence, and dismissed the suit with costs. The learned judge held in effect that according to the legal construction of the deeds the respondents had acquired nothing more than a right to take water representing 100 horse-power from the reservoir, if and when it was possible to do so, without affecting the supply of water required for the appellants' factory, which had existed before their ropework. That finding in law was necessarily fatal to the respondents' claim for damages, which was based upon the assumption that they had a preferential right to their stipulated quantity of water-power. the learned judge further held, in point of fact, that the short supply actually received by the respondents was due partly to *force majeure*, or in other words to the low state of the river, aggravated by the disrepair of the dam, from natural causes beyond the control of the appellants, and partly to their defective machinery.

On appeal, the Court of Queen's Bench, consisting of Sir Alexander Lacoste, C.J., with Baby, Bossé, Blanchet, and Hall, JJ., unanimously reversed the decision of the Superior Court; granted a declaration and injunction to the effect craved by the respondents; and also gave them decree for 1,000dols., being the full amount of the damages which they claimed. The reasons for the judgment of the Appeal Court were fully rendered by Hall, J.

Their lordships have not found the questions of law, which were raised and discussed by the appellants, in the course of the argument addressed to them, to be attended with difficulty. The fact that the North River may be in some sense navigable, cannot prevent a riparian owner from acquiring an interest in its water-power, which he can sell along with and as appurtenant to a parcel of his land. Even if the appellants had been unable, as they say they were, to give the respondents a good title as against the public, the law would not have permitted them first to sell a prior right to the water-power, and pocket the price, and then to pose as members of the public, and to deprive their purchaser of the water, by using it themselves.

Again, their lordships see no reason to doubt that, in a question with the appellants, or anyone who has derived an interest from them since April, 1888, the respondents have a preferable right to take water from the reservoir in question, to the extent of 100 horse-power. The deeds of sale are in terms absolute; they do not contain any reservation to the sellers to take a supply of water-power, either in priority to, or *pari passu* with, the purchaser; and they are granted with full warranty against eviction. The warranty imports that the purchaser, and his successors in title shall not be hindered by anyone in the exercise of their right to take preferably, from the water of the reservoir, a supply for their factory equivalent to 100 horse-power. There is no warranty that the river will bring to the reservoir a sufficient quantity of water to yield that amount of motive power, at all seasons. And, there is an express exception from the warranty, in the clause, which has already been quoted, with reference to necessary repair of the dam by the appellants. During legitimate repairs, the reservoir may cease to supply water available for manufacturing purposes; or, it may supply less than the amount to which the respondents are entitled. The clause protects the appellants against liability in respect of such failure or shortcoming; but it gives them no right, when the actual supply of water is less than 100 horse-power, to appropriate any part of it which may be required for the use of the ropework, in prejudice of the respondents.

In these circumstances, the case presented by the appellants appears to their lordships to resolve into two questions, which are questions of fact depending on the evidence:—(1) Were the respondents, through the act or default of the appellants, hindered from obtaining the full amount of water-power required for their factory, such amount not being in excess of 100 horse-power? (2) Was any deficiency in the respondents' water-power due to their own failure to make proper arrangements for its reception, and to provide proper machinery? In the event of the first of these questions being answered in the affirmative, and the second in the negative, a further question arises, as to the amount of damage, if any, which the respondents have suffered through the illegal conduct of the appellants.

The proof led by the parties, in so far as it relates to the dam, to the storage capacity of the reservoir which it forms, the precise means which have been employed, and the best available means which could be employed, for distributing the water-power which it represents among the parties interested, cannot be regarded as satisfactory. Facts capable of precise ascertainment, by measurement and otherwise, are left to speculation, and the estimates of the witnesses

differ widely. But, so far as their lordships are able to judge, the evidence favours the conclusion that the relative levels of the intake sluices, for the appellants' and respondents' works, have remained unchanged since the date when the respondents' factory was started, and that no substantial alteration has been made, since that time, upon any of the mechanical arrangements for distributing and utilizing the water-power of the reservoir. Their lordships must not be understood as indicating an opinion that the arrangements then made must remain stereotyped for ever; but they are of opinion that, until some steps were taken by the appellants, with a view to a new adjustment, the respondents were justified in leaving their original arrangements and machinery unaltered.

Their Lordships have been unable to find, in the evidence, any ground for affirming, either that the pier erected by the respondents in connection with their factory had any effect in diminishing the motive force of the water which they used, or that the machinery through which that force was developed was in any respect defective.

Keeping in view the opinion already expressed by their lordships, with regard to the nature of the warranty undertaken by the appellants, it does not admit of doubt, that, for at least eighteen months before this suit was brought, they acted in persistent violation of the warranty. During that period there were two exceptionally dry seasons; and the effect which the prevailing drought had, in diminishing the supply of water, was seriously aggravated by the state of disrepair into which the dam had fallen, owing to the action of floods and ice. It is neither alleged nor proved that the appellants failed to take proper measures for the restoration of the dam, or failed to execute the necessary repairs within a reasonable time. But the evidence shews that, whilst the river was low, and the repairs were going on, there was generally, if not constantly, an available supply of water-power obtainable from the reservoir. The evidence does not suggest that the total amount of water-power available at these times ever exceeded 100 horse-power. On the contrary, the evidence on both sides points to the inference that it frequently was considerably short of that amount. And it is proved beyond question, that the appellants and their tenant appropriated the bulk of the horse-power available, with this result, that, when the appellants and their tenant stopped working, the respondents had ample water-power to drive their machinery, and that, whilst the factories of the appellants and their tenant were in operation, the respondents' supply of water-power was either insufficient, or wholly ineffective.

The conclusion appears to their lordships to be inevitable, that the appellants must bear the loss resulting to the respondents, from their having, during the period already indicated, systematically deprived the respondents of the amount of water-power to which they were legally entitled. Their lordships, having examined the evidence bearing upon the pecuniary estimate of that loss, are unable to differ from the result arrived at by the Court of Queen's Bench. They will, accordingly, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must bear the costs of this appeal.

Solicitors for appellants, *Bircham & Co.*

Solicitors for respondents, *Simpson & Co.*

CORRECTION.—In the head-note to the report of *Broderip* v. *Salomon & Co.*, *ante*, p. 612, for

> "such company is entitled to treat the trader as its *agent*"

read,

> "such company is entitled to treat the trader as its *principal or cestui que trust*."

Court of Appeal.

From Chan. Div. (Lord Halsbury; and Lindley and A. L. Smith, L.JJ.) — March 6, 11, 12.

STRAPP v. BULL, SONS, & CO. (LIMITED). (a.)

Company—Debenture-holders' action—Money authorized to be raised in priority to debentures — Right of receivers and managers to be paid costs, charges, and expenses.

The receivers and managers appointed in a debenture-holders' action were authorized by orders of the court to raise £5,000 in order to carry on the business of the company, such sum to have priority over all the debentures of the company.

By a subsequent order it was provided that second debentures should be issued to the unsecured creditors of the company, and that the unsecured creditors or some of them should advance part of the £5,000, and the plaintiff in the debenture-holders' action the rest. Two of the unsecured creditors were subsequently added as defendants to the debenture-holders' action.

The greater part of the £5,000 was raised, but the receivers and managers, in carrying on the business of the company, incurred further costs, charges, and expenses, the payment of which they claimed in priority to the lenders of the £5,000 and to all other claimants.

Held (reversing the decision of Vaughan Williams, J.), *that the persons who advanced the £5,000 could not be regarded as being in the position of strangers advancing money, and that the receivers and managers were entitled to the priority they claimed.*

Joseph Bull, Sons, & Co. (Limited) was a company formed in 1882 for the purpose of carrying on business as contractors for public works.

The company issued debentures, most of which were held by William Strapp, who, in May, 1892, commenced an action against the company for the purpose of enforcing the debentures held by him and other persons, and to have, in the meantime, a receiver and manager appointed.

At that date the principal assets of the company consisted of three building contracts with the School Board for London.

By an order made in the action, dated the 6th of May, 1892, E. C. Bull and H. T. Bird were appointed, until after the 20th of May, 1892, *interim* receivers and managers, on behalf of the plaintiff and the other debenture-holders of the company, of all the property and assets of the company comprised in or subject to the securities and charges created by the debentures: and to manage the business of the company, and thereby it was ordered that such receivers and managers should be at liberty to raise the sum of £1,000 at a rate not exceeding £5 per cent. per annum as a charge on the assets, plant, property, and effects of the company in priority to the securities of all the debenture-holders of the company repre-

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

sented by the plaintiff in the debenture-holders' action.

By another order made in the debenture-holders' action, and dated the 13th of May, 1892, Bull and Bird were appointed receivers and managers on behalf of the plaintiff and other debenture-holders of all the property and assets of the company charged by the debentures, and to manage the business of the company; but they were not to act as managers for more than six months from the 13th of May, 1892, without the leave of the judge; and it was thereby ordered that they should be at liberty to raise the further sum of £4,000 at a rate not exceeding £5 per cent. per annum as a first charge on the assets, plant, property, and effects of the said company (other than the property comprised in certain specific charges therein referred to) in priority to the securities of all debenture-holders of the company.

On the 14th of May, 1892, M. T. Shaw & Co. presented a petition for the winding up of the company.

By an order in the winding up, dated the 1st of June, 1892, and made by consent, it was ordered that the petition should stand over for six months from that date; that the sum of £5,000 raised or be raised under the orders of the 6th and 13th of May, 1892, in the debenture-holders' action, and interest thereon, should be a first charge on all the assets in priority to all the debentures; that second debentures should be issued to the unsecured creditors for the principal moneys owing to them at that date, not including claims for interest or damages, and interest from that date; that the unsecured creditors, or some of them, should advance two-thirds of the said £5,000, and William Strapp should advance the remaining one-third as and when the same was required for carrying on the works; and that, pending the adjournment of the petition, the company should contract no further debts or liabilities.

By an order dated the 2nd of June, 1892, in the debenture-holders' action, Hobbs was appointed receiver and manager in the place of Bird.

By an order dated the 22nd of December, 1892, Chittick and Shaw, holders of second debentures in the company, were added as defendants to the debenture-holders' action.

The receivers and managers proceeded to carry out the three contracts with the School Board for London which involved a large outlay and expenditure in respect of wages. The contracts were completed by October, 1893.

The persons by whom the materials were supplied for carrying out and completing such contracts alleged that the receivers and managers were personally liable to them for the price thereof; and actions were brought against the receivers and managers personally to recover the same.

A motion was accordingly made by the receivers and managers asking for a declaration that they were entitled to a first charge upon all moneys, funds, and properties of the company comprised in or subject to any of the debentures issued by the company for the payment of the balance which should be found due to them upon taking their accounts as such receivers and managers and of the costs properly incurred by them, and also for effectuating and securing to the applicants an indemnity against all liabilities which they had properly incurred in acting as such managers as aforesaid upon contracts entered into and orders given by them or otherwise; that the said charge had priority over (*a*) the sum of £5,000 authorized to be raised by the orders of the 6th and 13th of May and the 1st of June, 1892, or much thereof as had actually been raised; (*b*) the first mortgage debentures issued by the company held by William Strapp, and other persons; (*c*) the second debentures of the company issued pursuant to the order of the 1st of June, 1892; and (*d*) all claims for costs.

On the 13th December, 1894, Vaughan-Williams, J., refused to make the order asked for.

The receivers and managers, by leave, appealed.

Farwell, Q.C., and *Upjohn*, for the appellants.—The receivers and managers are officers of the court, and are entitled to priority for their costs, charges, and expenses over all claimants.

They referred to *Ex parte Izard, In re Bushell*, 31 W. R. 418, 23 Ch. D. 75; *Batten* v. *Wedgwood Coal and Iron Co.*, 33 W. R. 303, 28 Ch. D. 317; *Burt, Bolton, & Hayward* v. *Bull, ante*, p. 180, [1895] 1 Q. B. 276; and *May* v. *Newton*, 35 W. R. 363, 34 Ch. D. 347.

Bramwell Davis, Q.C., and *C. J. Peile*, for the lenders of the £5,000.

George Lawrence, for the respondent Strapp.

Farwell, Q.C., replied.

Lord HALSBURY.—When the facts of this case come to be looked at, and one sees the situation of the several parties, I confess it does not appear to me that there is much difficulty in deciding the only question that is now before us. It is manifest from the original question which was before my brother Williams that there was a sort of conference between the different parties interested in this company, consisting of some persons who had secured claims by debentures, and a considerable body of unsecured creditors. It appears to have been assumed on both sides, and probably correctly, that if things went on as they were the unsecured creditors would get nothing, and the debenture-holders would get everything. At the same time it appeared to be in the contemplation of all parties that there was a considerable amount of property which could be properly realized if the company was allowed to go on and conclude the contracts which were then in course of performance, and obtain from the school board not only the sums of money which in pursuance of the contracts had been retained up to the completion of the contracts, but also a further profit arising from their completion. If the contracts were abandoned, not only would the retained moneys be forfeited in pursuance of the terms of the contracts, but all the plant, materials, and so on which the builders had placed there for the purpose of the performance of the contracts, were capable of being seized by the school board, and so a great loss would be inflicted on those who were interested in the assets of the company. To my mind it is manifest there was an agreement, not taking the form of a written contract, between the parties, such as to induce the learned judge to make the order made. On certain terms the £5,000 was to be brought into the concern, and the unsecured creditors were, in pursuance of that arrangement, to be turned into debenture-holders instead of unsecured creditors. That was the bargain, and that was the substance of the understanding at which the parties arrived. For the purpose of that bargain it was manifest that somebody or some persons must perform the contracts out of which the profits were to arise, and those persons were the receivers and managers. I think it was intended, speaking generally, that the company were not to engage in any new transactions, but were only to be permitted to carry on, by means of the receivers and managers, the contracts into which they had already entered. All this seems to be properly provided for by the order made by my brother Williams.

But then comes the question of the priorities. Now I quite agree that it was intended that those

who had advance the £5,000 should have priority over all the debenture-holders. But I do not concur in the idea that it ever could have been contemplated that those who were to take upon themselves the burthen of management and receivership should be left to speculate on whether or not they would ever get paid anything. It was an essential part of the arrangement that someone should manage those businesses. It was necessarily implied in that arrangement that those who, for the benefit of all concerned and not merely for themselves, were entering into this arrangement, and were carrying it on to its completion, so that there should be an ultimate resulting fund capable of being divided, should themselves be indemnified for the things they were doing—namely, carrying on the contracts. Whatever may be the aspect of the question, if you look at the different orders, during the whole course of this administration, and not looking at them separately by themselves—if you look at the whole as one arrangement to which all were parties and all tending to the same thing—it seems to me really to be free from doubt that that was the real meaning of the transaction. If that was the real meaning of the transaction it is idle to suggest that the receivers and managers ought not, in accordance with the ordinary rule, to be indemnified for doing that which was intended by them, as well as by others, to be for the common benefit of all. It seems to me hopeless to contend that the second debenture-holders, who were only brought into the condition of being debenture-holders at all by this arrangement for the advance of the £5,000, can be treated in two different capacities—that you are to look at them at one time as bankers advancing a sum of money, in which case they would be entitled to be paid their money at once, without reference to what the result of the experiment might be, or, on the other hand, to look at them as second debenture-holders only, and in that capacity to be postponed to the first debenture-holders and to those who had advanced the £5,000—that is to say, themselves.

It seems to me that that is an impossible contention. The blot throughout the whole of the judgment of Williams, J., as it appears to me, is that it treats these persons entering into this arrangement as if they were independent bankers advancing money from the outside. That is not the fact. They were persons who were buying their position as second debenture-holders by the advance of this money, and that seems to have been the theory on which the whole thing has been conducted.

Under these circumstances, I think that that part of my brother Williams's order is erroneous, and ought to be discharged, and that our declaration ought to be that these receivers and managers are entitled to the indemnity which they claim out of the funds.

LINDLEY, L.J.—I am of the same opinion. I cannot help thinking that such difficulty as arose in this case is attributable to an anxious desire on the part of the learned judge to make a short cut, and to do justice by orders which are more or less unusual, and perhaps in form a little irregular.

Now, in order to understand the case, it is not necessary to go through the orders in detail. It will be quite sufficient to refer shortly to those which are material. [His lordship read the orders and continued :—] One cannot help seeing what the object of the order of the 1st of June, 1892, was. Although in form it seems to have been irregular, because it was not made in the action at all, but simply in the winding up of the company, notwithstanding that it deals with persons who are parties to the action, the real object of it was to get all the unsecured creditors into a better position than they otherwise would have been. As the matter stood, they were liable to be overriden entirely in that debenture-holder's action, and whether they would ever have got anything I do not know. It was thought desirable to postpone the winding up, and in order to give them a *locus standi* in the debenture-holders' action, which they would not have had but for this piece of ingenuity—and it was a very ingenious thing to adopt—it was thought desirable to give them second debentures, so that that action might be regarded as for the benefit of all. It was therefore part of the bargain (and that was what I think the learned judge lost sight of), it was a benefit which they were to get—namely, second debentures—if and when that £5,000 should be advanced in the way in which it was advanced. [The Lord Justice stated the facts, and proceeded :] It was expected and hoped that if the affairs of the company could be kept going on under supervision and under the management of the two receivers and managers (which would involve a certain amount of outlay and expense, whether large or not I do not know) the result would be beneficial to everybody. There would then be enough to pay this £5,000, which was, of course, to come first, subject to the question now before us and which is in dispute. The first debentures were to come next, and then the unsecured creditors who had been made second debenture-holders in order to give them a *locus standi*. That was the whole scheme. It seems to me after that impossible to say that the receivers and managers were not the receivers and managers of the unsecured creditors as much as they were the receivers and managers of the first debenture-holders. They were receivers and managers of everybody interested in the success of the company. If we once get to that, and if we once get the persons who advanced the sum of £5,000 out of the category of strangers having rights prior to the debenture-holders and prior to the receivers and managers, it is obvious that the receivers and managers must be entitled to their indemnity and to their costs, charges, and expenses which they are *primâ facie* entitled to. Here it is that we part company with Williams, J. Williams, J., who had to construe these orders to which I have referred—and I do not propose to go into any further ones—has construed them as leaving the persons who advanced this sum of £5,000 in the position of strangers and as having nothing to do with the action, as prior mortgagees whose rights are quite unaffected. Of course no one imagined when this arrangement was made that everything would go wrong and that there would be a deficiency of assets so serious that there is not even enough to indemnify the receivers and managers what they have expended. They did not dream of that for a moment. If they had, no one would have advanced £5,000 or any-anything. It was hoped that the arrangement would have turned out better and that there would be something coming to the persons who advanced the £5,000, which was in the nature of salvage. It was hoped also that there would be something for the first debenture-holders and for the others; instead of that, things seem to have gone wrong. There is not enough to reimburse the receivers and managers what they have paid. Now I cannot agree in thinking that Williams, J.'s view is correct, that on the true construction of these orders the receivers and managers are to lose everything and are to have no indemnity at all in respect of any liabilities that they may have incurred, assuming that they have incurred them properly, and that they are to come in respect of their indemnity after those for whose benefit they were working. It cannot be that they are

to be regarded as not having any more to do with the action than outside creditors. That is not their position at all.

SMITH, L.J.—The main question in this case is whether my brother Williams was right in ordering that the receivers and managers of Joseph Bull & Sons, Limited, should be postponed to certain persons who subscribed the £5,000 under the circumstances which have been mentioned. Now it seems to me that so far as the general law is applicable to the position of the receivers and managers it is not in dispute. It was laid down in *Batten* v. *The Wedgewood Coal and Iron Co.*, and in *Ex parte Izard, In re Bushell*, that receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed receivers and managers; and that they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property. But it is said in this case that the persons who subscribed the £5,000 ought not to be called upon to pay the charges and expenses of the receivers and managers. It is said that they were not their receivers and managers, but were in reality the receivers and managers of the first debenture-holders; and that, therefore, inasmuch as the receivers and managers were not the receivers and managers of Chittick & Shaw, and the others who had advanced the £5,000, those persons had priority over all the debenture-holders. Now that is the point in dispute. It is said that the object of the persons who were advancing these moneys, and who were becoming second debenture-holders, was that these receivers were not to be paid a single shilling of money, but that they were to be paid by the first debenture-holders. How does that appear on the orders and on the facts of this case? It appears to me that the parties had agreed that the unsecured creditors who were about to become second debenture-holders were to have receivers and managers to watch over their own interests. I differ from my brother Williams, who in his judgment says that the persons who were advancing the £5,000 were the same as any strangers or any bankers who were making an advance to a firm who were in liquidation. I do not think that that was so. They were getting a consideration for what they were advancing. They were to become second debenture-holders. It is impossible to say that these gentlemen who lent the money were outsiders and strangers or mere bankers. I think the law as laid down in *Batten* v. *The Wedgewood Coal and Iron Co.* and *Ex parte Izard, In re Bushell* applies, and that the receivers and managers are entitled to be paid their charges in priority to all other claimants.

Appeal allowed.

Solicitors, *Ward, Perks, & McKay; West, King, Adams, & Co.; Witham, Roskell, Munster, & Weld.*

From Chan. Div.
(Lord Halsbury; and Lindley and A. L. Smith, L.JJ.)

March 1.

In re DARTNALL.
SAWYER *v.* GODDARD. (*a.*)

Trustee—Cestui que trust—*Legatee entitled in reversion—Right to information as to investment of estate—Solicitor and client—Costs—Personal order against solicitor—R. S. C.*, 1883, *ord.* 65, *r.* 11.

A beneficiary entitled to a share in a fund expectant on the death of a tenant for life is entitled to information from the trustees of the will as to the investment of the estate, although the estate may be amply sufficient.

The solicitors of such a beneficiary having instituted proceedings against the trustees without first holding sufficient communication with them, an order was made disallowing the plaintiff's solicitors all costs as against their client.

Appeal from an order of North, J., in chambers.

William Dartnall, the testator, by his will, after appointing the defendants, E. Goddard and W. F. G. Roberts, executors and trustees, gave all his property, subject to the payment of debts and legacies, to his trustees upon trust for his wife for life, and after her death upon trust to divide the sum of £900 equally between the children of T. Dartnall living at the testator's death. The will empowered the trustees to retain any existing investments which yielded income, and to vary investments at their discretion.

The testator died on the 23rd of July, 1894, at which date his widow, the tenant for life, was eighty-four years of age, and there were nine children of T. Dartnall living, of whom the plaintiff, Mrs. Sawyer, was one.

The plaintiff being desirous of mortgaging her interest under the will, her solicitors wrote on the 26th of November, 1894, to the defendant Goddard, asking among other things how the £900 was invested. The defendants' solicitors replied that there had been no appropriation of securities, whereupon, on the 8th of December, the plaintiff's solicitors asked for a statement showing the investments of the trust estates. To this the defendants' solicitor replied on the 11th of December, stating generally the nature of the securities, and that the estate had been sworn at £12,286 12s., but refusing to add to these particulars.

On the 14th of December the plaintiff's solicitors took out on behalf of the plaintiff an originating summons against the trustees, asking that they might be ordered to furnish proper particulars and accounts of the testator's estate and the investments thereof, and that they might be ordered to sign proper authorities to the railway and other companies in which any part of the trust funds might be invested to supply information to the plaintiff as to the amount of stocks or shares, and in whose name the same stood.

On the 20th of December the plaintiff mortgaged her interest under the will.

North, J., in chambers, made an order dismissing the summons with costs, and he also made an order, under Ord. 65, r. 1, that the plaintiff's solicitors should be disallowed their costs against her, and should repay to her the costs ordered to be paid by her to the defendants.

The plaintiff and her solicitors appealed.

Cozens-Hardy, Q.C., and *E. C. Macnaghten*, for the appellants.—The plaintiff was entitled to the information she required: *Ottley* v. *Gilby*, 8 Beav. 602; *In re Tillott*, 40 W. R. 204, [1892] 1 Ch. 86; *Low* v. *Bouverie*, 40 W. R. 50, [1891] 3 Ch. 82. The plaintiff's solicitors have been guilty of no misconduct such as to justify the personal order made against them: *In re Bradford*, 31 W. R. 919, 11 Q. B. D. 373, 15 Q. B. D. 635, 34 W. R. Dig. 43.

Micklem, for the respondents.—Having regard to the size of the estate, the plaintiff was not entitled to any further information. The plaintiff's solicitors showed unreasonable haste in commencing proceedings.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Cozens-Hardy, Q.C., replied.

Lord HALSBURY.—Both sides in this case have been to blame. The plaintiff's application for information as to the investment of the trust estate was a proper one, and should have been granted. On the other hand the parties began a correspondence, and three days after the end of it a hostile originating summons was taken out against the trustees. The learned judge dismissed the summons with costs, and ordered that the plaintiff's solicitors should be disallowed costs as against the plaintiff, and should pay the costs incurred by her. That is not a proper use to make of ord. 65, r. 11. We discharge the order of North, J., and order the trustees to give the plaintiff the particulars she requires. There will be no order as to costs, either here or below, except that the plaintiff's solicitors shall be disallowed all costs against her.

LINDLEY, L.J.—The trustees' refusal to give further particulars was unfortunate, because, strictly speaking, the plaintiff was entitled to them. But then, without any further communication, this very hostile summons was taken out. [His lordship thought the right order to make was that given above.]

A. L. SMITH, L.J., concurred.

Solicitors, *Mear & Fowler*; *Field & Strouts*.

High Court of Justice.

Chan. Div. Stirling, J. — May 7, 8; June 26, 29.

HOWARD v. FANSHAWE. (a.)

Landlord and tenant—Lease—Re-entry—Without process of law—Right to relief from forfeiture—Preamble to section 2, 4 *Geo.* 2, *c.* 28—*Common Law Procedure Act*, 1852, *ss.* 211, 212—*Bankruptcy Act*, 1883, *ss.* 44, 168.

In a proper case a lessee is entitled to relief from even forfeiture where the re-entry of the lessor has been a peaceable one and made without process of law.

The effect of the preamble to section 2 *of* 4 *Geo.* 2, *c.* 28, *and of section* 112 *of the Common Law Procedure Act of* 1852, *is not such as to limit the jurisdiction of the court to grant such relief only in those cases where ejectment proceedings have been taken.*

The right to relief from forfeiture is not a right purely personal to the lessee, but vests on his bankruptcy in his trustee in bankruptcy, and may be assigned by such trustee.

Action.

In 1892 the defendant entered into an agreement with E., a builder, for the erection of dwelling-houses in Stanley-road, in the parish of D., and for the granting to E. of leases of the houses to be erected.

On the 2nd of December, 1892, defendant granted to E. a lease of No. 5, Stanley-road, for 99 years, from the 25th of March, 1892, at a peppercorn rent for the first year, and thereafter at the rent of £5 per annum, paid quarterly.

At the date of the granting of this lease No. 5, Stanley-road, was not completed, but the lease was granted to E. to enable him to raise money thereon, which he did by depositing the said lease with the plaintiff by way of security for an advance of £200 and interest. In like manner, a lease dated the 22nd of December, 1892, of No. 1, Stanley-road, was granted to E. and deposited with the plaintiff to secure another sum of £200 and interest.

On the 6th of February, 1894, E. was adjudicated a bankrupt. At this date the houses Nos. 1 & 5, Stanley-road, were still incomplete. They had front doors, but neither back doors nor windows.

On the 21st of February, 1894, a land agent's clerk, instructed by defendant's solicitors, entered each of the said houses, and affixed to the front doors thereof a notice to the effect that possession had been taken on behalf of the defendant. Several letters passed between the plaintiff's and defendant's solicitors in reference to this possession, and on the 28th of June, 1894, the plaintiff tendered to the defendant the amount of ground-rent in arrear. This was refused by the defendant, who claimed to be in possession.

By a deed dated the 5th of July, 1894, E.'s trustees in bankruptcy, in consideration of £5, assigned to the plaintiff all his interests in Nos. 1 and 5, Stanley-road.

On the 6th of July, 1894, the plaintiff commenced this action, claiming possession of the properties comprised in the leases aforesaid, at the rents and under and subject to the lessee's covenants in such leases respectively reserved and contained, and relief from any forfeiture of the leases in consequence of non-payment of the rents reserved by the leases respectively, or on such terms as the court should think just. Each of the leases contained a proviso for re-entry, enabling the lessor to re-enter on any part of the demised premises in the name of the whole if the rent should be in arrear for twenty-one days, or if there should be any breach of covenant, "in which event the term hereby given shall absolutely determine."

On the 21st of February, 1894, the rent was in arrear, but it was not alleged that any breach of covenant had been committed which would justify the re-entry, and the question was whether, under the above circumstances, the plaintiff was entitled to be relieved from the forfeiture.

Stroud, for the plaintiff.—There has been no possession taken, such as precludes us from relief. There has been no breach of any covenant, and we have tendered the amount of ground-rent due. Therefore, we are entitled to relief.

J. G. Wood, for the defendant. There is no case for relief. There is no jurisdiction in this court to grant relief, seeing that the re-entry was a peaceable one and made without process of law. I admit that there would be such jurisdiction if there had been ejectment. I rely on the preamble to section 2 4 Geo. 2, c. 28, which is in the following terms:—"And whereas great inconveniences do frequently happen to lessors and landlords in cases of re-entry for non-payment of rent, by reason of the many niceties that attend the re-entries at common law, and for as much as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment before he can obtain the actual possession of the demised premises." This shows that the Legislature contemplated relief only where there had been ejectment. I also rely on the fact that there is no reported case which proves such jurisdiction. The jurisdiction of equity in this matter only arises where proceedings have been taken at common law.

Stroud, replied.

Cur. adv. vult.

STIRLING, J., after stating the facts as above set

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

out delivered a reserved judgment as follows:—It was admitted in argument by defendant's counsel that, if on the 21st of February, 1894, the defendant had recovered possession by means of legal proceedings taken against E., the latter or his trustee in bankruptcy would be entitled to be relieved both under the general jurisdiction of the court and under the statute 4 Geo. 2, c. 28. It was, however, strongly argued that no relief could be given where the lessor had recovered peaceable possession without the assistance of any court, and in support of this contention reliance was placed first, on the circumstance that no case could be found in which such relief had been given, and (secondly) on the preamble to the 2nd section of the statute just referred to, which was said to amount to a recognition by the Legislature that the right only exists where the demised property has been recovered by legal process. Before dealing with these arguments, it seems desirable to consider the grounds on which such relief was formerly given by the Court of Chancery. In *Wadman* v. *Calcraft*, 10 Ves. 67. Sir Wm. Grant, M.R., says: "The plaintiff seeks to be relieved against a forfeiture of his lease, which he states to have been incurred solely by non-payment of rent, and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture, considering the purpose of this clause of re-entry to be only to secure the payment of rent, and that when the rent is paid the end is obtained, and therefore the landlord shall not be permitted to take advantage of the forfeiture." [His lordship having referred at considerable length to the cases of *Sanders* v. *Pope*, 12 Ves., at p. 282; *Davis* v. *West*, 12 Ves. 475; and *Bowser* v. *Colby*, 1 Hs. 109, continued:—] These authorities seem to me to establish that the ground upon which courts of equity formerly gave relief was that the proviso for re-entry was in the eye of the court simply a security for the rent, and on principle I cannot see that it makes any difference whether the lessor avails himself of such security with or without the assistance of a court of law. It is no doubt remarkable that no reported case appears to have occurred in which relief was given where the landlord re-entered peaceably and without bringing ejectment, but it is to be remarked that re-entry in this way can be but seldom effected. As to the preamble of the statute it is to be remarked that although in terms it appears to contemplate the necessity of an ejectment in every case, the existence of cases of peaceable re-entry in vacant possession may have been overlooked or may have been considered of so infrequent occurrence that their existence did not amount to a grievance.

I think, then, that if the lease had remained vested in E. or his trustee in bankruptcy, he or his trustee would have been entitled to relief. It was said, however, that the right was personal to the lessee and that relief could not be given to his mortgagee. It is unnecessary to consider whether a mortgagee, by virtue of his mortgage, is entitled to relief from a forfeiture as to which I only refer to *Hare* v. *Elms*, 41 W. R. 297, [1893] 1 Q. B. 604. In the present case the mortgagor has become bankrupt and the mortgagee has obtained from his trustee in bankruptcy an assignment of the equity of redemption in consideration of a payment of £5.

Now by section 44 of the Bankruptcy Act, 1883, all property of the bankrupt vests in the trustee, and by section 168 property includes things in action. The right of the bankrupt to be relieved of a forfeiture appears to me to be a thing in action and to have become vested in the trustee in bankruptcy, who was entitled to sell the right and assign it to a purchaser: *Seear* v. *Lawson*, 28 W. R. 929, 15 Ch. D. 426; *Guy* v. *Churchill*, 37 W. R. 504, 40 Ch. D. 481. I think, therefore, the plaintiff is entitled to bring the action.

Lastly, it was contended that the plaintiff had deprived himself of his right to relief by the position which he took up in the interval between the 21st of February, 1894, and the bringing of the action, and in particular by the letter of the 4th of May, 1894, in which he declined to pay anything to the defendant except the costs of a new lease. I am unable to take this view of the plaintiff's conduct. I think that the correspondence does not show a refusal of the plaintiff to pay the arrears of rent, but merely a refusal to pay the sums claimed by the defendant's solicitors in the letter of the 25th of April, 1894. Consequently, I am of opinion that the plaintiff is entitled to the relief he asks for by his action, and I make a declaration in the following form—*i.e.*, that the plaintiff shall, on paying the rent, have, hold, and enjoy the demised premises according to the terms of the leases thereof, without any new lease, following the words of section 212 of the Common Law Procedure Act of 1852. It certainly appears from this section that the Legislature contemplated thereby cases of relief in equity where the tenant had been ejected by means of ejectment proceedings, but the provision was a remedial one, and ought, therefore, to be read in as wide a sense as possible, and in my opinion the wording of the section is not such as to compel me to hold that all proceedings other than those in ejectment are thereby excluded.

Solicitors, *H. C. Barker; Flower, Nussey, & Fellowes.*

Chan. Div. } June 15.
Kekewich, J. }

DAVIES v. VALE OF EVESHAM PRESERVES (LIMITED). (*a.*)

Practice—Receiver and manager—Company—Debenture-holders' action—Continuation of receiver—Form of judgment.

Where, on an interlocutory order, a receiver and manager has been appointed as receiver generally and as manager until a fixed date, upon the motion for judgment in the action, the minutes of judgment should not continue the receiver, but merely extend the time during which the receiver may act as manager, as he is still in office as receiver by reason of the former order.

This was an action by the second debenture-holders against the company and the first debenture-holders, asking for the usual accounts and inquiries. Shortly after the issue of the writ, on motion, a receiver and manager was appointed, as receiver generally, and as manager until the 30th of June.

The action now came on for judgment in default of defence, and the minutes of the order proposed "to continue the receiver and manager."

Ashton Cross, for the plaintiffs.

Duka, for the defendants.

KEKEWICH, J.—I do not think the minutes should continue the receiver. He is already appointed generally by the interlocutory order, and the proper form of order now is merely to extend the time during which he may act as manager. I think that a further extension from the 30th of June to the 30th of

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

November would be proper, and the minutes should be amended accordingly.

Solicitors, *Richard White*, for *Hartland, Isaac, & Watkins*, Swansea; *J. A. Smith*.

*NOTE.—*Cf.*, Palmer on Companies, 5th ed., p. 622, form 434, also p. 618, form 427; *Underwood* v. *Underwood*, 37 W. R. 428, 60 L. T. N. S. 384; Seton, 5th ed., vol. 1, pp. 635-637; vol. 2, p. 1185, form 3.

Chan. Div. }
Kekewich, J. } May 7.

BISHOP *v.* SMYRNA AND CASSABA RAILWAY CO. (*a.*)

Company—Winding up—Undivided profits—Profits earned before liquidation—Preference shareholders—Capital—Costs of liquidation—Priority.

Where, on a limited company going into liquidation, there is standing to the credit of its revenue account a sum representing undivided net earnings,

Held, that, notwithstanding the liquidation, such sum was, by the terms of the memorandum and articles of association, applicable as "profits," in payment of arrears of dividend due to the preference shareholders in priority to the payment of a deficit on the capital accounts, to the costs of liquidation, or to the return of capital to the shareholders.

Motion.

The Smyrna and Cassaba Railway Co. (Limited) was incorporated in 1864 under the Companies Act of 1862, and had for its object the construction and working of a line of railway in Asia Minor from Smyrna to Cassaba, with a branch to a village named Bournabat, for which a concession and firman had been granted by the Sultan of Turkey.

The nominal capital of the company was £800,000, divided into 14,000 preference shares and 26,000 ordinary shares of £20 each, of which 6,250 and 19,687, had been issued respectively and paid up in full.

The preference shares were entitled to a dividend of seven per cent. per annum in priority to the ordinary shares, and also to a one-fifth share of any surplus profit that might remain after a dividend of seven per cent. per annum had been paid on the ordinary shares.

By the company's articles of association it was provided as follows:—

Article 58. That ordinary general meetings of shareholders should be held, to receive the balance-sheet account and directors' report (half-yearly) in April and October.

59. That "for that purpose the balance-sheet shall be made up to the 31st of December and the 30th of June in each year, and shall contain a true account of the capital, credit, and properties belong to the company, and the debts, gains, and losses of the company which may have arisen in the course of the preceding half year, and shall show the balance remaining after payment of all expenses of maintenance and working of the railway, which balance shall be designated the "net revenue."

61. That "the approval by a general meeting of the balance-sheet, and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards reopened."

The Ottoman Government became indebted to the company, under certain conventions, in a large sum.

On the 16th of July, 1894, the company went into voluntary liquidation, and appointed a liquidator.

Until the end of the year 1889, the preference shareholders were paid their dividends in full, and dividends were also paid on the ordinary shares, but from that date no dividends were paid on the ordinary shares, and the dividends on the preference shares had also fallen into arrears.

On the 31st of December, 1893, as shown by the accounts adopted at the company's half-yearly meeting in April, 1894, there was a balance to the credit of net revenue account of nearly £20,000, and by the 26th of July, 1894, that balance had increased to £22,295 6s. 1d.

The accounts at that date showed a deficiency of over £16,400 on capital account, being the balance of the company's claim against the Ottoman Government. The result was that the sum of £22,295 6s. 1d., being the balance to the credit of net revenue, as aforesaid, was insufficient to pay in full the deficit on capital account and the arrears of dividends on the preference shares, and the costs of liquidation.

The plaintiff, representing by arrangement all the preference shareholders, claimed to have the remaining arrears of dividends due on the preference shares down to the liquidation, paid out of the £22,295 6s. 1d. or out of such part of the assets of the company as represented profits earned by the company down to the liquidation, before any distribution thereof among the ordinary shareholders; and now moved for an interim injunction to restrain the liquidators (who contended that these assets should be applied: 1. Paying off deficit in capital account. 2. The payment of costs of liquidation. 3. The return of capital to the shareholders) from making any distribution among the ordinary shareholders out of such sums without first paying in full the arrears of dividend due to the preference shareholders.

There was on the evidence some doubt as to whether the whole of the sum of £22,295 6s. 1d. was properly attributable to revenue as "profits," but it was admitted that a large portion of it was undivided revenue derived from the working of the railway.

The motion was by consent treated as the trial of the action.

Renshaw, Q.C., and *P. S. Stokes*, for the plaintiff.—This sum represents undivided profit. Consequently the preference shareholders are under the company's articles entitled to be paid thereout their seven per cent. dividend in priority to the ordinary shareholders: *Wilmer* v. *Macnamara*, *ante*, p. 519, [1895] 2 Ch. 245; *Lee* v. *Neuchatel Asphalte Co.*, 37 W. R. 321, 41 Ch. D. 1; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Mills* v. *Northern Railway of Buenos Ayres*, 19 W. R. 171, L. R. 5 Ch. App. 621, 631; *In re Bridgwater Navigation Co.*, [1891] 2 Ch. 317, 39 W. R. Dig. 56. Were the company a going concern there would be no question about it, and under article 61 the balance sheet of the 31st of December, 1893, must be taken to be correct.

Warmington, Q.C., and *F. M. S. Cassel*, for the defendant company.—The sum stated as net revenue is not correct. The accounts were taken on the footing of the company being a going concern; that being no longer the case sums properly stated as being to the credit of the revenue account are assets of the company in liquidation, and as such are applicable, as the assets of an ordinary trading partnership would be applicable, under section 44 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), sub-section (*b*). In *In re Bridgwater Navigation Co.* the question was what was to be done with the surplus after the paid

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(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

up capital had been returned. The circumstances appear in *Birch* v. *Cropper*, 38 W. R. 401, 14 App. Cas. 525. "Profits" are determined after ascertaining loss or depreciation in capital: *Verner* v. *General and Commercial Investment Trust*, *per* Kay, L.J., [1894] 2 Ch., at p. 268. The cases all treat of a company which is a going concern. The balance-sheets ought to have been prepared as set out in article 59.

Renshaw, Q.C., in reply.—The rules governing ordinary partnership give way to special contract, and rights of priority under such must be preserved in distribution: *Griffith* v. *Paget*, 25 W. R. 821, 6 Ch. D. 511.

KEKEWICH, J.—The word "profit," like many other words in the English language, is capable of more than one meaning, and is often and properly used in more than one sense; and I think that the two different senses in which the word "profit" is used, form the key to the difficulty in the present case. In one of its ordinary meanings, "profit" expresses the sum which periodically—whether half-yearly, yearly, or at any other period as fixed by agreement—is divisible among partners (including, of course, members of a company) as income, and sometimes called net profits in order to distinguish it from gross profits. It is the sum which, on taking accounts properly and deducting expenses, is found to be the sum made by trading, and as such, divisible among the parties entitled. That is one meaning of the word profits. But it is also probably used in the following sense. On the winding up of a concern, after paying all debts and expenses, and after repaying to each partner what he has bought in as capital, there is, if the concern has been successful, a balance left, and that balance is "profits." It is perfectly immaterial whether you treat this balance as capital or income, inasmuch as the same persons are in either case entitled to receive it, and it is for them to decide how it is to be treated. One of the best instances I can think of is the case of a partnership formed for and concerned in a single transaction, *e.g.*, the purchase and sale of a ship. There no account is taken during the transaction. The capital is found, the cost of advertisements and other expenses are paid, and on the sale being completed, if successful, the balance remaining after repaying each partner his capital, is "profits."

These two distinct meanings of, and modes of ascertaining "profits" help me to determine this case. I have been referred to recent cases, in which the question has been raised as to whether a company incorporated under the Companies Acts may divide at the end of a half-year or other period, what may have been made in that period without having regard to any loss or diminution of the capital producing that income which may have occurred, and the courts have decided in such cases that division may be so made.

What may, however, happen on the winding up of a company has not been determined by, and has nothing whatever to do with, these decisions. In winding up, it is necessary to take accounts properly for that purpose and in accordance with the memorandum and articles of association, and when that has been done to ascertain once for all, independently of any estimates, but in accordance with actual results, what the assets really are; and then, when you have got them in, you ascertain what the "profit" is, and divide it among the partners or shareholders in accordance with the provisions regulating the partnership or company. In doing all this it may be that you will have sums which should have been divided before—"profits," for instance, of the last or preceding year's trading—but which, instead of having been divided, have been carried to a reserve fund or a sinking fund; such sums are sometimes called "undrawn profits." Are they, however, any the less "profits" because they have not been divided? Mr. Warmington says that, on the authority of the cases, they must not be treated as "profits." But what is the present case? I have here the case of a company where before liquidation and while still a going concern "profits" have been realized but have not been divided, and these "profits" have come into the hands of the liquidator. What is to be done with them? Are they to go into the general mass in the liquidation, or are they "profits" and to be divided as such? I see no answer to the plaintiff's contention that the profits should be divided on a certain footing, that is, seven per cent. interest on their shares should be paid to the preference shareholders in priority to every one else. The only answer to this that can possibly be made is that this has not been done while the company was a going concern. But the rights still remain and are enforceable, because they are laid down by the company's memorandum and articles of association, and therefore it is a matter of contract. This is strictly in accordance with the principles laid down in *Griffith* v. *Paget* in accordance with the principles of contract, and in no way adverse to the principles laid down in any of the other cases which have been cited to me.

I, therefore, think that the plaintiff succeeds in this action, and there must be a declaration that the preference shareholders are entitled to be paid their arrears of interest out of such part of the company's assets as represents profits up to the date of the liquidation; all parties to have their costs paid out of the assets.

Solicitors, *Parker, Garrett, & Parker*; *Birchem & Co.*

Q. B. Div.
(Day and Wright, JJ.) April 26.

REIS v. PERRY. (*a.*)

Libel—Privilege—Publication of information to which the public had access by statute—Trade protection society—Information supplied by Government official inaccurate—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 6, 7, 11, 12.

A trade protection society published in their gazette information of a registered deed of inspectorship as set out in an official office extract. The information was inaccurate, inasmuch as under the column headed "Property included under the deed" there appeared the words "Estimated assets—Nil." As a matter of fact, if the debtor's property had been realized, it was sufficient to pay all the creditors in full.

The debtor brought an action for libel.

Held, that the plaintiff could recover, on the broad principle that a person who published information concerning another for his own profit was responsible for its accuracy; and the fact that in the present case the information was published without malice and was copied from an authorized official document was no defence.

Per Wright, J.—*It is questionable whether a trade journal can safely publish the contents of the statutory affidavit merely made by the debtor as to his property, as there is nothing in the Act which expressly entitles a*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

person to see and make extracts from the affidavit as distinguished from the deed itself.

Appeal from the decision of the recorder sitting at the Mayor's Court, London.

The facts were as follows: In October, 1894, one Reis filed a deed of inspectorship of his affairs which included a statement of the whole of his property. As required by section 4 of the Deeds of Arrangements Act, 1887, he duly registered the deed, together with an affidavit as directed in section 6, sub-section (1), which set out the total estimated amount of the property and liabilities included under the deed. Section 7 directs that the registrar shall keep a register, in which he shall enter an extract of the contents of every deed of arrangement registered under the Act and specifies that the extract shall contain (*inter alia*) "the amount of the property and liabilities included under the deed as estimated by the debtor." By section 11 any person shall be entitled to have an office copy or extract from any deed registered under the Act. Section 12 enacts that any person shall be entitled, at all reasonable times, to search the register, and on payment of a fee to make extracts from any registered deed of arrangement. In the affidavit which the debtor has to make as part of his statutory declaration he is required to state the amount of property included under the deed of arrangement.

In the present case, Reis, the plaintiff in the action, in his affidavit instead of stating in the space set aside for the purpose in the form subjoined to the affidavit the amount of property included in the deed, struck out paragraph 2 of the form and wrote instead the words "No property is included under the deed." In the register, under the heading "Property included under the Deed," there appeared merely a dash.

The defendants in the action were a trade protection society, carrying on business under the style of W. R. Perry, Limited, and were the publishers of a trade journal known as "Perry's Gazette," which contains information relative to the affairs of traders. With the sole object of obtaining information for their journal, W. R. Perry, Limited, applied under section 11 of the Act for an extract copy from the register of the plaintiff's deed of inspectorship and were duly supplied by the official in charge with the usual stamped extract in which, after setting out the liabilities and secured creditors, there appeared under the heading "Property" the words "Estimated Assets, Nil." These last three words constituted the alleged libel, as Reis had sufficient property, if it were realized, to pay all his creditors in full. The defendants published the extract as it was received by them from the official source and took no steps to inquire into the accuracy of it.

The learned recorder at the trial decided that the defendants were liable for the inaccuracy of the statement which they published, and awarded the plaintiff £50 by way of damages.

The defendants appealed.

Robson, Q.C. (with him *McKenna*), for the appellants.—The misstatement in the defendants' journal was the natural consequence of the plaintiff's own wrongful act for he did not fill up the form in accordance with the requirements of the Act. The information he supplied was in such a form that it might reasonably have been construed by the official or any one else as amounting to a statement that his assets were "nil." The publication of information to which the public have a right of access was moreover privileged: *Searles* v. *Scarlett*, 40 W. R. 696, [1892] 2 Q. B. 56, 66 L. T. N. S. 837. The public by statute have a right not merely to inspect the registered deeds of inspectorship, but to obtain a stamped "extract copy," and the publishing of such an extract fell within the decision of the House of Lords in the case of *Fleming* v. *Newton*, 1 H. L. Cas. 363, and even if the information was inaccurate, if that inaccuracy was in the "extract copy" itself, the publisher could in that case successfully set up the plea of privilege. [WRIGHT, J.—There is nothing in the Deeds of Arrangement Act, 1887, which expressly entitles a person to see and make extracts from the affidavit.] The definition of a deed of arrangement in section 4 would include the affidavit. The registrar was ordered to keep a register of every deed registered. By section 11 any person shall be entitled to have an office copy of or extract from any deed registered under the Act. The object of the Act was to give the public full information of the affairs of any trader who chose to take advantage of the Acts.

Dickens, Q.C., and *R. Isaacs*, for the respondent.—The appellants are responsible for the information of the debtor's affairs, which they publish for their own profit, and cannot plead privilege, if that information is inaccurate. The question of malice might affect the question so far as the *quantum* of damages is concerned, but the plea that the publication was made without malice is no defence to the action.

DAY, J.—The appeal must be dismissed, for I think that the decision arrived at by the learned recorder is right. Independently of the authorities cited for the defendants, the correctness of which decisions I do not for a moment question—it seems to me that the present case admits of no doubt. The principle of law applicable to such cases as this, clearly is that where a person publishes for his own profit information about another person's affairs, he is responsible for the accuracy of such information.

WRIGHT, J.—I concur. Two questions are raised by this case, one at any rate of extreme importance to business men. The first question is whether the publication, by a private individual of matters which are contained in a public document open by law to the inspection of the public, can be the subject of privilege. In the case of *Searles* v. *Scarlett* the mere publishing of information contained in an official document open to public inspection was held privileged. Indeed, the question of privilege was carried a step further in the case of *Fleming* v. *Newton*, but no such principle of defence as was raised there seems applicable to the present case, for it cannot be contended that the registration of a deed under the Deeds of Arrangement Act, 1887, has the effect of a judgment. Then comes the second question, assuming that the information to which the public had access was from some cause or other incorrect, and was innocently published by a person for his own benefit in the ordinary course of his business, Could that person set up privilege then? I agree with my learned brother that, apart from the decision in *Searles v. Scarlett*, in which case no question as to the accuracy of the information had to be considered by the court, there can be no doubt that a person who chooses to publish information about another's affairs must take the risk of whether the statement, as received by him, was accurate. In my opinion it is no defence to say that the misstatement was made in first instance by a government official or anyone else, or that he had used all reasonable care to secure the accuracy of the information. To my mind there is a third point of difficulty, for I doubt whether in any case a person has a right to publish information

contained in the affidavit filed by the debtor in conformity with the requirements of section 7 as to the property passing under the deed. The Act states clearly enough that under section 12 any person shall be entitled to inspect and make extracts from any deed of arrangement, and under section 11 any person is entitled to have, on payment of a fee, an office copy of or extract from, any deed registered. It seems questionable, therefore, whether, supposing the subject-matter of the publication to be accurate, any trade protection society is safe in publishing the contents of the statutory affidavit at all. I am also doubtful whether an individual has a right to publish extracts merely, of the information to which, under section 12, the public have a right to inspect and take certain extracts from, and I am inclined to think that no one can safely publish any information as to the debtor's affairs unless he is prepared to show that the information he published is an absolutely exact copy of the whole of the office copy, or of the deed itself as it appears on the register.

Appeal dismissed.

Solicitors for the appellants, *McKenna & Co.*

Solicitors for the respondent, *Spyer & Sons.*

Q. B. Div.
(Wright and Kennedy, JJ.) April 24.

CARTWRIGHT *v.* REGAN. (*a.*)

Bill of sale—Validity—Deviation from statutory form—Covenant to produce last receipts not in writing—No power to seize on failure to do so—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and Schedule.*

A bill of sale contained a covenant that the grantor would produce his last receipt for rent, taxes, rates, and outgoings, without specifying that there should be any previous demand by the grantee; and the bill of sale also contained a proviso that the goods conveyed should not be liable to seizure except for the causes specified in section 7 *of the Act of* 1882.

Held, that the deviation from the form of the Schedule to the Act was not a material one, and did not render the bill of sale void under section 9 *of the Act.*

Barr *v.* Kingsford, 56 *L. T. N. S.* 861, 35 *W. R. Dig.* 26, *considered and distinguished.*

This was an appeal from the decision of His Honour Judge Bacon sitting at the Whitechapel County Court.

Regan, having obtained judgment against one Hawthorn, proceeded to issue a writ of execution which was duly levied on Hawthorn's goods. Whereupon the claimant Cartwright gave notice that the goods taken in execution belonged to him under a bill of sale dated the 27th of November, 1894, made between himself and Hawthorn to secure to him the repayment of £50 with interest.

Upon the receipt of this notice the high bailiff, at the instance of the execution creditor, took out an interpleader summons, which was tried on the 31st of January, 1895, to test the validity of the claim, and the claimant lodged the amount of the levy in the hands of the high bailiff to abide the order of the judge. At the hearing the claimant put in evidence an office copy of the bill of sale, the material part of which is as follows:—

"And the mortgagor (Hawthorn) will punctually pay all rent, taxes, rates, and outgoings to become due and payable in respect of the premises on which the said chattels and things, or any of them, are or shall be, *and will produce the last receipts for such rents, taxes, and rates.* Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in section 7 of the Bills of Sale Act, 1878, Amendment Act, 1882. In witness, &c." [A schedule of the goods conveyed by the bill of sale followed.]

It was not denied that the bill of sale was the evidence of a perfectly honest transaction, and that the consideration had been truly stated; but a technical objection was taken for the execution creditor against the bill on the ground that the general covenant that the grantor would produce on demand the last receipt for rent, taxes, and rates was contrary to the form prescribed by the Act, and rendered it invalid.

The learned county court judge decided in favour of the claimant, and from his decision the execution creditor appealed.

W. H. Stevenson, for the appellant, submitted that an absolute covenant to produce receipts on demand was unreasonable, and gave a ground for seizure outside any power ever intended to be conferred on him by the Act. Such a covenant made a bill of sale void under the 9th section of the Bills of Sale Act, 1882. It was never intended that the goods should become liable to seizure in the event of the grantor not complying with a mere verbal demand to produce his last receipts.

He relied on the case of *Barr* v. *Kingsford*, 56 L. T. N. S. 861, 35 W. R. Dig. 26, where it was held that a covenant to produce receipts "on demand" was void. The object of the Act was to protect borrowers, and the bill of sale must, to be valid, follow exactly the particulars as to form given in the Act designed for their protection.

He cited *In re Williams, Ex parte Pearce*, 32 W. R. 187, 25 Ch. D. 656.

A. Clavell Salter, for the claimant, contended that this was a bare covenant to produce the last receipts, under which the goods were not seizable in the event of the grantor not doing so. The present case was, moreover, distinguishable from *Barr* v. *Kingsford*, for there the covenant to produce on demand was coupled with a power to seize the goods on breach of covenant, although that power was made inconsistent by a proviso that the goods should be seizable only for those causes mentioned in section 7 of the Act of 1882.

W. H. Stevenson replied.

WRIGHT, J.—In my opinion the decision of the learned county court judge was right, and this appeal, therefore, fails. The bill of sale contains a covenant to produce a receipt for rent, rates, and taxes, but omits to specify in what way that receipt is to be demanded. There is a covenant for seizure in it, which limits the power to seize to those cases of default mentioned in section 7 of the Bills of Sale Act, 1882. It is, therefore, such a bare covenant to produce receipt as is of no importance in determining the validity of the bill of sale itself, and it is in accordance with common sense to hold that the inclusion of such a covenant is an immaterial departure, if one at all, from the provisions of the Bills of Sale Act. The learned counsel for the execution creditor relied on the case of *Barr* v. *Kingsford*. In that case it was laid down that a covenant to produce last receipts on demand avoided a bill of sale on the ground that a covenant to produce generally could not be necessary for the protection of the grantee, inasmuch as the Bills of Sale Act only gave power to seize on failure to comply with a demand to produce in writing. In giving judgment in that case Lord

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Coleridge, C.J., proceeded very much on the ground that the bill of sale contained a clause for seizure not merely in the event provided for by the Act of 1882, but also in the event of the breach of any covenant. What Lord Coleridge, C.J., and Pollock, B., decided was that in connection with the receipt the only lawful power to seize was a failure to comply with a demand in writing to produce them ,and it was wrong, therefore, to add a power to seize the goods for non-compliance with a mere demand to produce receipts when merely verbally demanded. In that case moreover the bill of sale was inconsistent, for it added a proviso that the chattels assigned should not be liable to seizure or be taken possession of by the grantee for any cause other than those mentioned in section 7 of the statute, but that proviso followed upon an express covenant that there should be seizure on the happening of another event. In that case there was an inconsistent proviso, in this case there is not. The appeal therefore must be dismissed with costs.

KENNEDY, J.—I am of the same opinion. It seems to me that the case of *Barr* v. *Kingsford* can be distinguished from the present case. When you look at the bill of sale in that case there was there what is wanting in this one—an express provision "that in case the borrower should at any time make default in the performance or observance of any of the covenants or agreements therein contained, or should become bankrupt, or enter into liquidation for the benefit of or compound with his creditors, or if any event mentioned in the 7th section of the Bills of Sale Act, 1878, Amendment Act, 1882, should happen then the principal money thereby secured with interest should become immediately payable without the necessity for any demand of payment being made." The parties therefore contemplated that if on demand the grantor did not produce his last receipt, the goods could be seized forthwith. That covenant was followed by a proviso that the chattels so assigned should not be liable to seizure for any causes other than those specified in section 7 of the Bills of Sale Act, 1882. Now under that Act the demand to produce must be made in writing if seizure is to follow for breach of covenant to produce. Consequently the bill of sale was inconsistent. During the argument that fact was pointed out and Pollock, B., remarked that it was a futile provision when it followed a clause making the whole amount claimable and payable and the goods seizable, in the breach of a covenant not countenanced by the statute: In the present case there is no such covenant. There is only a naked covenant to produce and only a liability for seizure in those cases specified in the Act of 1882. The present case is therefore distinguishable from that of *Barr* v. *Kingsford* and the objection taken against the validity of the bill of sale cannot be sustained.

WRIGHT, J.—I wish to add to what I have already said that there is another ground upon which the present case can be distinguished from that of *Barr* v. *Kingsford*. It has often been laid down, for example in the case of *Ex parte Stanford*, 34 W. R. 17, 17 Q. B. D. 259, that a bill of sale may be set aside not merely if its form should differ from that prescribed by the statute, but if it is reasonably calculated to deceive those for whose benefit the statutory form was devised, and nothing could be more calculated to do so than the covenant to produce in that case. In my opinion no such question arises in the bill of sale we have just considered.

Appeal dismissed.

Solicitor for the appellant, *F. Deakin.*
Solicitor for the respondent, *H. Morris.*

Q. B. Div.
(Cave and Lawrance, JJ.) April 3.

HILL v. HAIR.

Local government—Sewer—Single private drain—Local Act—Public Health Acts, 1848 (11 & 12 *Vict. c.* 63); 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13, 15, 41; 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

A single private drain, constructed prior to the passing of the Public Health Act, 1848, *and carrying the combined drainage of the several houses, originally into a ditch, and subsequently into a public sewer, is a sewer within the meaning of the Public Health Act*, 1875, *and is not a "single private drain" within the meaning of a section of a local Act containing provisions similar to those of section* 19 *of the Public Health Acts Amendment Act*, 1890. *Such drain is, therefore, repairable by the local authority, and the local authority are not entitled to exercise against the owner of one of the houses the powers conferred upon the local authority by section* 41 *of the Public Health Act*, 1875.

Special case stated by justices of the city of Carlisle.

The respondent was summoned before the justices on an information and complaint preferred against him by the appellant, who was the inspector of nuisances for the local authority, charging the respondent with having failed to comply with a notice requiring him to abate a nuisance arising from the defective condition and construction of a brick drain on his premises, and for that purpose to execute certain alterations in the drain. The notice was served under the Carlisle Corporation Act, 1887, and section 41 of the Public Health Act, 1875.

The premises in question, together with adjoining premises, belonging to six different owners, were residential premises built before the Public Health Act, 1848, came into operation. All the premises originally belonged to one owner, and were drained by a combined system of drainage constructed upon private property, which conveyed the sewage into an adjacent ditch.

In 1853 the urban sanitary authority acting under the provisions of the Public Health Act, 1848, substituted a public sewer for the ditch, and the respondent's drains and those of the adjoining premises were connected with the sewer. The system of drainage on the respondent's and the adjoining premises had never been approved of or adopted by the sanitary authority, but had always been regarded as private drainage, for which the authority was not responsible. The brick drain or sewer in question on the respondent's premises formed part of the drainage system of the respondent's and the adjoining premises, and carried the drainage of these premises into another drain or sewer, and thence into the public sewer.

The Public Health Acts Amendment Act, 1890, had been adopted by the sanitary authority of Carlisle prior to the commencement of these proceedings.

By section 134 of the Carlisle Corporation Act, 1887, where two or more houses or premises are connected with a single private drain, which conveys their sewage into a private sewer, the corporation shall have all the powers conferred by section 41 of the Public Health Act, 1875.

The justices held that the drain in question was a sewer vested in the local authority, and not "a single private drain" within the meaning of section 134 of the Carlisle Act, and that it was not the duty of the respondent to abate the nuisance.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

The Public Health Act, 1875, s. 41, provides that on the written application of any person to a local authority, stating that any drain on or belonging to premises within their district, is a nuisance or injurious to health, the local authority may empower their surveyor or inspector of nuisances to enter such premises and examine such drain, and if it appear to be in bad condition or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works, and if such notice is not complied with, the person to whom it is given shall be liable to a penalty, and the local authority may, if they think fit, do the work themselves, and recover in a summary manner the expenses incurred by them in so doing.

Section 4: Drain means any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. "Sewer" includes sewers and drains of every description except drains to which the word drain interpreted as aforesaid applies.

The Public Health Acts Amendment Act, 1890, s. 19, (1) "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under section 41 of the Public Health Act, 1875, . . . and the local authorities may recover any expenses incurred by them in executing any works under the powers conferred upon them by that section from the owners of the houses in such shares and proportions as shall be settled by their surveyor or (in case of dispute) by a court of summary jurisdiction." (3) "For the purposes of this section the expression 'drain' includes a drain used for the drainage of more than one building."

Channell, Q.C., and *Macmorran*, for the appellant.—This was a single private drain within the meaning of section 134 of the Carlisle Act: *Selfe* v. *Hove Commissioners*, *ante*, p. 300, [1895] 1 Q. B. 685, and is therefore repairable by the respondent. *Travis* v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233, does not apply to this case, because here the local authority had adopted the Public Health Acts Amendment Act, 1890.

Poland, Q.C., and *A. Glen*, for the respondent.—This drain was constructed before the passing of the Public Health Act, 1848, and was a sewer within the definition of sewer in that Act. It therefore vested in the local authority from the date of that Act, and has ever since been repairable by them. *Travis* v. *Uttley* only follows previous decisions in which it was held that sewers vest in the local authority except when made for private profit. *Bonella* v. *Twickenham Local Boord*, 36 W. R. 50, 20 Q. B. D. 63; *Acton Local Board* v. *Batten*, 28 Ch. D. 283, 33 W. R. Dig. 128; *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135; *Minehead Local Board* v. *Luttrell*, 42 W. R. 667, [1894] 2 Ch. 178; *Bateman* v. *Poplar District Board of Works*, 36 W. R. 501, 37 Ch. D. 272. [He was stopped.]

Channell, Q.C., replied.

CAVE, J.—I am of opinion that the magistrates were right in dismissing this complaint. The cases cited by the counsel for the respondent show what was the true construction of the Public Health Act, 1848, and those cases also show that when that Act was passed all sewers then existing thereupon became vested in the local authority. It is said on behalf of the appellant that the local Act has impliedly repealed the Public Health Acts, 1848 and 1875, and that the sewer in question in this case must be taken to have been divested of its public character and to have become a private drain. There does not seem to me to be any ground for that argument. Section 134 of the local Act only applies to drains which were private drains when the Act passed. The only case which causes me any difficulty is that of *Self* v. *Hove Commissioners*, and I was for some time pressed by the observations of Wills, J., in that case, but these observations must be taken as applying to the particular facts of the case before him. In that case the plaintiff was the owner of a semi-detached house, adjoining which was another house, the property of a different owner, and if it be the fact, as is stated in the report of that case in the *Law Journal* (64 L. J. Q. B., at p. 218), that the two houses were within the same curtilage, it follows that the drain was not a sewer within the definition in section 4 of the Public Health Act, 1875. [*Channell, Q.C.*, who was counsel for the respondent in *Selfe* v. *Hove Commissioners*, stated that it was not the fact that the houses in that case were within the same curtilage.] Whether that may have been the fact or not, it was immaterial to the main point decided in that case, and in any view that case is not an authority binding upon us here.

It follows from the provisions of the Public Health Act, 1875, that there may be drains or sewers, draining premises within the same curtilage which may be private drains, although they drain more than one building; also there may be sewers which, being made for profit, do not vest in the local authority. That may possibly account for section 134 in the private Act and section 19 in the Public Health Act, 1890, but our decision in this case does not in any way affect these sections. In my opinion this drain was not a private drain, and this appeal must be dismissed.

LAWRANCE, J.—I agree.

Solicitors for the appellant, *Mellor, Smith, & May*, for *Collingwood*, Carlisle.

Solicitors for the respondent, *Indermaur & Brown*, for *Blackburn & Main*, Carlisle.

Q. B. Div.
(Wills and Wright, JJ.) Feb. 12.

In re AN ARBITRATION BETWEEN GRIFFITHS AND MORRIS. (*a.*)

County court — Prohibition — Claim for unexhausted improvements—Appointment of referee—Jurisdiction of county court registrar—Award—Power of registrar to award solicitor and client costs — County Court Rules, 1889, *ord.* 40, *r.* 7—*Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 9, 19, 20, 24.

The court will set aside an award made under the Agricultural Holdings Act, 1883, *if it appears on the face of the award that one of the referees was appointed by the county court registrar, unless the award shows that such appointment was made with the consent of the party on whose behalf the referee was to act.*

Held, by Wills, J., that ord. 40, *r.* 7, *of the County Court Rules*, 1889, *which purported to give larger jurisdiction to the county court registrar in this matter the*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

is conferred by section 9, *sub-section* 6, *and section* 11 *of the Agricultural Holdings Act*, 1883, *was* ultrà vires.*

Held, also by Wills, J., that a referee or umpire had no power to order that the costs of the award should be paid on solicitor and client scale.

Motion for a prohibition under ord. 40, r. 8*a*, directed to the judge of the county court at Carnarvon to prohibit any further proceedings upon an order for the enforcement of an award made by him under section 24 of the Agricultural Holdings Act, 1883.

The material facts are these:—The land in question had been let in March, 1887, by Mrs. Morris to one Griffiths at a yearly rent of £52 10s. Before the expiration of his tenancy, the tenant gave due notice to Mrs. Morris that he claimed £84 as compensation for unexhausted improvements under the Agricultural Holdings Act, 1883.

The claim not being admitted, he appointed a referee to act for him, and called upon Mrs. Morris to appoint one to act on her behalf.

Mrs. Morris failed to comply with this notice, and Griffiths thereupon took out a summons under ord. 40, r. 7, of the County Court Rules, 1889, for the appointment by the county court judge of a referee to act for Mrs. Morris. The lady disregarded the summons, and the registrar, without obtaining her consent, proceeded to appoint one Roberts to act as her referee.

The referees being unable to agree, the matter was referred to an umpire who subsequently made his award, which stated the appointment of Roberts to act on behalf of Mrs. Morris "by order of the county court of Carnavonshire, holden at Carnavon," and after awarding the sum of £76 to Griffiths in compensation, the umpire directed that all "costs of and in connection with the appointment of a referee by the registrar of the said county court on behalf of the said Catherine Morris and incurred by the said Griffith Griffiths as between solicitor and client, to be paid by the said Catherine Morris, and that all other costs incurred by the said Griffith Griffiths as between solicitor and client of attending this reference and in preparing therefor . . . shall be divided into equal moieties, and that one of such moieties to be paid by the said Catherine Morris to the said Griffith Griffiths.

Mrs. Morris, not having complied with the award, an order was made by the county court judge under section 24 of the Agricultural Holdings Act, 1883, that the amount of the award together with the costs as taxed, amounting in all to £82 11s., should be paid by her, and appointed the high bailiff as receiver of certain property belonging to her.

Mrs. Morris then made the present application for prohibition.

Danckwerts, for the prohibition.—The award is bad, because a referee has been appointed by the registrar without the consent of Mrs. Morris, and has been proceeded with *ex parte* without notice. It is consequently irregular. Moreover, the umpire has exceeded his powers in directing that costs should be paid on solicit and client scale. The case, therefore, comes within *Farquharson* v. *Morgan*, 42 W. R. 306 [1894] 1 Q. B. 552.

E. H. Lloyd, in support of the award.—Under ord. 40, r. 7, of the County Court Rules, 1889, the award is good and not irregular. That rule requires that every application for the appointment of a referee shall be by summons, "as the case may be," and if either party desires to be heard before the judge, he must give notice in writing to the registrar. [WILLS, J.—That rule makes the absence of objection equivalent to consent and and goes beyond what the Act directs.] The umpire is right in directing costs to be paid as he thinks just. There is only one scale of costs in the county court, and as a matter of fact the costs will be taxed on that scale.

WILLS, J.—I am of opinion that prohibition must go. There is one fatal objection to the jurisdiction of the county court judge, for it appears, upon the face of the award, that proceedings to obtain the appointment of a referee were taken before the registrar, and it appears from the proceedings in the court, that this order was made by the registrar without consent. If the matter rested on the construction to be placed on the words of the Act alone, then it is plain that such an appointment could not be upheld, because such consent is a condition to the jurisdiction of the registrar. It has been argued that the absence of consent has been cured by ord. 40, r. 7, of the County Court Rules, 1889. That rule directs that "every application for the appointment of a referee or umpire under section 9, sub-section 6 and 9 of the said Agricultural Holdings Act, shall be by summons . . . returned in less than seven days from the date thereof, except by consent. Such summons shall be taken out by the party applying, and shall be addressed to the other party, and shall direct the party summonsed to attend before a judge or registrar, as the case may be, in chambers, on the return day thereof for the purpose of proceeding with the appointment." In my opinion that means that the appointment is to be made by the judge if there is not consent, and by the registrar if there is consent. That is the only meaning I can bring myself to put upon the words "as the case may be." The rule goes on as follows:—"If either party should desire that such application be heard before a judge, he shall give notice in writing to the registrar two clear days at least before the day fixed for the application, and in such case the application shall come on before the judge on a day to be fixed by the registrar. If no such notice be given, then the application may be disposed of by the registrar, who shall have power to adjourn the application, if he shall think fit, for hearing by the judge." It is on this latter part of rule 7 that the tenant relies. I think the rule is *ultrà vires*, and therefore bad, because it goes beyond the Act of Parliament, for it says in effect that where notice has been given to a person, who, however, pays no attention to it, that notice shall be deemed to operate as consent by such person to the appointment being made. That is contrary to general principles. It has been indeed constantly held that you cannot make a person a consenting party to a transaction by giving him notice that his silence will be treated as equivalent to his consent.

The umpire has directed that the costs of the award should be paid on the scale of solicitor and client costs. By section 20 of the Agricultural Holdings Act, 1883, the umpire is empowered merely to award that one of the parties should pay half or whatsoever proportion of the costs he choses to fix, but he had no larger power. In my opinion, therefore, he has not

* This order, so far as it was at variance with the Agricultural Holdings Acts in providing that an application to appoint such referee after notice might be disposed of by the registrar without consent unless one of the parties gave a written notice of his desire that it should be heard before the county court judge, has since been annulled by No. 32 of the County Court Rules of 1895, which directs that ord. 40, r. 7*a* [Procedure on application for appointment of a referee or umpire], shall stand in lieu of it.

the power to make the order he has made as to the taxation of the costs.

Counsel contended that the order on this point was in fact inoperative, and therefore immaterial, because the registrar would tax the costs on the ordinary county court scale. Were this an ordinary proceeding in the county court that might be so, but these proceedings are entirely outside the ordinary jurisdiction of the county court, and in such a matter as this a difference would be made in costs given under one scale or the other. If the question of costs stood alone it would be almost too trivial a matter to deal with, and prohibition might possibly not have gone, but in this case I also hold that the award is bad for the fatal defect apparent on the face of it, and the application, therefore, succeeds.

WRIGHT, J.—I concur. I would like to point out that the only provision for questioning the award is by appeal, which lies only on certain grounds where the claim exceeds £100. In the present case the claim is less than that figure, and therefore the enactment applies that the award shall not be questioned except on the ground stated in the Act. The Act requires consent should be given to the appointment of a referee by a registrar. Here the appointment by the registrar of a referee to act on behalf of Mrs. Morris appears upon the face of the award, but the award does not state that such appointment was made after the necessary consent was given. It is for that reason irregular and must be set aside.

Prohibition issued.

Solicitors for Mrs. Morris, *Lloyd George & Co.*, for *Lloyd George & George*, Criccieth.

Solicitors for Griffiths, *L. W. Byrne*, for *T. W. Henwood*, Carnarvon.

C. C. R.
(Lord Russell of Killowen, C.J., Hawkins, Cave, Grantham, and Lawrance, JJ.) April 6.

REG. *v.* BAKER. (*a.*)

Criminal law—Perjury—Materiality of evidence.

False evidence wilfully and corruptly given as to matters affecting the credit of the witness is material, and he may be convicted of perjury in respect thereof.

At the trial of a person upon a charge of selling beer without a licence he falsely swore that a plea guilty put in upon the occasion of a previous charge for a similar offence being made against him, had been put in without his knowledge or consent.

Held, that such evidence affected his credit as a witness, and was material, and that he was rightly convicted of perjury in respect of such false evidence.

Case stated by his Honour Judge Chalmers sitting as commissioner of assize.

The defendant Baker was tried on the 9th of February, 1895, at the Glamorganshire Assizes on a charge of wilful and corrupt perjury.

The indictment charged that on the 18th of December, 1894, at the petty sessions held at Cardiff before the stipendiary magistrate, the defendant was charged with the offence of selling beer without a licence, and having been duly sworn, deposed that he never authorized the plea of guilty to be put in to a previous charge of selling beer without a licence, contrary to section 3 of the Licensing Act, 1872, on the 6th of November, 1894, and that he had not authorized his solicitor to put in the plea of guilty to the charge, even by an indirect authority, and that he had no knowledge that his solicitor was going to plead guilty on his behalf, and that it was against his wish and will that the plea of guilty was put in, all of which statements were alleged to have been falsely and corruptly made.

It was proved before the commissioner that, at the hearing before the magistrate, the defendant swore that he had been previously convicted of selling beer without a licence on the 6th of November, 1894, and that the conviction was in respect of the same premises, and that he had never authorized the plea of guilty to be put in on the 6th of November.

He then proceeded to swear as follows:—

"I was at the police-court at eleven a.m. on the 6th of November. I met my solicitor, Mr. Belcher, outside. He said: 'Your case won't come on for an hour.' I said: 'Will you send for me when wanted?' I then took the witnesses to the Black Lion Hotel, and had not been there ten minutes when Jacobs came in and said the case was over, and that Belcher had pleaded guilty. I was very much annoyed, as I had given no authority to plead guilty, not even indirect authority. I was surprised at the information received. I went with Belcher to the office, and remonstrated with him, as it was against my wish the plea of guilty was put in. Belcher did not tell me that he would not go into court unless a plea of guilty was put in."

Evidence was called on behalf of the Crown to show that the defendant, after full explanation of the matter, had authorized his solicitor, Belcher, to plead guilty on his behalf, and that when he was informed of what had been done, he expressed himself as perfectly satisfied with the result.

At the conclusion of the case for the Crown, counsel for the defendant took the objection that, even if the statements made by Baker were knowingly false, they could not amount to perjury, because they were not material to the issues then pending before the stipendiary magistrate.

The commissioner held that Baker, having tendered himself as a witness, was properly examined at that stage of the proceedings concerning the circumstances of his previous conviction, and that his answers were material, inasmuch as, in the event of a conviction, the facts deposed to would be taken into consideration by the magistrate in the ultimate determination of the case.

The jury found the defendant guilty.

The question for the opinion of the court was whether the above statements of the defendant were material to the issues then depending before the stipendiary magistrate.

The defendant did not appear either by counsel or in person.

C. J. Jackson, for the prosecution, was not called upon to argue.

Lord RUSSELL OF KILLOWEN, C.J.—The sole point in this case is whether the statements made by the defendant which the jury have found to have been made falsely and wilfully, were material to the issue which was before the magistrate when the defendant was charged for the second time with having sold beer without a licence. The first ground taken at the assizes on behalf of the defendant is that as he had admitted the previous conviction and had not appealed therefrom it was immaterial whether the plea of guilty had been put in on the previous occasion

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

his consent or not. The answer is that the defendant's replies would affect his credit as a witness, and all false statements wilfully and corruptly made as to matters affecting credit are material. The magistrate might have been influenced in arriving at his decision by the circumstances of the previous conviction, and if the defendant's solicitor had pleaded guilty on his behalf without his knowledge or consent, that might have been taken into consideration as affecting the amount of the punishment. The second ground is that the previous conviction could only become material upon the conviction of the defendant in the then pending proceeding, and that as a fact the proceedings had been adjourned to await the result of the prosecution for perjury. I do not see the relevance of that argument. The magistrate must consider the case on the evidence before him. If the defendant had been convicted on the previous occasion *per incuriam* the magistrate might have treated the subsequent breach of the law as if it had been a first offence. The third ground is that a previous conviction only affected the amount of punishment to be awarded and not any issue of fact, and further, that the magistrate could only consider the fact of the previous conviction and not the circumstances under which it took place. But as I have already pointed out, that is a mistaken view. I am, therefore, of opinion that the evidence was material.

As to the authorities:—In *Reg.* v. *Overton*, Car. & Marsh. 655, the date of a receipt given for the price of a hound was held to be material by Patteson, J., after consulting with Parke, B., on the ground that any question in cross-examination which goes to the credit of the witness is material. The case afterwards came before eleven judges, who supported that view. In *Reg.* v. *Lavey*, 3 Car. & K. 26, a plaintiff swore that she had never been tried at the Old Bailey or been in custody in a certain police station, and the evidence was held to be material as affecting her credit. In *Reg.* v. *Gibbon*, 10 W. R. 350, L. & C. 109, it was held by eleven judges (Martin, B., and Crompton, J., doubting) that perjury might be assigned on evidence going to the credit of a material witness, although such evidence, being legally inadmissible, ought not to have been received. That is a strong authority—stronger than is needed to support the present conviction.

I am of opinion that the conviction was right, and ought to be affirmed.

HAWKINS, CAVE, GRANTHAM, and LAWRANCE, JJ., concurred.

Conviction affirmed.

Solicitors for the prosecution, *Riddell, Vaizey, & Smith*, for *J. L Wheatley*, town clerk, Cardiff.

Prob. Div. & Adm. Div. Divorce. } April 4, 30.

BEAUCLERK *v.* BEAUCLERK. (*a.*)

Divorce—Separation deed—Adultery and cruelty—Unreasonable delay—Order for restitution of conjugal rights—Disobedience—Adultery—Petition for dissolution—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

A husband and wife were married in 1858, *and voluntarily separated in* 1870. *In* 1890 *the court, on the ground of unreasonable delay, dismissed the wife's undefended petition for dissolution of the marriage, on the ground of her husband's adultery and cruelty. In* 1894 *the wife obtained a decree for restitution of conjugal rights on a petition, to which the husband did not appear. The husband failed to comply with this decree, and the wife petitioned for a dissolution, on the ground of desertion and cruelty.*

The court granted a decree, holding that there had not been unreasonable delay in presenting the petition for restitution of conjugal rights, as, on the evidence, until that suit was instituted there was nothing to show when the husband first became unable or unwilling to use the deed as an answer to the wife's claim.

Semble, *that delay is no answer to a petition for restitution of conjugal rights, but* quære *whether it is not an answer to a petition for dissolution founded on adultery and desertion by refusal to comply with a decree for restitution of conjugal rights where there has been unreasonable delay in applying for such decree.*

Hearing before the court itself of the wife's petition for the dissolution of the marriage on the ground of her husband's adultery and desertion under section 5 of the Matrimonial Causes Act, 1884.

The suit was undefended.

April 24.—*Sir Henry James, Q.C.*, and *Searle*, for the petitioner.—The facts and arguments are set out in the judgment.

Cur. adv. vult.

April 30.—Jeune, P.—In this case the petitioner obtained a decree for restitution of conjugal rights on the 4th of June, 1894. The order was disobeyed by the respondent, and at a subsequent date in the same year he is proved to have committed adultery.

The right of the petitioner to a divorce would therefore be clear were it not that there are other facts which give rise to a question whether there has been such unreasonable delay as to induce me, in the exercise of my discretion under section 31 of the Act of 1857 to refuse that relief.

The marriage between the parties took place on the 1st of December, 1858. On the 18th of July, 1870, they separated under a deed, the terms of which show that the separation was at that time voluntary on both sides.

In August, 1890 (see *Beauclerk* v. *Beauclerk*, [1891] P. 189), the petitioner presented a petition for a divorce on the ground of cruelty before the separation and of adultery alleged to have been committed in 1889. The acts of cruelty charged showed that the respondent had to the knowledge of his wife committed adultery before the separation. Butt, J., after requesting the Queen's Proctor to argue the matter, refused a divorce on the ground that the acts charged did not constitute legal cruelty, but he offered to grant a judicial separation on the ground of adultery.

On appeal by the petitioner, the Court of Appeal did not express a decision whether the conduct of the respondent had amounted to cruelty, but held that there had been unreasonable delay in presenting the petition, and on that ground affirmed the decision of Butt, J.

In his argument before me Sir Henry James relied on the terms of the Matrimonial Causes Act, 1884, which make a respondent who fails to comply with a decree of the court for a restitution of conjugal rights guilty of desertion, and provides that in such case "the wife may forthwith present a petition for the dissolution of her marriage, and the court may pronounce a decree *nisi* for the dissolution of the marriage on the grounds of adultery coupled with desertion." It was, therefore, contended that no period before the dis-

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

obedience to the decree for restitution of conjugal rights ought to be considered as a period of delay. In *Bigwood* v. *Bigwood*, 36 W. R. 928, 13 P. D. 89, Lord Hannen said, "I am of opinion that section 5 of the Act of 1884 places the desertion which arises on a disobedience to a decree for restitution of conjugal rights on the same footing as desertion for two years with all its consequences, and it may be coupled with adultery either before or after the decree of restitution." I entirely assent to that proposition, and I may add that the statement in the usually most accurate work of Brown and Powles on Divorce that in *Smith* v. *Smith*, 58 L. T. N. S. 639, 36 W. R. Dig. 71, "the court expressed a doubt whether it was intended so to use the Act of Parliament for the purposes of obtaining a divorce" does not seem well-founded. Nor do I think, as I said when the suit of the petitioner for restitution of conjugal rights was before me, that delay is any answer to a petition for restitution of conjugal rights. But in this case I do not think it necessary to go the length of assenting to Sir Henry James's argument. I wish to guard myself from being supposed to hold that, when a petitioner having a complete case for a dissolution on the grounds of desertion and adultery is guilty of unreasonable delay in bringing it forward, she avoids the consequences of that delay by obtaining a decree for restitution of conjugal rights, or that, when there has been unreasonable delay in applying for restitution of conjugal rights, such delay, though it be no ground for refusing the application, may not be ground for the court exercising its discretion on the subsequent petition for a dissolution. It is perfectly true that the petition in such case is founded on a desertion which would in a sense be recent if the suit for restitution of conjugal rights were recent. But it may well be said that it would unduly limit the effect of section 31 of the Act of 1857 to deny that it applied in such a case, and it may well be doubted if it was the intention of the Act of 1884 to afford a method of obtaining a divorce in spite of acquiescence in matrimonial misconduct. In the present case, however, I do not think there has been any such unreasonable delay as to deprive the petitioner of her rights. It is not easy to follow the decision of the Court of Appeal in *Beauclerk* v. *Beauclerk* as reported, because it is not clear why it appeared to the Court of Appeal that they were affirming an exercise of discretion by Butt, J., whereas that learned judge decided the case solely on the question of the legal nature of cruelty.

But I will assume that the petitioner would have been guilty of unreasonable delay in claiming a dissolution on the grounds of cruelty and adultery. It does not, however, follow that she has been guilty of unreasonable delay in presenting the petition based as it is on adultery and desertion. Owing to the separation having been at first by the will of the husband and wife, and having apparently so continued until the letter which preceded the suit for restitution of conjugal rights, the petitioner could not before that suit have proved desertion. Was there, then, unreasonable delay in applying for restitution of conjugal rights? Apart from other considerations, there is, I think, a conclusive reason why I am not called on to say that there was. As the deed of separation, which might have been an answer to the suit for restitution, was not set up by the husband, I decided, following the case of *Tress* v. *Tress*, 35 W. R. 672, 12 P. D., 128), that there was nothing to prevent the decree for restitution. But it is impossible for me to say that the petitioner's suit for restitution of conjugal rights was practicable before it was in fact instituted, because I cannot tell when the husband first became unable or unwilling to use the deed as an answer to the wife's claim. There will, therefore, be a decree *nisi*, with costs.

Decree nisi, with costs.

Solicitors for the petitioner, *Leman, Groves, & Leman.*

Prob. Div. & Adm. Div. Divorce. } April 4.

JONES v. JONES. (*a.*)

Divorce—Proceedings before justices—Husband convicted of aggravated assault—Order for separation, maintenance, and custody of children—Evidence—Procedure appeal—Power to remit—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.

Where a husband has been summarily convicted of an aggravated assault within the meaning of 24 & 25 *Vict. c.* 100, *s.* 43, *upon his wife, he is entitled to give evidence if the wife asks under section* 4 *of the Matrimonial Causes Act*, 1878, *for an order for separation, maintenance, and custody of children.*

Where such evidence had not been given before justices this court, on appeal, remitted the case to them for rehearing.

Powell *v.* Powell, 14 *P. D.* 177, 38 *W. R. Dig.* 98, *overruled.*

Appeal by William Jones against an order made by justices for the City of Bristol under section 4 of the Matrimonial Causes Act, 1878, that his wife should be no longer bound to cohabit with him, and ordering him to pay her £2 weekly, and giving her the custody of the child of the marriage. The justices had previously convicted him of an aggravated assault upon his wife within the meaning of 24 & 25 Vict. c. 100, s. 43.

At the hearing before the justices evidence was first given by the respondent as to the assault, and her solicitor proposed to continue her examination by asking her as to any recent acts of cruelty; but this was objected to by the husband's solicitor as being inadmissible till the justices had dealt with the charge of aggravated assault, and the objection was sustained.

During her cross-examination, however, the respondent volunteered the statement that she had wanted a separation order for some time on the ground of her husband's cruelty, and the respondent's solicitor was allowed by the magistrates to re-examine as to antecedent acts of cruelty.

Two witnesses were called in corroboration of the wife's statement. One was called for the husband as to the assault.

The justices convicted the husband of an aggravated assault, and they then asked the wife what her husband's means were, and in reply she stated that about five years' previously, shortly before their marriage, he had told her that his income was £600 a year.

The husband's solicitor did not apply to cross-examine the wife as to the antecedent acts of cruelty or as to her husband's means, and the husband was not tendered as a witness, and the justices made the order appealed against.

The husband now by affidavit contradicted the wife's statements as to income and previous assault.

Lord Coleridge, Q.C. (*Howland Roberts* with him), for the appellant.—The husband is entitled to give evidence, the justices did not satisfy themselves that

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

the future safety of the wife was in peril, and the evidence as to means was entirely insufficient: *Powell* v. *Powell* was erroneously decided and is not binding on this court. It was the decision of a single judge before the Rules of the Supreme Court, 1883, which by ord. 59, r. 4a, requires these appeals now to be to a divisional court. The court has power to remit to the justices for hearing *Foulkes* v. *Foulkes*, 69 L. T. N. S. 461.

Foote, for the respondent.—Apart from the question whether *Powell* v. *Powell* was rightly decided, here no evidence was tendered on behalf of the husband and the order was rightly made on the evidence before the justices. No injustice has been done, as the husband may apply to the justices to vary the order, and at the hearing he may give evidence.

JEUNE, P.—In this case the magistrates found the aggravated assault proved, and then without further evidence, except a statement by the wife, proceeded to make an order for judicial separation and maintenance and for the custody of the child.

It appears to me that the statement of the wife as to means was entirely insufficient. There is no blame attached to the magistrates for they were not asked by the husband or his solicitor to be allowed to cross-examine, nor was the husband's evidence tendered. The fault, if any, and it was not a serious one, was that of the solicitor; but the fact remains that on entirely insufficient evidence the husband was ordered to pay a sum of money which may or may not be a proper amount for maintenance. This court has undoubtedly power to hear the evidence, but that would involve considerable expense to the parties, and by far the most reasonable course is that the case should be heard by the magistrates. I have no doubt that this court, having been given the power of appeal, has also the power to send back the case for further hearing. I think I might add that, with all respect to the learned judge who decided *Powell* v. *Powell*, in my opinion the husband ought to be allowed to give evidence. The power to convict of assault depends on the Act of 1861 (24 & 25 Vict. c. 100, s. 43), which enables the magistrate to find the accused guilty of aggravated assault. Then came the Matrimonial Causes Act, 1878, which gave power where a husband had been so convicted and the future safety of the wife was in peril to order a judicial separation with maintenance and custody of the children; in other words, it superadded powers derived from the jurisdiction of this court, and I think the legislation must have intended that the case should be heard in the same way as in this court, where the husband's evidence would be admissable. It could not have intended that in a case heard before magistrates the husband should not be able to give evidence, whereas in identically the same case, if heard in this court, a husband would have an opportunity of defending himself. I cannot help saying this is in accordance with the elementary rules of justice.

I am aware that this view involves differing from the case of *Powell* v. *Powell*; but I am reminded by Bruce, J., that in the case of *The Arina*, 35 W. R. 654, 12 P. D. 118, the President, Sir James Hannen, and Butt, J., sitting as the full court, reversed a decision of Dr. Lushington in the case of *The Princess Helena*, Lush. 190, 9 W. R. Adm. Dig. 22, there seems to be sufficient to justify us sitting here as a divisional court in reviewing the decision of a single judge. It would, in my opinion, be an absurdity if the husband could give evidence on an application to vary the order, as it is admitted by the respondent's counsel he could do, and not upon the original application. This case must therefore be remitted to the justices, and the husband must pay the costs in this court and of the hearing before the justices.

BRUCE, J., concurred.

Case remitted for further hearing.

Solicitors for the appellants, *Ridsdale & Sons*, for *Gregory & Hirst*, Bristol.

Solicitors for the respondent, *Ford & Ford*, for *Wansbrough & Robinson*, Bristol.

Court of Appeal.

From Q. B. D. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — June 21.

PAYNE v. WILSON. (a.)

Sale of goods—Hire and purchase agreement—Possession by hirer—Fraudulent sale by hirer—Conviction of hirer for larceny as a bailee—Revesting of title in owner—Sale of Goods Act, 1893 (56 & 57 *Vict.* c. 71), *s.* 24.

Appeal by the plaintiff from the judgment of the Queen's Bench Division (*ante*, p. 250, [1895] 1 Q. B. 653). Upon the appeal being called on the defendant's counsel stated that, in consequence of the decision of the House of Lords in *Helby* v. *Matthews* (*ante*, p. 561), he could not uphold the judgment appealed from.

Groser, for the plaintiff.

Jelf, Q.C., and *Herbert Smith*, for the defendant.

Appeal allowed.

Solicitor for the plaintiff, *H. E. Tudor*.

Solicitors for the defendant, *Proudfoot & Chaplin*.

From Q. B. Div. (Lindley, Lopes, and Kay, L.JJ.) — May 14, 15.

ATTORNEY-GENERAL v. JACOBS-SMITH. (b.)

Inland Revenue—Account duty—Marriage settlement of widow — Children by former marriage — Voluntary disposition—Volunteers—Customs and Inland Revenue Act, 1881 (44 *Vict.* c. 12), *s.* 38, *sub-sections* (a) (c)—*Customs and Inland Revenue Act*, 1889 (52 *Vict.* c. 7), *s.* 11.

The consideration of marriage extends only to the husband and wife and the children of that marriage; all other persons are volunteers in some sense.

In a marriage settlement made by a widow on her second marriage, shares belonging to her were given to her adult sons by her former marriage, and other shares belonging to her were assigned to trustees upon trust as to some, for the benefit of other children of the widow by her former marriage, and as to the residue upon trust in the events that happened, but subject to certain life interests, to all her children by her former marriage. The settlor died in 1890, *within five months of the execution of the settlement.*

Held (*reversing the decision of the* Queen's Bench Division, ante, *p.* 253), *that the children by the former*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

(b.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister- t-Law.

marriage were not within the marriage consideration, but were volunteers; that, therefore, the Crown was entitled to account duty under the Customs and Inland Revenue Acts, 1881 *and* 1889, *as upon a voluntary disposition in respect of the shares taken by the children of the former marriage.*

Gale *v.* Gale, 25 *W. R.* 772, 6 *Ch. D.* 144) *distinguished.*

Appeal by the Attorney-General from a decision of a Divisional Court, Wright and Collins, JJ. (reported *ante*, p. 253, where the facts are fully set out).

Sir R. T. Reid, A.G., and *Vaughan Hawkins*, for the appellant.—The case on which the divisional court based their judgment (*Newstead* v. *Searles*, 1 Atk. 265) was a decision on the statute, 27 Eliz., and ought not to be extended to cases under the Revenue Acts.

They used the same arguments as in the court below, and referred to the following additional cases: *Clayton* v. *Wilson*, 3 Madd. 302 (note), 6 Man. & S. 67 (note); *Johnson* v. *Legard*, 6 Man. & S. 60; *Heap* v. *Tonge*, 9 Hare, 90; *Clarke* v. *Wright*, 9 W. R. 571, 6 H. & N. 849; *Sutton* v. *Chetwynd*, 3 Mer. 249; *Price* v. *Jenkins*, 25 W. R. 427, 4 Ch. D. 483; and on appeal, 5 Ch. D. 619, 25 W. R. Dig. 253.

Jelf, Q.C., and *Micklem*, for the respondents.—*Newstead* v. *Searles* lays down the rule in the clearest terms that the issue of a widow by a former marriage, if included in the subsequent settlement, are not volunteers, and that case has never been overruled, and is treated as good law in all precedents of conveyancing.

They also referred to *Ex parte Marsh*, 1 Atk. 158; *Cotton* v. *The King*, 2 P. Wms. 357, 674; *Rock* v. *Dade*, May's Fraudulent Conveyances, App. No. 13, p. 579.

Vaughan Hawkins, in reply, referred to *Lord Saltoun* v. *The Advocate-General*, 8 W. R. 3 Macq. 659, 671.

LINDLEY, L.J.—The point in this case is whether upon the true construction of the Customs and Inland Revenue Act, 1881, as amended by the Customs and Inland Revenue Act, 1889, account duty is payable in respect of the shares which are the subject of the marriage settlement of the 18th of March, 1890, with which we have to deal. I am not going through that settlement, which is a very complicated one. It will be quite enough if I say that it does comprise or may be treated as comprising very considerable property in the shape of shares: that 4,000 of those shares are given to trustees for the benefit of four children, by her former marriage, of the settlor, Mrs. Anne Smith, widow, as she then was; and 1,000 other shares are given to trustees for an infant son of hers by her former marriage; another 1,000 shares for another infant son by her former marriage; and 600 shares to her daughter (by the former marriage), Mrs. Wood, settled in the usual way to Mrs. Wood and her children; and 600 other shares to another married daughter, which were also settled. Now those shares, the 4,000, the 2,000, and the two lots of 600 each, to which I have referred, are not preceded by any life estate at all, and I group those together and treat them as one fund for the purpose of the present decision. The rest of the trust funds consists of shares in which there is a life interest. First of all there is £1,000 a year given to the settlor's second then intended husband, and the rest of the income is given to Mrs. Smith for life, and then, in the events which have happened, I understand that the whole of this property goes ultimately to her eight children by her first husband. Mrs. Smith died on the 2nd of August, 1890. What is claimed is account duty on both classes of this property as against those children by her first husband. That, shortly stated, is the position of affairs.

Now the question whether this account duty is chargeable or not, turns upon two sub-sections of the 38th section of the Act of 1881 to which I have referred, as amended by the Act of 1889. I take, first of all, those shares to which I first alluded, and which are given to Mrs. Smith's children by her first husband without any intervention of any life estate at all. They are said to come under the clause I am about to read. Sub-section 1 of section 38 enacts that: "Stamp duties at the U. K. rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or movable property, to be included therein according to the value thereof." Sub-section 2 of the same section enacts that: "The personal or movable property to be included in an account shall be property of the following descriptions, viz.: (a) Any property taken as a *donatio mortis causâ*"—that is out of the question here—"made by any person dying on or after the 1st of June, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased." For "three" months we must now read "twelve" by reason of the alteration made by the Act of 1889.

Now the Crown claims this account duty on the first batch of shares, upon the ground that they are the subject of a "voluntary disposition made by a person dying after the 1st of June, 1881, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made twelve months before death." I do not see upon what principle we can say that this first batch of shares are not the subject of such a voluntary disposition as I have just read. Mr. Jelf and Mr. Micklem have contended that the voluntary disposition there means a voluntary settlement or voluntary instrument of some kind or another. But I am of opinion that the word "disposition" is put there by way of contrast, as I shall show presently. Whether this is a voluntary disposition in a settlement which is a marriage settlement, or whether it is a voluntary disposition unmixed up with other dispositions seems to me for this purpose immaterial. Whether the property is given out and out separately, or given out and out by way of a deed of settlement or otherwise, which also leaves other portions of the property to other people, seems to me immaterial. We have to consider the subject of the disposition which is to operate as an immediate gift, whether by way of transfer, delivery, declaration of trust, or otherwise. It comes to this: read the trust as you like with reference to this first batch of shares, there is a voluntary disposition of those shares by way of gift to the children by the first husband.

I confess I do not quite follow what appears to have been the difficulty of the learned judges in the court below upon this particular point. I can only give effect to the view which I have already expressed, that this is, as I read it, a complete disposition by way of gift of these shares, although it is equally true it takes effect in the settlement made on the marriage of Mrs. Smith, and that that settlement does contain various other clauses relating to other property.

I now come to what I may call the settled shares, which constitute the bulk of the property. As to

those shares, we have to read the statute further on. They do not come within clause (*a*), which I have read, because clause (*a*) refers only to an immediate gift. These other shares, the settled shares, are preceded by a life estate, and are not an immediate gift at all; they come under clause (*c*) of sub-section (2) of section 38 of the Act of 1881, as amended by the Act of 1889.

Now clause (*c*) of the Act of 1881 I will read, and then I will read the amended clause in the Act of 1889. [His lordship read the clause, and continued:—] The important words there are "any past or future voluntary settlement made by any person," and so on. This, being a marriage settlement, might not be a voluntary settlement; probably it is not. In order to meet the difficulty arising from that circumstance, the Act of 1889 runs thus: [His lordship read section 11, and continued:—] So that what is hit at now is this—not merely voluntary settlements, but settlements which are not voluntary, but which contain clauses in favour of volunteers.

Now, am I bound to say that under this marriage settlement these limitations to the children of the first husband of Mrs. Smith are limitations in favour of volunteers? If so, this account duty is payable. That gives rise to this question: What do you mean by a volunteer? And upon that point we have had cases cited to us covering the last half century. Unquestionably there is some difficulty about it. The cases which have been referred to are cases in which the point has arisen between persons claiming under settlements and persons claiming under the statute of 27 Elizabeth. It is said that anybody who cannot take under a settlement without being overridden by a subsequent purchaser for value is a volunteer. It is also said that, inasmuch as *Newstead* v. *Searles* and one or two other cases show that the children of the first marriage of a lady who makes a settlement upon them are not volunteers so as to be overridden by subsequent purchasers for value, they are not volunteers at all. Now that contention, as I have remarked, has given rise to the investigation of a great number of cases. We have attended to them, and have considered what effect ought to be given to them. I say at once that nothing which will fall from me is intended to throw the slightest doubt upon the propriety of the decision in *Newstead* v. *Searles* or any other of the cases which have been decided upon the question of the true construction of the statute of 27 Elizabeth. That statute, as we all know, was so worded as to give rise to difficulties, and it was held very early that all voluntary settlements, however *bonâ fide*, were null and void as against purchasers for value, even with notice of those voluntary settlements. What those cases have to do with is the true meaning of the expression "volunteer." All that they are of any use for on the present occasion is to throw light upon the meaning of the term "volunteer." I have listened to the arguments upon the whole of those cases, and I do not think that it is easy to deduce from them any one general proposition which would be consistent with all of them. They are very difficult to reconcile one with another. Some of the decisions are, to my mind, altogether irreconcilable. But there is one feature which appears to me to be common to the whole of them, subject to one possible remark, and that is this: "that the consideration of marriage extends only to the husband and wife and the children of that marriage, and that all other persons are volunteers in some sense."

But there are cases, and *Newstead* v. *Searles* is one, to the effect that children of a first marriage may not be volunteers in the sense that the limitation to them is not necessarily invalid in favour of a purchaser for value under the statute of 27 Elizabeth. I do not think you can read *Newstead* v. *Searles*, and I do not think you can read any case, as going the whole length of saying that those persons to whom I have alluded are not volunteers. They are volunteers with an exception.

The Act of 1881, however, has nothing to do with exceptions. We are clear of exceptions. What we have to do now is to apply an Act of Parliament passed for the whole of the United Kingdom, and to say whether volunteers are hit by that Act which contains the above-mentioned sections. Therefore, I think we need not trouble ourselves with the exceptions contained in *Newstead* v. *Searles*, *Gale* v. *Gale*, 25 W. R. 272, 6 Ch. D. 144, *Clarke* v. *Wright*, and some of the other cases. The case which goes farthest is *Gale* v. *Gale*, because all the other cases which have been referred to, and which I will run over shortly in a moment, are cases in which the question has been discussed solely with reference to the statute of 27 Elizabeth. But *Gale* v. *Gale* was not. In *Gale* v. *Gale*, Fry, J., as he then was, held that the children of a lady by her first marriage who were volunteers—and he treats them so—could nevertheless enforce a covenant contained in a marriage settlement against persons claiming under the will of the settlor. He said that although they were volunteers, yet, having regard to the decision in *Newstead* v. *Searles* they were volunteers of an exceptional kind, they were volunteers in favour of whom the court would execute an imperfect gift. That is what it comes to. Whether he went too far in that respect I do not know. I must say I feel great difficulty in following that. It certainly went far beyond *Newstead* v. *Searles*. All that *Newstead* v. *Searles* decided was that such persons who took under the settlement there in question were not to be overridden by a subsequent conveyance to a purchaser under the statute of 27 Elizabeth. Now the *ratio decidendi* of *Newstead* v. *Searles* has been discussed from various points of view ever since I knew anything of this branch of the law. It is impossible to read Lord Hardwicke's decision in *Newstead* v. *Searles* without seeing that he laid considerable stress upon what he called reciprocal considerations. And what he meant was put into more explicit language and made plainer to the ordinary comprehension by Hall, V.C., in *Price* v. *Jenkins* and afterwards by Lord Selborne in the House of Lords in *Mackie* v. *Herbertson*, 9 App. Cas. 303, 32 W. R. Dig. 176, and in the case in the Privy Council of *De Mestre* v. *West*, [1891] A. C. 264, 39 W. R. Dig. 204. I am disposed to think that the true view of *Newstead* v. *Searles* is that pointed out by Hall, V.C., and adopted by Lord Selborne, and I may say that to my knowledge that view was not new when Hall, V.C., expressed it in *Price* v. *Jenkins*. The view is this, that, although the children by the first marriage may be, and indeed are, volunteers, it is impossible to defeat the interest given to them, in favour of a purchaser under the Statute of 27 Elizabeth, without defeating the interest of persons who are claiming under the settlement which is then entered into. The interests are so mixed up together that you cannot unravel them, and the validity of one set saves the possible invalidity of the other set. That I believe to be the true solution. Be that as it may, I do not think that there is any case—certainly not the case in the Exchequer Chamber of *Clarke* v. *Wright*—which is adverse to the children of the first marriage, or illegitimate children either, being treated as volunteers. Whether the settlement is to be defeated by a purchaser under the Statute of 27 Elizabeth is another matter, and as to that question, if it arises, the observations I have made will have no effect.

We must look at this matter, I think, apart from

all technicalities of the statutes. We have got to construe now an Act applicable to the whole of the United Kingdom; it is applicable to volunteers. The whole question we have to consider is: What is a volunteer? Having regard to the general understanding of what is meant by that expression, I am of opinion that these children are volunteers and are liable to account duty.

LOPES, L.J.—This is a matter with regard to voluntary settlements and volunteers, on which I need scarcely say I am not so familiar as my learned brethren. I shall be satisfied, therefore, to express very shortly the conclusion at which I have arrived. The question we have to decide is whether the children of Mrs. Smith by a former husband are volunteers within the meaning of the Inland Revenue Acts which have been referred to. The question is really almost academic, as in the Act of last year which has been substituted for the Acts with which we are now dealing, the expression volunteer does not occur.

The conclusion I have arrived at, after carefully considering the arguments and the cases which have been cited to us, is that the consideration of marriage only extends to the husband and wife and the issue of that particular marriage, and does not extend to any one else. Therefore, in effect, all but the husband and wife and their issue are volunteers.

Now, in order to determine the meaning of the word volunteers, many cases have been cited to us, particularly the case of *Newstead* v *Searles*. It is to be observed that that case was a decision in respect of the statute of 27 Elizabeth. Another case upon which great reliance was placed by the respondents was *Clarke* v. *Wright*, and that, again, was a decision upon the same statute. Certainly I should have great difficulty indeed in getting over the effect of those decisions if it had not been for what was said by Lord Selborne in two cases to which reference has been made, namely, *Mackie* v. *Herbertson* in the House of Lords, and *De Mestre* v. *West* in the Privy Council. It appears to me that Lord Selborne in those two cases has given a satisfactory explanation of the case of *Newstead* v. *Searles*. He accounts for the decision there, by saying that in that case the limitations with regard to the children of the former marriage and the children of the second marriage were so complicated and mixed up, and were so much dealt with as a class, that it was quite impossible to give effect to the limitations in favour of the one without giving effect to the limitations in favour of the other. That I felt at one time might be said to be a mere *dictum*, and outside the cases in question. There is some foundation for that observation. But when I come to look carefully at the judgment of Lord Hardwicke in *Newstead* v. *Searles* I find expressions by him which to my mind give colour to the explanation put upon that case by Lord Selborne. I think, therefore, that that gets rid of the difficulty which certainly impressed me for a long time, arising through the decision of *Newstead* v. *Searles* in particular, and also of *Clarke* v. *Wright*.

But then there was another case cited to us, upon which much reliance was placed, and I do not wonder at it. That was the case of *Gale* v. *Gale*, a decision of Fry, J., that appeared to me to be the strongest case that the respondents had to rely upon. But, when that case is carefully analysed, it appears to me that it does not in any way prevent us putting the construction upon the word volunteer that we propose to put. I find in that case that Fry, J., says that the children are volunteers, but that they come within an exception in favour of volunteers, and that, although volunteers, they are entitled, on the ground of that exception, to enforce performance of the covenant contained in the marriage settlement against persons claiming under the will of the settlor.

In the result, therefore, I have arrived at the conclusion that the Crown are entitled to succeed, and that this appeal ought to be allowed.

KAY, L.J.—The question that we have to determine is, What is the meaning of the words "voluntary disposition" in the Customs and Inland Revenue Act of 1881, and the word "volunteer" in the Customs and Inland Revenue Act of 1889? That question depends upon what was the accepted meaning of those words at law and in equity at the time when those statutes were respectively passed.

Now, with regard to the claim in this case, it is a claim for account duty under these Inland Revenue Acts upon provisions made in an ante-nuptial marriage settlement. There is a declaration of trust, without the interposition of any life estate, in favour of the children of the lady by a former marriage. The question is whether those provisions, made directly in favour of the children of the former marriage, come within either of the two sections which Lindley, L.J., has read. Now, they do not come within section 38 (2) (*c*) of the Act of 1881, or section 11 of the Act of 1889, because those sections seem to be confined to the case of a settlement in which there is a previous life interest given.

It has been argued by the respondents' counsel that the other clause of sub-section (2) of section 38 of the Act of 1881—section 38, sub-section (2) (*a*)—does not apply, because these dispositions being contained in an ante-nuptial settlement, which, of course, was a settlement between the husband and wife for ample value, cannot be considered a voluntary disposition. I confess that I am quite unable to follow that argument.

Clause (*c*) of sub-section (2) applies to voluntary settlements in which there was a previous life interest given to one of the settlors. But clause (*a*) of the same sub-section applies to any voluntary disposition whatever. It does not say whether it is in a settlement or not; but it may be that it involves a voluntary disposition in a settlement in which there is no previous life interest given, because it contemplates that a voluntary disposition may be made, amongst other things, by a declaration of trust. It does not say by a verbal declaration of trust only, which would not be applicable in some cases. It must be taken to mean a declaration of trust, whether contained in the settlement or a verbal declaration of trust. Here we have distinctly a declaration of trust in the settlement, which settlement, as between the settlors, was for valuable consideration enough, but which settlement, as to these provisions which I am now considering, was a settlement in favour of the children of the lady by a former marriage, and those children clearly did not come within the marriage consideration in that particular settlement. Now, the question is, whether they were volunteers or not at the time that that Act was passed.

The other question arises under the other clause (*c*) of sub-section (2), and relates to what is, in effect, a limitation after a previous life interest to the settlors, or one of them, in favour of the same class of persons in the events which have happened—namely, the children of the lady by a former marriage. Are they or are they not volunteers? That is the question which we have to decide. Were they, or were they not, within the meaning of the words "volunteer or voluntary disposition" at the time when that Act was passed?

Primâ facie, persons to whom property is limited

directly or by way of remainder in an ante-nuptial settlement, who are not the husband, wife, or issue of the marriage, are not within the marriage consideration; and although the limitation to them is in the settlement which, as between the settlors, contains the most valuable consideration imaginable—that of marriage—nevertheless for some purposes, if not for all purposes, they are to be treated as volunteers. Undoubtedly, *primâ facie*, that would apply to children of either of the settlors by a former marriage; and the course of the decisions shows that it would certainly apply to children of the husband by a former marriage, and that the husband could not include his own children by a former marriage in the limitation, so as to make them other than volunteers. They still would be volunteers. But it is said that there is an exception in the case of children of the wife or intended wife by a former marriage, and that if they are included in the settlement they are not volunteers. Well, judges have again and again remarked upon that as being a very extraordinary exception, and have doubted it and felt great difficulty in ascertaining what the reason of it might be. But we now have an authoritative explanation of the decision in *Newstead* v. *Searles* by one of the greatest masters of equity who has lived in our time, if not in any time, the late Lord Selborne, and he, in the case of *Mackie* v. *Herbertson*, after a careful consideration of all the decisions that could be brought to his attention upon the point, and all the remarks that have been made upon *Newstead* v. *Searles*, came to the conclusion to which I am now going to refer. [His lordship then read extracts from the judgment of Lord Hardwicke in *Newstead* v. *Searles*, and Lord Selborne in *Mackie* v. *Herbertson*, and continued:—] That is a construction of the decision of Lord Hardwicke in *Newstead* v. *Searles* which makes it perfectly consistent with all the other cases on the subject of volunteers in a marriage settlement. According to that the children of the wife by a former marriage were volunteers. But because their interests were so complicated and mixed up with the interests of the possible issue of the then contemplated marriage that they could not well be separated, they were treated as persons who were entitled to come to the court to have the articles of settlement enforced, and were treated as being brought in that way within the marriage consideration, or at least entitled to have the benefit of it. Otherwise the settlement would be or might be defeated even as to the children of the contemplated marriage who are undoubtedly within the marriage consideration. In the case of *Price* v. *Jenkins* the point came before Hall, V.C., before the case of *Mackie* v. *Herbertson* had arisen, and he took the same view of *Newstead* v. *Searles* and gave a similar explanation of it. In 1891 the point came before the Privy Council in the case of *De Mestre* v. *West*, when Lord Selborne was sitting as one of the judges of that court, and he again had to consider the case of *Newstead* v. *Searles*. In the meantime the case of *In re Cameron and Wells*, 36 W. R. 5, had come before me and I had had the presumption to say that the explanation given by Lord Selborne in *Mackie* v. *Herbertson* was a very ingenious one, but that I could not quite reconcile it with all the language used by Lord Hardwicke in *Newstead* v. *Searles*. Lord Selborne, in *De Mestre* v. *West*, referred to the case before Hall, V.C., of *Price* v. *Jenkins*, and also to the case of *In re Cameron and Wills* which had come before me in which it was attempted to extend the supposed doctrine of *Newstead* v. *Searles* to the children of the husband by a former marriage, and I declined to carry it any further.

Now, we have got those two authoritative explanations of the real grounds of *Newstead* v. *Searles* given by no less an authority than Lord Selborne speaking in the House of Lords, and delivering a considered judgment in the second case in the Privy Council. Lord Selborne gave those explanations after all the difficulties that have been suggested as to the supposed decision of Lord Hardwicke in *Newstead* v. *Searles*, and after it had been canvassed in the intermediate cases to which reference was made. Can this court hesitate to accept that as the true meaning of the decision in *Newstead* v. *Searles* after an authority of this kind? I confess I cannot for a moment doubt that if this question should ever come before the House of Lords—I mean the question of what was the meaning and what is in fact the decision in *Newstead* v. *Searles*—they would follow that which, by the mouth of Lord Selborne in *Mackie* v. *Herbertson*, has been expressed in the House of Lords as being the true meaning of that decision, and by which he abides when he comes to give the judgment in the Privy Council in *De Mestre* v. *West*. If so, it would be idle for this court to say, notwithstanding what the House of Lords has said by the mouth of Lord Selborne in *Mackie* v. *Herbertson*, notwithstanding the further valuable construction given by the same judge and expressed in *De Mestre* v. *West*, we shall hold that Lord Hardwicke did not mean that which Lord Selborne says that he meant; that the decision was not, upon the ground on which Lord Selborne puts it, but that it was a decision that children of the wife by a former marriage come within the marriage consideration of a settlement made upon a subsequent marriage. For my part I am perfectly unable to say that, after what has taken place in those two cases. If so, this case is completely determined, because at the time these Revenue Acts were passed, it was the case that the children of the former marriage of the intended wife were not within the marriage consideration of the settlement then to be made, but were volunteers. That is the word used in the second Act explaining clause (*c*) in the first Act. The disposition in their favour by the settlement was a voluntary disposition within the meaning of clause (*a*) of sub-section (2) of the first Act.

For these reasons, with deference to the opinion of the learned judges in the court below, I think that their decision ought to be overruled, and that the claim of the Crown is a good one.

Appeal allowed.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Sherlock & King*, for *Blyth*, Norwich.

High Court of Justice.

Chan. Div. } Chitty, J. } July 11, 16, 23.

In re FOVEAUX'S ESTATE.

CROSS *v.* LONDON ANTI-VIVISECTION SOCIETY. (*a.*)

Charity—Charitable purposes—Intention to benefit the community—Anti-vivisection societies.

Institutions whose objects are lawful and intended to benefit the community may be charities although the

(*a.*) Reported by G. ROWLAND ALSTON, Esq., Barrister-at-Law.

achievement of their objects might not in fact benefit, or tend to benefit, the community.

The "Victoria-street joined with the International Society for the Total Suppression of Vivisection" and "The London Anti-Vivisection Society, Sackville-street" are charities.

In exercise of a testamentary power of appointing £6,000 for some charitable purpose, a testatrix appointed (*inter alia*) a sum of £300 to "The Victoria-street joined with the International Society for the Total Suppression of Vivisection," "The London Anti-Vivisection Society, Sackville-street," and "The Scottish Society for the Total Suppression of Vivisection, Edinburgh." The executors took out a summons to determine whether the above-mentioned societies were charities, making the first two of them defendants.

The Scottish Society, being out of the jurisdiction, agreed to abide the result of the decision.

Farwell, Q.C., and *W. Freeman*, for the executors, stated the point.

W. D. Rawlins, for the anti-vivisection societies.—Anti-vivisection societies are charities, as their intention is to benefit the morals of the community: *In re Douglas, Obert* v. *Barrow*, 35 W. R. 740, 35 Ch. D. 472; *In re Joy, Purday* v. *Johnson*, 37 W. R. Dig. 200, 60 L. T. N. S. 175; *Armstrong* v. *Reeves*, 25 L. R. Ir. 325, 39 W. R. Dig. 36; *Thornton* v. *Howe*, 10 W. R. 642, 31 Beav. 14; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 544, 580; *University of London* v. *Yarrow*, 5 W. R. 29, 543, 1 De G. & J. 72, 80.

H. Fellowes, for the Royal Free Hospital and other charities entitled in default of appointment.—The English cases contain nothing but *dicta*, and the decision in the Irish case of *Armstrong* v. *Reeves* does not bind this court. The Irish Vice-Chancellor was mistaken in thinking that *In re Joy* decided the point; and, as he held there was no perpetuity in the case before him, the question of charity did not arise. Where there is no perpetuity a gift to a non-charitable society is good. *Cocks* v. *Manners*, 19 W. R. 1055, L. R. 12 Eq. 574, 585 (apparently referred to in *In re Joy*, 60 L. T. N. S., at p. 178, under the name of *Cox* v. *Mallow*). To be a charity there must really be some public benefit: *Attorney-General* v. *Whorwood*, 1 Ves. Sen. 534; *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, 583. Good intent does not make a purpose charitable: *per* Lord Bramwell, *Ibid.*, 564. Cases like *Thornton* v. *Howe* and *Attorney-General* v. *Lawes*, 8 Hare, 32, are confined to religious purposes, and only show that the element of religion, however foolish or grotesque, makes a charity. Only domestic animals or animals useful to man can be the objects of charity: *In re Vallance*, Seton, 5th ed. 1141; *University of London* v. *Yarrow*. The *dictum* to the contrary in *Marsh* v. *Means*, 5 W. R. 815, 3 Jur. N. S. 790, is wrong. The infliction of pain is not necessarily cruelty: *Lewis* v. *Fermor*, 35 W. R. 378, 18 Q. B. D. 532.

Rawlins, in reply.—*Thornton* v. *Howe* cannot be distinguished as suggested, as, apart from the public benefit, a religious gift is not charitable: *Cocks* v. *Manners*.

Cur. adv. vult.

July 23.—CHITTY, J, stated the facts and continued: Had the testatrix made the gifts out of her own personal estate the gifts would have been perfectly valid. The societies are lawful societies. No question of perpetuity would have arisen on the terms of her will or from the nature of the constitution of the two defendant societies, or, indeed, of the Scottish Society, so far as I am aware of the nature of the constitution of that society. The object of the two societies before the court is substantially the same—the total suppression of the practice of vivisection. According to the rules of the Victoria Society the object is the total abolition of the practice of vivisection as defined in the report of the Royal Commission, and the action of the society in opposing vivisection rests upon moral grounds, other considerations are to be taken into account subordinately only (rules 1 and 2). The object of the London Anti-Vivisection Society is declared by its rules to be to secure the total abolition of the practice commonly called vivisection. Should it ever be desirable, either from its object having been attained or from other reasons, to dissolve the society, its general surplus property is to be applied for the benefit of the animal creation in such manner as the general committee shall determine (rules 14, 19).

In determining this question of charity the court does not enter into or pronounce any opinion on the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral. Humane men and women of a high order of intelligence and education are found in the ranks on either side. Stated broadly, one side holds that the practice, under carefully guarded provisions, although it may inflict some suffering on the lower order of animals, is justifiable and tends to promote the welfare of the human race, and also of the lower order of animals in general. They have the Act of Parliament in their favour (39 & 40 Vict., c. 77). On the other hand, the anti-vivisectionists hold that the practice is wholly unjustifiable. The repeal of the Act of Parliament is undoubtedly part of their object; it is not, however, confined to this, but extends to the total suppression of what the members of the societies consider to be a cruel and immoral practice. The element of morality and the improvement of morality from their point of view must, I think, be taken to be involved in their object. Cases arise, such as the present, in which it is not easy to ascertain whether a particular institution is or is not a charity. Charity in law is a highly technical term. The method employed by the court is to consider the enumeration of charities in the statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose, something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice. In *The Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, Lord Macnaghten (p. 583) said that charity, in its legal sense, comprises four principal divisions—trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads. In examining the purposes of any particular trust the court has taken a liberal rather than a narrow view of the subject. Under the head of the advancement of religion the court has not confined itself to the advancement of the tenets of the Church as established by law; it has held trusts for the promotion of many diverse forms of the Christian religion to be valid charities. A strong illustration

of this is to be found in *Thornton* v. *Howe*. Sir John Romilly held there that a trust for the publication of the works of Joanna Southcott was a valid charity. He found that her works were not immoral or subversive of religion, although he found in them much that was very foolish, and, although he said that they were in a great measure incoherent and confused, he considered that they were written with a view to extend the influence of Christianity—*i.e.*, the advancement of religion. This was the ground on which he based his decision. He did not think that it was incumbent on him to say that religion would in fact, or according to his own judgment, be advanced. He looked to the view or purpose of the writer. Again, take the head of relief of poverty. Dole charities were greatly in favour with our ancestors. Modern experience, regard being had to the increase of population, change of residence, and other altered circumstances, has shown that such charities tend to pauperize a district, and are not beneficial; and in framing new schemes, the court, having within the limits of judicial discretion to express its own views on the question, sets itself against this form of charity. Yet, undeniably, a dole charity, if created at the present day, is a valid charity.

I proceed to deal with the authorities more particularly bearing on the present question. In *University of London* v. *Yarrow* it was held that a bequest for establishing an institution for investigating, studying, and curing maladies, distemper, and injuries to which any quadrupeds or birds useful to man might be found subject was charitable. It was part of the testator's bequest that kindness to the animals committed to the charge of the superintendent of the institution should be a general principle of the institution. Lord Cranworth thought that by animals or birds useful to mankind, domestic animals were meant; but if a more expansive meaning ought to be attributed, he would not at all say that the charity would be bad. In *Marsh* v. *Means*, Wood, V.C., appears to have considered that if the gift had been for supporting the objects and principles enunciated in the prospectus published in "The Voice of Humanity" there would have been a good charity. Stated generally, the main object was to prevent cruelty to animals, and the animals intended to be protected were not merely domestic animals. In *In re Vallance* a society to promote prosecution for cruelty to animals was deemed charitable. In *In re Douglas, Obert* v. *Barrow*, Kay, J., considered that gifts to the Royal Society for the Prevention of Cruelty to Animals and the Society for the Protection of Animals liable to Vivisection and to the Home for Lost Dogs were all charitable. On the appeal, Lindley, L.J., was of the same opinion, but he declined to express any opinion, one way or the other, whether "The International Society for the Total Suppression of Vivisection," in its then present shape, was as good an object for a charitable bequest as it had been before its constitution had been altered, and Bowen, L.J., expressly reserved this question for future consideration. In *In re Joy, Purday* v. *Johnson* there was a gift in favour of a society which the testatrix described as "The Society for Suppressing Cruelty by United Prayer." His decision was that there was no such society in existence at the time of the testatrix's death; that, in substance, the lady herself was the society, if it ever existed; and that the society, assuming that it continued to exist until her death at all events, died with her; and that no general charitable intent was manifested. The question whether an anti-vivisection society was a charity was discussed but not decided. In *Armstrong* v. *Reeves* the Vice-Chancellor of Ireland held that legacies to two societies, the objects of which were the suppression of vivisection, were charitable legacies. In opposition to the claim of the defendant societies, it was argued in the present case that the Vice-Chancellor took an erroneous view of the effect of the authorities he referred to; but, however this may be, the Vice-Chancellor clearly expressed his own opinion on the subject apart from *In re Joy, Purday* v. *Johnson*, and *In re Douglas, Obert* v. *Barrow*. Again, it was in the present case urged that, having decided that there was no perpetuity, it became unnecessary for the Vice-Chancellor to consider the question of charity. But the Vice-Chancellor considered this question on the assumption that there was a perpetuity, and the conclusion at which he arrived cannot be treated as a mere *dictum;* it was part of his decision. Now, although his judgment does not bind me as an authority, still I ought to treat it with the respect due to the learned Vice-Chancellor of Ireland. In *The Income Tax Commissioners* v. *Pemsel*, Lord Halsbury, L.C., refers to the purposes of anti-vivisection societies as being comprehended in England within the term "charitable purposes" (see p. 550).

The result appears to me to be this: There is a balance of judicial opinion in favour of the defendant societies being considered charities; there is no express authority to the contrary. On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily, cruelty; into the question of what is cruelty the moral element largely enters (*Lewis* v. *Fermor*). It may be truly said that the infliction of justifiable pain is not cruelty. The question of what is and what is not justifiable, is a question of morals, on which men's minds may reasonably differ and do in fact differ. Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would in fact be benefited is a question on which I think the court is not required to express an opinion. The defendant societies may be near the border line, but I think they are charities.

Solicitors, *King & McMillin; F. Cotton; Hyde, Tandy, Mahon, & Sayer.*

Q. B. Div.
(Lord Russell of Killowen, C.J., and Charles, J.) — May 20, 22.

BADLEY *v.* CUCKFIELD UNION RURAL DISTRICT COUNCIL. (*a.*)

Local government—Bye-laws—New building—Wall partly combustible and partly incombustible—Wooden frame covered with corrugated iron—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 158.

By one of the bye-laws made by a rural sanitary authority in pursuance of section 158 *of the Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *it was provided*

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

that "every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials, properly bonded and solidly put together with good mortar . . . or good cement . . ."

Held, that a sanatorium, the walls of which were constructed of a framework of wooden upright and horizontal posts and rails, with sheets of corrugated galvanized iron one-thirty-second of an inch in thickness, with a layer of felt inside three-sixteenths of an inch in thickness fixed to the outside of such framework, the inside of which was lined with matchboarding, was not a building enclosed with walls constructed of hard and incombustible materials, and was an offence against such bye-law.

This was a case stated by consent for the opinion of the court under order 34 of the Rules of the Supreme Court.

The facts of the case as set out in the stated case are as follows:

The plaintiff was the lessee for a term of years of a house known as "Bedales," and grounds adjoining, situate at Lindfield, in the defendants' district, which he used as a boarding school for young gentlemen.

By an order of the Local Government Board, dated the 11th day of October, 1882, and made in pursuance of section 276 of the Public Health Act, 1875, the provisions of sections 157 and 158 of that Act, in force in urban districts, were declared to be in force in that portion of the defendants' district in which the plaintiff's premises were situate. In pursuance of the last-mentioned section and of the said order, the defendants' predecessors, the Cuckfield Union Rural Sanitary Authority, made certain bye-laws, which were duly allowed by the Local Government Board and were still in force in the said portion of the defendants' district, and were to be taken as part of this case.

On the 21st of January, 1895, the plaintiff, desiring to construct a sanatorium in connection with his school, caused to be sent by his surveyor to the surveyor of the defendants, under bye-law 92, the notice following:—

"Sir,—I send plan of a proposed sanatorium proposed to be built at "Bedales," in connection with the school, to be put on a brick foundation, cement concrete floors, concrete under all wood floors, galvanized iron outside and boarded inside, with iron roof, which I trust will be correct."

The defendants signified their disapproval of the intended building by notice in writing signed by their surveyor.

The plaintiff, notwithstanding such disapproval, commenced to put up the sanatorium with sheets of corrugated galvanized iron, one-thirty-second of an inch in thickness, with a layer of felt inside three-sixteenths of an inch in thickness, fixed to the outside of a framework of wooden upright and horizontal posts and rails, the sheets being fixed to each other where they joined by rivits or other metal fastenings. To the inside of the said framework was fixed a lining of wood matchboarding five-eighths of an inch in thickness, which immediately enclosed the room and was separated from the felt layer by a hollow space of four and a half inches being the thickness of the posts and rails aforesaid.

The defendants duly gave him notice, under bye-law 99, to remove and pull down the work, and, in default of his doing so, were proceeding to remove and pull down the same, when this action was commenced. It was thereupon agreed that a case should be stated, and that the plaintiff should not prosecute the work nor the defendants pull down what had already been erected until the decision of the court should be obtained.

It was admitted by the defendants for the purposes of the case that all proper notices, plans, sections, and descriptions of materials had been given and deposited, and that, save in respect of the materials of which the walls were to be composed and the thickness thereof, the proposed building would not infringe any of the said bye-laws.

It was admitted by the plaintiff that he waived his right under bye-law 99 to have an opportunity of showing cause why the said work should not be removed.

It was contended by the defendants that the effect of bye-laws Nos. 11 and 19, or one of them, is to forbid the erection of buildings with walls of galvanized iron only or of galvanized iron boarded inside.

It was contended by the plaintiff that such bye-laws only regulate the quality of and manner of employing the materials there specified in walls proposed to be built in the ordinary way where some such materials must be used, and do not apply to or forbid the erection of walls of totally different materials and structure.

The questions for the court were—

(1) Whether the defendants' bye-laws prohibit the erection of the plaintiff's said proposed building? and if so

(2) Whether such bye-laws are to that extent unreasonable and bad?

The bye-laws of the Cuckfield Union which apply to this case are set out in the judgment of the court.

Rowlatt, for the plaintiff.—The regulations are applicable only to masonry, and would be unreasonable if they could be applied to the building in this case. This is not a prohibited building within the bye-laws.

Alexander Glen, for the defendants.—A mixed wall partly combustible and partly incombustible comes within the meaning of a combustible wall. The walls of the building must be constructed wholly of incombustible materials, otherwise it contravenes bye-law 11: *Payne* v. *Wright*, 40 W. R. 191; [1892] 1 Q. B. 104; *Hibbert* v. *Acton Local Board*, 5 Times L. R. 274; *Stevens* v. *Gourley*, 8 W. R. 85, 29 L. J. C. P. 1.

Cur. adv. vult.

May 22.—The following reserved judgment was delivered by

LORD RUSSELL OF KILLOWEN, C.J.—In this case, which was argued two or three days ago, a puzzling question arose upon the construction of the bye-laws made by the Guardians of the Poor of the Cuckfield Union, in the County of Sussex, which bye-laws relate to new streets and new buildings, and have been approved of by the Local Government Board as far back as November, 1883, and appear to have been in operation since that time. The question arose in this way: The plaintiff, W. Badley, having certain property within the area over which the jurisdiction of this authority exists, was minded to erect a sanatorium in connection with other property of his, known as "Bedales," and, being so minded to erect this sanatorium, he, on the 21st of January, 1895, writes to the local authority, the defendants, stating that he sends a plan of the sanatorium "proposed to be built at "Bedales" in connection with the school, to be put on a brick foundation, cement concrete floors, galvanized iron outside, and boarded inside with iron roof, which I trust will be correct." It was not found to be correct according to the view of the local authority, and, accordingly, they signified their disapproval, and

forbad the erection. The question really is whether they were justified in so forbidding. That turns on the true construction to be placed upon certain of these bye-laws.

I have to make one general preliminary observation—knowing how very common it is to erect buildings for various purposes, including, I think, buildings in which persons are intended to reside, composed mainly, so far as the external parts are concerned, of iron—namely, that it is, to say the least of it, very remarkable that there is no set of provisions specifically addressed to that class of construction. We have to see whether or not any of these rules do in point of fact cover the case in question, because, although they may not be intended specifically to apply to them, yet if the fair construction of them is to prohibit the construction of such buildings as the one here in question, effect must be given to that prohibition. The first rule important to call attention to is rule 2 which is headed "Exempted Buildings," that is to say, the enumeration of a considerable class of buildings to which the rules have no application. Amongst them, for instance, under the letter "h" are buildings erected and used, or intended to be erected and used, exclusively for the purpose of a plant-house, orchard-house, vinery, summer-house, poultry-house, or aviary" with certain other additions; then, under sub-head (*i*), "Any buildings which shall not exceed in height 30ft., as measured from the footings of the walls, and shall not exceed in extent 125,000 cubic feet, and shall not be a public building, and shall not be constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment." Then (*j*), "Any building which shall exceed in height thirty feet"—with certain limitations as to cubical contents—"and shall not be constructed or adapted to be used either wholly or partly for human habitation, or as a place of habitual employment." So there is a large class of buildings entirely excluded which may be and frequently are made of iron.

Then we come to the 11th bye-law, which is the one which, I think, is most important in this case. It provides: "Every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone or other hard and incombustible materials properly bonded and solidly put together." I pause there for one moment. What follows in explanation of the proper bonding and solidly putting together very clearly applies to buildings of stone or of brick, and has no proper application to the case of an iron building at all; but we think that the latter part must be read after the words "solidly put together," so as to make it run that in the case where it is of bricks or of stone then the bonding and the solidly putting together is to be done by means of mortar and cement—cement mixed with sand or otherwise, as the case may be—and I think that was suggested by the learned counsel on the part of the plaintiff as the proper reading of that section, and with that we agree. We have, therefore, to ask whether the earlier part does or does not contain a provision which applies to this case, and a provision which is not complied with in the plans, and so forth, of the intended building. Now to begin with, this is not constructed of good bricks or stone, but the rule contemplates that the walls shall be, or may be, of some other hard and incombustible material. Now, concrete would be such a material. We think also that iron would be such a material—that is to say, it would be a hard and incombustible material.

Now take this building. The first question we have to ask ourselves is: Is the building, which is admitted to be a new building, and which is admitted also to be a building intended for the residence of human beings, enclosed, first of all, by walls at all; and, in the next place, is it enclosed by a wall of hard and incombustible material? I suppose I must assume that it is enclosed by a wall. The more important question is, What is the wall? That leads to another question, What is a wall? I am not going to give anything like an exhaustive definition of what is a wall, but I suppose it would be admitted that a wall, properly so called, must at least be something that will stand by itself. Well, if so, it clearly cannot be that the galvanised iron, which is the only hard and incombustible material in this case, will satisfy that enquiry. I now come to what is the actual construction of this wall, and I take the description of its construction, not beginning at the outside or at the inside, but taking it in the way in which it would be actually constructed in the order of time. Now the way it would be constructed in the order of time is this—that there would be upright posts of a certain amount of strength and solidity; to those wooden posts would be attached wooden frames; to those wooden frames would be fastened externally what my learned brother, in the course of the arguments, called a "skin of galvanised iron"—corrugated iron—one-thirty-second of an inch in thickness, with a series of plates, which plates would be rivetted together at the point of junction. Then we should have got the upright posts, the framing annexed to those upright posts, and the outer skin, one-thirty-second of an inch, nailed to that frame and to those posts. Then, inside, we should have a hollow space between that outer skin and the internal covering, to which I will presently refer. In that space it was proposed to put a certain thickness of felt, a combustible material, and inside that again a match-boarding, and so the so-called wall would be complete.

Now, what is the wall? I have given one reason, sufficient, I think, to show that the one-thirty-second of an inch of the only non-combustible material—namely, iron—cannot be called a wall, and I think, for the purposes of this case, we must regard the wall as made up, at least, of the wooden posts, the wooden frame, and the external skin or coating of corrugated iron. Can we say, therefore, assuming that this rule applies, as we hold that it does, that this can be said to have been a wall of incombustible material? I think most distinctly not. The case is still stronger, of course, if you regard the match-boarding, which would give some slight support, and if you regard the felt as part of the wall. Regarding the wall as composed of wooden posts and the corrugated iron attached to them, we think it is not a wall composed of hard and incombustible material, and therefore we think it an offence against this rule, and that it cannot be permitted.

We have been referred to some other rules to which it is not necessary, I think, that I should make any reference—the 19th rule for instance was referred to—but the learned counsel for the plaintiff has certainly quite satisfied me, speaking for myself, that that was intended to refer to walls made either by bricks or of mortar, or of blocks of concrete, or matters of that kind intended to be laid horizontally, and, therefore, has no application to the present case.

On this ground, therefore, we think this is a building that does offend against these rules, and cannot be permitted.

CHARLES, J.—I am entirely of the same opinion.

Judgment for the defendants.

Solicitors for the plaintiff, *Withers & Withers.*

Solicitors for the defendants, *C. M. Waugh.*

Q. B. Div.
(Grantham and Wright, JJ.) } May 21.

REG. v. COMMISSIONERS FOR TAXES OF THE BARNSTAPLE DIVISION OF ESSEX. (a.)

Tithe—Income tax assessment for occupation of land—Reduction by commissioners—Right of the owner of the tithe rent-charge to appeal—Income Tax Act, 1853 (16 *&* 17 *Vict. c.* 34), *Schedule B—Tithe Act,* 1891 (54 *&* 55 *Vict. c.* 8), *s.* 8, *sub-sections* 1, 3—*Taxes Management Act,* 1880 (43 *&* 44 *Vict. c.* 19), *s.* 57, *sub-section* 10.

Where an owner and occupier of lands subject to a tithe rent-charge successfully appeals to the commissioners for a reduction of the assessment made by the surveyor under Schedule B of the Income Tax Act, 1853, *the owner of the tithe charge has a right of appeal to the commissioners by section* 8, *sub-section* 3, *of the Tithe Act,* 1891, *if the assessment made by the surveyor has, on appeal, been reduced by them to such an extent that the tithe charge exceeds two-thirds of the annual value of the land as ascertained by the assessment, in consequence of which reduction so much of the tithe rent-charge as is equal to the excess, ceases to be recoverable from the occupier under section* 8, *sub-section* (1).

This was a motion showing cause against a rule *nisi* for a *mandamus* to the Commissioners for General Purposes under the Income Tax Acts for the Barnstaple Division of the county of Essex, directing them to hear and determine an appeal of the Rev. E. P. Gibson, rector of the parish of St. Ramsden Bellhouse against an assessment under schedule B of the Income Tax Act, 1853, of lands in the ownership and occupation of Mr. Helsham Jones, in that parish.

The facts were these. The Rev. E. P. Gibson, as rector of the said parish, was entitled to the tithe rent-charge on lands in the said parish; and Mr. Helsham Jones was the owner and occupier of two farms in said parish containing some 350 acres, the tithe rent-charge on which amounted to about £70. In October, 1894, Jones appealed to the Income Tax Commissioners for his district against the assessment of the lands in question, which was then £130 under schedule A, and £200 under schedule B. The commissioners heard the appeal, and Mr. Jones satisfied them that he had made no profits from the farms, and they reduced the assessment under schedule A to *nil* and under schedule B to £73. The rateable value of the property was £196. Notice was not given to the rector, Mr. Gibson, of this appeal, nor was he aware of it till after it had been heard and determined. He now desired to question, by way of appeal, this reduction of Mr. Jones' assessment, on the ground that, by reason of the provisions of the Tithe Act, 1891, s. 8, sub-section (1), his interest as owner of the tithe might be affected should Mr. Jones elect to apply to the county court for a reduction of his tithe rent-charge.

Section 8, sub-section (1) of the Tithe Act, 1891, provides that "where a sum is claimed on account of tithe rent-charge issuing out of any lands, and the county court is satisfied that if the sum claimed is paid, the total amount paid on account of the tithe rent-charge for the period of twelve months next preceding the day on which the sum claimed became payable will exceed two-thirds of the annual value of the lands, as ascertained and entered in the assessment for the purposes of schedule B of the Tithe Income Tax Act, 1853 . . . the court shall order the remission of so much . . . of the sum claimed as is equal to the excess, and the amount so ordered to be remitted shall not be recovered."

Mr. Gibson also claimed the right of appeal under sub-section 3 of the same section, which directs that "for the purposes of this section the owner of the tithe rent-charge shall have the same right of appeal as the owner of lands, whether under the enactments relating to the said assessment or under this section."

Accordingly, on the 2nd of January, 1895, Mr. Gibson appealed to the commissioners, and due notice was given to Mr. Jones, who attended. The commissioners decided that they had no jurisdiction to hear the appeal, and declined to go into the question of the value of the land. They held also that Mr. Gibson had no right of appeal, on the ground that an owner of lands would not, as such owner, be entitled to appeal or to be heard under similar circumstances.

Lawson Walton, Q.C. (with him *J. C. Earle*), for the commissioners, showed cause.—The question now sought to be raised has been already decided when the appeal by the occupier was heard and determined by the commissioners. A right of appeal only lies to the commissioners from the assessment of the surveyor. The owner of the tithe rent-charge desires to appeal to the commissioners against an assessment which they themselves have made. He seeks in fact to appeal from Cæsar to Cæsar. The commissioners, moreover, have no power to hear the appeal, for it is expressly provided by section 57, sub-section 10, of the Taxes Management Act, 1880, that an appeal once determined by the General Purposes Commissioners shall be final. The owner of the tithe rent-charge, moreover, is not "a person aggrieved," and has, therefore, no right to ask to be heard.

Channell, Q.C. (*Stevenson Moore* with him), on behalf of Mr. Gibson, in support of the rule. In cases where the interest of the owner of the tithe rent is affected, as in the present case, by a reduction in the assessment under schedule B of the occupier, he becomes a "person aggrieved" within the meaning of the statute, and as such is entitled to appeal. He had no cause of complaint until the commissioners had actually reduced the occupier's assessment, and his appeal must be taken as an appeal from the assessment made by the surveyor as altered to his disadvantage by the commissioners. The occupier naturally desired to reduce the assessment on his lands as much as possible; the tithe-owner, on the other hand, desired that the assessment should not be reduced, at all events, below a certain figure, in order to keep up the value of the tithe rent-charge.

GRANTHAM, J.—I am of opinion that the rule on the commissioners to hear the appeal must be made absolute. The case as argued was extremely complicated, although the main questions we have to decide are clear enough, and are, first, whether the owner of the tithe rent-charge has, in this case, a right to appeal; and, secondly, whether the commissioners, having decided the question on the appeal of the occupier, can rehear it on the appeal by the owner of the tithe rent-charge. It is now conceded for the purposes of deciding those questions that the owner of the tithe rent-charge gave notice of his intention to appeal in time, and if that fact had been stated earlier in the argument one difficulty would have been got rid of. Assuming, therefore, that the prosecutor gave his notice to appeal in time, I think that section 8, sub-section 3, of the Tithe Act, 1891, gives him clearly a right of appeal.

The other question we have to decide is whether the commissioners, having already decided on the appeal by the owner and occupier of the land the value of

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the assessment of the farms, can afterwards hear an appeal by the owner of the tithe rent-charge. I am of opinion that that sub-section, giving as it does the owner of the tithe rent-charge a right to demand an appeal, gives also the commissioners the power to hear such appeal.

WRIGHT, J.—I am of the same opinion. It is clear that section 8 sub-section 3 confers upon the tithe-owner a right of appeal against the assessment of the surveyor. In the present case the lands were assessed by the surveyor for the purposes of schedule A. & B. of the Income Tax Act, 1853, and against that assessment the owner and occupier of the lands appealed and succeeded in getting the assessment reduced. The court is now asked to find that the tithe-owner can appeal against that decision of the Commissioners, because in consequence of the provisions of section 8 sub-section 1 of the Tithe Act, 1891, it is apprehended that if the occupier can show that the amount claimed on account of the tithe-rent charge, will exceed two-thirds of the annual value of the land, as ascertained by the commissioners on appeal, he can apply to the county court judge under that section for a *pro tanto* remission of his tithe rent-charge. The tithe owner has under section 8, sub-section (3) certainly some new right conferred on him, and the court cannot give proper effect to the sub-section unless it holds that a right of appeal exists in such a case as this. The commissioners must, therefore, hear the appeal and deal with it.

They think, however, that they have no power to hear such an appeal by the owner of the tithe rent-charge, and the question we have to decide is whether section 8, sub-section 3, of the Tithe Act of 1891 gives them jurisdiction. The question is not without difficulties, but, on the whole, I think that the appeal must be dealt with as if the assessment appealed from had, in fact, been made by the surveyor. There is also another ground upon which possibly the appeal should be granted. The first appeal was heard without the tithe owner having any notice of it, and it might be said that it was not a duly constituted hearing.

Order made absolute.

Solicitors for the Inland Revenue, *E. F. & H. Landon.*

Solicitor for the prosecutor, *E. W. I. Peterson.*

Prob. Div. & Adm. Div. Probate. } March 1; April 1.

CHICHESTER AND ANOTHER *v.* QUATREFAGES AND OTHERS. (*a.*)

Probate—Will—Two codicils—Identical words of gifts and legacies—Cumulative or substitutional—Revocation.

A testator by his will appointed his wife and brother executors, and gave certain specific articles to his wife, and gave the residue, subject to her life interest therein, as to £5,000, to A. and remainder to three other sisters. After the will his wife was confined in an asylum, and subsequently he made a codicil revoking the appointment of his wife and brother as trustees and executors and appointing others, giving instructions as to his burial and monument, bequeathing pecuniary legacies, revoking the gift of specific articles to his wife and giving them to his nieces, and reducing the income of his wife in the residue to £500, and giving the residue, subject to the gift of £5,000 thereof to A., to his two brothers. The wife died, and he made a second codicil, containing no reference to the first codicil, but only to the will, but the language was almost identical with the first codicil, as it was prepared by altering a draft of it. It, however, omitted the revocation of the gift of specific articles to the wife and the gift of the residue to his wife for life and £5,000 to A., but directed his trustees to set aside £5,000 out of residue for A., and the amount of one pecuniary legacy was altered after engrossment.

Held, that the testator intended to revoke the first codicil and substitute the second for it, and that probate should go of the will and second codicil only.

Hearing before the court itself of an action in which the plaintiff's, executors of the will of Edward Joseph Eyre, claimed probate of his will and second codicil thereto, excluding from probate a first codicil as being revoked by the second.

The defendants, who were legatees whose legacies were the same in each codicil, claimed probate of both codicils.

Mar. 1.—*Bayford, Q.C.*, and *Bargrave Deane*, for the plaintiffs, cited *Methuen* v. *Methuen*, 2 Phil. 416; *Greenough* v. *Martin*, 2 Add. 239; *Thorne* v. *Rooke*, 2 Curt. 799.

Inderwick, Q.C., and *Walter Inderwick*, for the defendants, cited *Wilson* v. *O'Leary*, 20 W. R. 501, L. R. 7 Ch. App. 448; *Hooley* v. *Hatton*, 1 Bro. C. C. 390 (note), 2 W. & T. L. C., 6th ed., p. 349.

The facts and arguments are set out in the judgment.

April 1.—JEUNE, P.—The question in this case is whether the second of two codicils made by Edward Joseph Eyre was in addition to or substitution for the first.

The testator made his will on the 1st of December, 1871. Among the provisions we find that he appointed his wife and Lewis Joseph Eyre, his brother, executors; he gave his wife certain jewellery and other specific articles; and, subject to a life interest to his wife, gave the residue of his property, as to £5,000 to his sister, Juliana Stainforth, and as to the remainder, to the testator's three sisters on further conditions, which it is not necessary to specify.

The first codicil was made on the 3rd of October, 1891; before it and after the will the testator's wife had been confined in an asylum. The testator by this codicil revoked the appointment of his wife and brother as trustees and executors, and appointed his nephew, Arthur Chichester, and Joseph Raymond Gasquet in their places. He gave directions as to the place of burial and the monument to be erected on his grave. He then bequeathed the following legacies: "To the said Arthur Chichester, £200, and to the said Joseph Raymond Gasquet, in case he shall prove my will, £100; to my niece, Henrietta Eyre, £100; to my sister-in-law, the mother of the said Henrietta Eyre, my India shawl; to my niece, Regina Stainforth, £100; and to my nurse, Mary Aldridge, £200. I bequeath to the priest in charge for the time being of the said Church of St. John the Baptist, Bristol-road, aforesaid, the sum of £100, to be expended by him in his discretion in the relief of the poor of the district surrounding the said church; I bequeath to the said Arthur Chichester and Joseph Raymond Gasquet my several boxes containing miscellaneous articles, together with the contents thereof, each of said boxes having on it my name and address, upon trust, to divide such contents thereof, or such of them, and in such manner as they shall in their discretion think fit, amongst the poor of the district surrounding the church of St. John the

(*a.*) Reported by J. GERARD LAING, Esq., Barrister-at-Law.

Baptist aforesaid, and the remainder thereof, if any, in such manner, and in such discretion as aforesaid, among all or any of the members of my family." The testator proceeded to recite the gift by his will of jewellery and other articles to his wife, and substituted for it a gift to his nieces. He then, after reciting the distribution of the residue, reduced the income to his wife for life to £500, and after her death gave, subject to the gift of £5,000 to his sister, Juliana Stainforth, the residue to his brothers Lewis Joseph Eyre and John Joseph Eyre. After the first codicil, and before the second, which was made on the 1st of December, 1893, the testator's wife died.

It would clearly be allowable to refer to parol evidence bearing on the making of the two codicils. There is, however, no such evidence available; but it appears, on the face of the documents, that the testator made on a draft of the first codicil certain alterations, and the document so altered became the second codicil. The second codicil nowhere refers to the first codicil, but only to the will. In it the testator recited the appointment by his will of his wife and brother as trustees and executors and the death of his wife, and then appointed Arthur Chichester and Joseph Raymond Gasquet trustees and executors. He made a gift to Mary Aldridge of £400, altering the codicil after engrossment for this purpose. He omitted the recital and the revocation of the gift of jewellery and other articles to his wife, and the subsequent gift of £5,000 to his sister, Juliana Stainforth, and substituted for it a direction to the trustees to set aside £5,000 out of the residue for such sister. The second codicil was otherwise identical in language with the first.

The principles upon which the court acts in determining what documents constitute the will of a testator are quite clear. The duty of the court is to ascertain from the contents of the documents themselves, or, if need be, by recourse to external evidence, what was the intention of the testator. Two passages in two judgments of Sir John Nichol have constantly been referred to on the subject. In *Methuen* v. *Methuen*, 2 Phill. 416, at p. 426, that learned judge said: "In the Court of Probate the whole question is one of intention. The *animus testandi* and the *animus revocandi* are completely open to investigation in this court." And in *Greenhough* v. *Martin*, 2 Add. 239, at p. 243: "In a court of construction, when the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself in order to ascertain the intention of the testator; but in the Court of Probate the inquiry is not so limited, for the intentions of the deceased as to what instruments shall operate as his or her will are to be there collected from all the circumstances of the case taken together." As instances of cases in which principles have been applied to the case of wills with the result that the intention to revoke was held proved by inference, I would refer to *Dempsey* v. *Lawson* (25 W. R. 629, 2 P. D., 98) and *Jenner* v. *Ffinch* (28 W. R. 520, 5 P. D., 106), both before Lord Hannen. In the first of these cases, as in the present case, the contents of the documents constituted the chief, if not the only, elements from which inference of revocation was sought to be drawn.

In the present case it is to be observed not only that the second codicil refers entirely to the will, but also that (apart from the change in the amount of the gift to the nurse effected after the second codicil had been engrossed) the second codicil expressed only the legal effect of the first codicil, having regard to the fact of the supervening death of the wife. The inference seems clear. I can understand the testator, after his wife's death, preferring that the testamentary intentions of his will should appear to be modified by her death and not by her previous unfortunate condition, and redrawing the codicil in that view; but it appears to me that he never could have intended that the codicils should stand together for the purpose only of duplicating such gifts as a court of construction might hold to be cumulative. But the case is stronger, I think, when we come to details. There is one gift, as I have said, of an increased amount, and there are several gifts which are mere repetitions as to amount. It was argued before me that if both documents were admitted to probate a court of construction would hold some at least of the identical gifts to be accumulative. The question, however, of construction of identical gifts in documents admittedly intended to be read together is not the same as that of inference to be drawn from such identity as to the existence of such intention; but it is not necessary to rely on these instances. It is impossible to suppose that the specific gifts of the India shawl and other articles were repeated for any other reason than that the testator intended the second codicil to be a substitute for the first, and the same observation applies to the direction as to the testator's funeral and monument. I have no doubt, therefore, that the testator intended to revoke the first codicil and substitute for it the second, and that probate should go of the will and second codicil only. Costs of all parties to be costs out of the estate.

Solicitors for the plaintiffs, *Slaughter & Colgrave.*

Solicitors for the defendants, *Few & Co.*

Prob. Div. & Adm. Div. Admiralty. } March 6.

"THE HESTIA." (*a.*)

Admiralty—Salvage—Services priced by salvage agreement not performed—Amount of salvage remuneration due in respect of salvage services rendered to vessel in distress afterwards towed into safety by other salvors—Costs nomine expensarum.

The right of salvors to receive salvage remuneration does not depend upon whether or not a contract exists entitling them to salvage remuneration. Therefore where the master of a vessel in distress contracted to pay an agreed sum of £3,000 for being towed into a port of safety by another vessel, and the agreement was not performed, but it appeared that the vessel whose master had agreed to so tow the vessel in distress, had towed her into a somewhat better position than that in which she was first fallen in with, and had thus contributed in some degree to her being ultimately towed into safety by other salvors, the court taking the value of the salved vessel, her cargo and freight, as between £34,000 and £35,000, awarded as salvage remuneration £3,000 to the salvors by whom the salved vessel had been towed into safety, and £300 to the salvors who had entered into, but not performed, the salvage agreement.

The ultimate salvors were condemned in an amount of costs nomine expensarum *for not consenting to consolidation of their action with the action of the first salvors.*

These were two unconsolidated actions of salvage heard together, one instituted on behalf of the owners, master, and crew of the steamship *The Dunwent Holme* against the steamship *The Hestia*, by

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

freight and cargo, and the other on behalf of the owners, master, and crew of the steamship *The Escalona*, also against *The Hestia*, her freight and cargo.

The actions were heard on the 2nd, 4th, 5th, and 6th of March last before Bruce, J., assisted by two of the Elder Brethren of the Trinity House.

For the purpose of the suits the value of *The Derwent Holme* was taken at £20,000, that of *The Escalona* at £13,000, and the affidavit of values stated the value of *The Hestia* to be £24,300, the value of her cargo £9,620, and the value of her net freight at £360.

The result of the evidence appears from the judgment.

Sir Walter Phillimore and *H. Holman*, for the owners, master, and crew of *The Derwent Holme*.—The services of *The Derwent Holme* are admitted to have been meritorious, the towage of *The Hestia* into safety left uncompleted by *The Escalona*, having been successfully accomplished by the first-named vessel. For those services at least the amount specified in a salvage agreement made with the master of *The Escalona*, as the amount the master of *The Hestia* was willing to pay for being towed into safety—viz., £3,000 ought to be awarded by the court.

Aspinall, Q.C., and *F. Laing*, for the owners, master, and crew of *The Escalona*.—Having regard to the fact that *The Hestia* was ultimately salved, *The Escalona* is entitled to salvage reward for the salvage services she did render. She towed *The Hestia* into a position of less danger than that in which she was when first fallen in with, and enabled *The Hestia* to get the assistance of *The Derwent Holme* as *The Derwent Holme* might not have come up with her at the place where she was first taken in tow. For such services, contributing to the ultimate safety of the property salved, the court has always given salvage reward. *The Melpomene*, 21 W. R. 956, L. R. 4 A. & E. 129, *The Edward Hawkins*, Lush. 515, just as in the contrary case where a vessel is shown to have not in any degree benefited the property by her services, a salvage reward has been refused: *The Cheerful*, 34 W. R. 307, 11 P. D. 3; *The Benlarrig*, 14 P. D. 3, 37 W. R. Dig. 168; *The Lepanto*, [1892] P. 122, 40 W. R. Dig. 245. It is immaterial that *The Escalona* did not succeed in towing *The Hestia* into safety, for there is no pretence that she was guilty of misconduct in leaving *The Hestia*, and a salvage agreement does not in any degree fetter the discretion of the court to award salvage remuneration where beneficial services have been rendered; the amount specified in the agreement being little more than a guide to the court as to what the parties considered the entire services arranged for were worth. The present action is not an action on the salvage agreement, it is an action of salvage.

They referred to *The Westbourne*, 38 W. R. 56, 14 P. D. 132; Kennedy on Civil Salvage, p. 34.

Joseph Walton, Q.C., and *Butler Aspinall*, for the defendants, the owners of *The Hestia*, referred to *Cutter* v. *Powell*, 6 T. R. 320, and the notes to that case in the second volume of Smith's Leading Cases, and contended, on the authority of that case, that as *The Escalona* had not performed the services referred to in the salvage agreement above set out, the court ought not to award any salvage to her at all.

BRUCE, J.—In this case the steamship *Escalona* fell in with the steamship *Hestia*, disabled and in a position of some peril in the Gulf of St. Lawrence on the 3rd of November of last year. On the same day a salvage agreement was entered into between the masters of *The Escalona* and *The Hestia*, which was in the following terms:—Steamship *Escalona* at Sea, November, 1894. "I agree to pay to the steamship *Escalona* or owners the sum of three thousand pounds for towing the steamship *Hestia* from sea to a place of safety. (Signed) John Rayne, master steamship *Hestia*. Witness—W. Lindsay; John Ross; David Marcan."

After this agreement had been signed *The Escalona* took *The Hestia* in tow, and the towage proceeded until the weather became bad and the further progress of the two vessels was interrupted by the breaking of the hawser. *The Hestia* then let go her anchors in deep water, and rode out a gale, *The Escalona* standing by. There seems to have been some misconception on the part of the master of *The Escalona* as to what *The Hestia* was doing, and I think he was mistrustful of his own tackle; and he does not appear to have been able to hold *The Hestia* so as to enable her to get up her anchors. In fact, the master of *The Hestia* did get up twenty fathoms of his starboard cable before *The Escalona* left; but, on the refusal of the master of *The Hestia* to slip the cables of *The Hestia*, the master of *The Escalona* seems to have come to the conclusion that it was not incumbent on him to stay there any longer, and, though he went to take a message to the lighthouse at Heath Point, he left *The Hestia* without performing the salvage agreement.

I am, therefore, clearly of opinion that, as *The Escalona* did not tow *The Hestia* into a place of safety, the sum of £3,000 claimed under the agreement cannot be awarded to her, but counsel for the defendants have further contended that, as the master of *The Escalona* undertook to render a specified service for a specified sum and failed to do so, he is not entitled to any salvage reward, even though he may have rendered some service to *The Hestia* contributing to the ultimate safety of that vessel.

I cannot assent to that argument. No doubt it is well established as a common law doctrine, that at common law, where there is a contract to perform a specified service for a specified remuneration, nothing becomes due under the contract until the specified service has been performed. And more than that, according to the ordinary principles applied at common law, although the service stipulated for in an agreement may have been partly performed, yet, as the contract is not divisible, no obligation arises out of it to pay any part of the stipulated remuneration, and the existence of an express contract negatives the presumption which might otherwise arise of an implied contract to pay for the work done according to the value of what has been performed. If salvage claims were dependent upon contract, I should have great difficulty in holding that *The Escalona* was entitled to anything even on the assumption that she had rendered some service. But salvage claims do not rest upon contract. Where property has been salved from sea perils and the claimants have effected the salvage, or have contributed to the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or help to save.

No doubt the parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon the contract, and may exist, and frequently does exist, in the absence of any contract, either express or implied. The way in which an agreement affects the question of salvage is stated by Kennedy, J., in his book on Salvage, in the following terms (at p. 42): "A salvage agreement is an agreement which fixes, indeed, the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one of which is the preservation of some part at least of the

res, that is, ship, cargo, or freight." In the present case I think I must regard the claim of *The Escalona* as if there had been no agreement; and then the question arises what did *The Escalona*, in fact, do towards the preservation of the property? The elder brethren agree with me in thinking that, if *The Escalona* had stayed by *The Hestia* a little longer, the probability is that the circumstances would not have proved insurmountable, so as to render the performance of her agreement impossible; but those circumstances rendered the completion of the salvage service by *The Escalona* so difficult that I cannot find that the master of *The Escalona* was guilty of any culpable neglect, and if *The Escalona* did render any salvage service to *The Hestia*, and did contribute to her ultimate safety, I think she must be entitled to salvage reward.

I have consulted the Elder Brethren on these points, and they think, and I agree, that it would be very difficult to say that *The Hestia*, when she was left by *The Escalona*, was in a position of much greater safety than when she was first taken in tow by *The Escalona*, but that she was in a somewhat better position, for she was some fifty miles nearer the destination: she was in a position to communicate with the lighthouse at South Point, and so more readily get assistance; and she was also more in the way of vessels passing along the Gulf of St. Lawrence. On these grounds I think that *The Escalona* did contribute to a small extent to the ultimate safety of the vessel, and that, therefore, she is entitled to a small award of salvage. Under all the circumstances I think the proper sum to award to the owners, master, and crew of *The Escalona* is £300.

With regard to the circumstances of the services rendered by *The Derwent Holme*, I am advised by the Elder Brethren, and have no doubt, that when that vessel took *The Hestia* in tow the latter vessel was in a position of great difficulty. She had been left by a tug sent out to her assistance in answer to the message taken by *The Escalona*. She was drifting helplessly, with her anchor down, but not holding, and was within a few miles of the shore. It was bitter wintry weather, thick with snow, and if *The Derwent Holme* had not come up, and, at some risk to herself, promptly rendered the services she did, *The Hestia* might have drifted ashore and become a total wreck. The position when the hawser parted was also one of difficulty, and the towage, of over 300 miles, lasted three days. Taking into account the values at risk, I think, under all the circumstances, the award to *The Derwent Holme* should be £3,000; but as the owners of that vessel have caused some extra expense by not consenting to the consolidation of their action with that of *The Escalona*, I shall direct that £20 *nomine expensarum* be deducted from the costs to which they are entitled.

Solicitors for the owners, master, and crew of *The Derwent Holme*, *Downing, Holman, & Co.*

Solicitors for the owners, master, and crew of *The Escalona*, *Botterel & Roche.*

Solicitors for the defendants, *Walters, Johnson, Bubb, & Wharton.*

Prob. Div. & Adm. Div. Admiralty. } Nov. 12, 19.

"THE ENGLISHMAN" AND "AUSTRALIA." (a.)

Admiralty — Damage — No contribution amongst tort-feasors—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5—*Right to assignment of judgment confined to cases where express or implied contract of indemnity in existence before satisfaction of judgment.*

By the judgment in an action of damage in rem *instituted on behalf of the owners of a steamship, against a barque, and a steamtug by which the barque was being towed at the time of the collision with the plaintiffs' steamship, all three vessels were found to blame, and the owners of the barque and the owners of the steamtug were condemned in a moiety of the plaintiffs' damages, and the owners of the steamship were condemned in a moiety of the damage sustained by the steamtug, the owners of that vessel having claimed such damages by way of counter-claim in the action.*

After the reference in the action had been heard, the owners of the barque applied by way of summons in the action that the owners of the steamship might be ordered under section 5 *of the Mercantile Law Amendment Act,* 1856, *on payment to them by the owners of the barque of the moiety of the damages done to the steamship, together with interest and certain costs due to them, but less the moiety of the steamtug's damages, to assign to the owners of the barque the judgment so satisfied by such payment.*

Held, that the application must be dismissed, as the owners of the barque "were not liable for any debt or duty" within the meaning of the section; that the section pointed to the assignment of something in the nature of a security for a debt or duty for the performance of which an obligation existed prior to the judgment sought to be assigned, and that the provisions of the section were confined to cases of joint liability arising out of contract, and had no application to a case of tort, where the defendants, jointly liable, were, as against each other, under no liability to contribute.

Merryweather *v.* Nixan, 8 *T. R.* 146, *examined.*

This was a summons before the judge in chambers taken out on behalf of the owners of the barque *Australia*, the defendants in an action of damage in *rem* instituted on behalf of the owners of the steamship *Ada* against the barque *The Australia* and a steamtug called *The Englishman*; and by the summons the applicants called on the owners of the *Ada* to show cause why on being paid £3,267 15s. 1d., the amount of damages recoverable by the owners of *The Ada* under the judgment in the action, together with interest and costs, the owners of *The Ada* should not assign that judgment to the owners of *The Australia*, under the 5th section of the Mercantile Law Amendment Act, 1856.

At the hearing of the action all three vessels had been found to blame, and a decree was drawn up (the terms of which are stated in the judgment) whereby the owners of *The Ada* became entitled to obtain the whole amount of the damages, interest and costs they were entitled to recover under the decree at their option, either from the owners of *The Australia* or the owners of *The Ada* (see *The Ada and Thomas Joliffe*, 39 W. R. 176, [1891] P., 7; *The Englishman and Australia*, *ante*, p. 62, [1891] P., 25).

Nov. 12, 1894. — The summons having been adjourned into court, was argued in court before the judge.

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Scrutton, on behalf of the owners of *The Australia*, in support of the summons, contended that the owners of *The Australia* were ready and willing to pay the whole of the damage, interest, and costs recoverable from them under the judgment. They had brought themselves within the provisions of the 5th section of the Mercantile Amendment Act, 1856, and were consequently entitled to an assignment of the judgment under that section; and that by reason of the relief given by that section, and having regard to the judgment of the House of Lords in *Palmer* v. *The Wick Steamship Co.*, A. C., [1894] p. 318, the principle said to be enunciated in *Merryweather* v. *Nixan*, 8 T. R. 186, that there could be no contribution between tort-feasors had no application to prevent the owners of *The Australia* if they procured an assignment under the section, subsequently suing the steamtug *The Englishman* for contribution.

Phillimore and *Nelson*, for the plaintiffs, the owners of *The Ada*.—The owners of *The Australia* are not within the section. That section only relates to contracts: *Batchellor* v. *Lawrence*, 9 W. R. 373, 9 C. B. N. S. 543; *Woolley* v. *Batte*, 2 C. & P. 417; *Adamson* v. *Jarvis*, 4 Bing. 66. Moreover, the owners of the barque *The Australia* have not satisfied the judgment, and indeed they are only now seeking to do indirectly what the court has said persons in their position cannot do directly, that is, restrict their liability to only a moiety of the decree made against them, there being no contribution between tort-feasors. (*The Englishman* and *Australia*, *ante*, p. 62; *The Avon* and *Thomas Joliffe*.) We ask that the applicants should pay the whole judgment against them without having any assignment.

Butler Aspinall, for the owners of *The Englishman*.

Cur. adv. vult.

Nov. 19.—BRUCE, J.—The facts of the case are these: The steamtug *Englishman* having in tow the barque *Australia*, came into collision with the steamship *Ada*. *The Ada* sank, and *The Englishman* sustained damage. The present action—an action of damage—was brought on behalf of the owners of *The Ada*, *in rem*, against *The Englishman* and against *The Australia*, and in the action the owners of *The Englishman*, by way of counter-claim, sought to recover against the owners of *The Ada* the damages sustained by *The Englishman* in the collision. The action was heard before the President, assisted by two of the Elder Brethren of the Trinity House, and by the decision in the action all three vessels were found to blame. It was, I think, part of the finding of the court that *The Englishman* was in the service of *The Australia*, and that *The Australia* was answerable for the negligence of the servant. The decree entered in the action declared that the President pronounced the collision to have been occasioned by the fault or default of the owners, masters, and crew of *The Englishman*, *The Australia*, and *The Ada*, and condemned the owners of the steamtug *Englishman* and their bail, and the owners of the barque *Australia* and their bail in a moiety of the plaintiff's claim arising out of the collision, and also condemned the owners of the steamship *Ada* and their bail in a moiety of the counter-claim of the owners of the steamtug *Englishman* in respect of the said collision, and he referred the damages to the registrar, assisted by merchants, to report the amount thereof (see *ante*, p. 62). The registrar has found that half the amount of the damages actually sustained by *The Ada* amounts to the sum of £3,428 19s. 9d., and he has found that the amount of the *Englishman's* damage amounts to £237 13s. 3d. There are sums to be added for interest, and the costs of the action, which I need not further take into consideration.

The summons now before me was then taken out by the defendants, the owners of *The Australia*, calling upon the plaintiffs, the owners of *The Ada*, to show cause why, upon payment to them of the sum of £3,267 15s. 1d. damages recoverable by them under the judgment in the action, and whatever other sum might be due in respect of costs and interest, the plaintiffs should not be ordered to execute to them an assignment of the judgment.

The sum mentioned in the summons—viz., £3,267 15s. 1d,—is arrived at on the principle of deducting from the amount in which the owners of *The Australia* and *The Englishman* have been condemned, the amount in which the owners of *The Ada* have been condemned in respect of the counter-claim established by the owners of *The Englishman* against *The Ada*. In other words, the owners of *The Australia* claim the benefit of *The Englishman's* counter-claim, and propose to pay to *The Ada* no more than *The Englishman* would be bound to pay. The application is based on the provisions of section 5 of the Mercantile Law Amendment Act, 1856. That section provides as follows: "Every person who, being security for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor or other proceeding at law or in equity in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance shall not be pleadable in bar of any such action or other proceeding by him; provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid more than the just proportion to which, as between those parties themselves, such last person shall be jointly liable."

In considering whether the application on the summons should be granted, one objection of form is not unworthy of consideration. There is no provision in the section enabling the court to exercise the jurisdiction thereby conferred upon motion, and *Phillips* v. *Dickson*, 8 W. R. 390, 8 C. B. N. S. 391, is a direct decision that advantage cannot be taken of the section in question upon motion, and, so far as I can discover in all the cases in the books in which relief has been given otherwise than in administration actions, an action has been instituted for the express purpose of claiming the relief. I am, however, exceedingly reluctant to rest my decision upon a mere question of form, and therefore I propose to consider the application as if it had been brought before the court in a formal and regular manner.

The first question to be considered is whether the owners of *The Australia* come within the words of the section, "'person' . . . being surety for the debt or duty of another, or being liable with another for any debt or duty." It is not contended that the applicants are sureties, but it is said that they are liable with another (the owners of *The Englishman*)

for a debt or duty; that the owners of *The Englishman* are co-debtors with the owners of *The Australia* to the owners of *The Ada*. It is clear that the owners of *The Australia* only became liable upon the judgment, and, if they and the owners of *The Englishman* are co-debtors, they are co-debtors only by virtue of the judgment. On the construction of the section I think the liability creating the obligation of the two persons as co-debtors is a liability which must be existing prior to and independently of the "judgment, specialty, or other security," the assignment of which is contemplated. "The judgment, specialty, or other security" referred to in the section as "held by the creditor in respect of such debt or duty," refers, I think, to something in the nature of a security for the debt or duty, and implies that the obligation to pay the debt or perform the duty springs from some other source than the judgment, specialty, or security. As there was no joint liability prior to the judgment, the 5th section of the Mercantile Law Amendment Act, 1856, does not, in my opinion, apply, and the owners of *The Australia* and the owners of *The Englishman* were not co-debtors prior to the judgment.

But it does not seem to me necessary to rest my decision upon a verbal criticism of the section. The 5th section of the Mercantile Law Amendment Act, 1856, was never intended to apply to cases where there was no liability to contribute as between the persons jointly liable. It was intended to apply only in cases where the joint liability arose out of or sprang from contract. It was certainly never intended to overrule the principle of *Merryweather* v. *Nixan*, 8 T. R. 186, or to give a right to demand an assignment in cases where no right of indemnity exists. As in the course of the argument a good deal was said about *Merryweather* v. *Nixan*, it may be well that I should state the doctrine which, it appears to me, that case establishes. The facts were these. The plaintiff and the defendant had been held jointly liable to the extent of £840 in an action brought against them by the owner of a reversionary interest in a mill for damage done by them to the mill. The whole £840 was levied on the plaintiff, who sought to recover in an action of *assumpsit* contribution from the defendant. Thomson, B., held that no implied *assumpsit* arose as between joint wrongdoers, and nonsuited the plaintiff. Lord Kenyon and the judges of the King's Bench held the nonsuit right. Lord Kenyon said that he had never heard of such an action having been brought where the former recovery was for tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of *assumpsit*; then he added: This decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right. The meaning of that sentence is, I think, this: although no implied indemnity arises from the simple fact that one of two tort-feasors has paid the whole of the damage for which both are liable, yet this principle does not affect cases where one man has employed another to do acts for the purpose of asserting a right, either under an express indemnity, or under such circumstances as to raise an implied indemnity, provided the acts are not of such a character as to be obviously unlawful.

Adamson v. *Jarvis*, 4 Bing. 66, affords an example of the class of cases to which Lord Kenyon referred. In that case the plaintiff, an auctioneer, sold goods under the order of the defendant, and paid the proceeds to the defendant. The defendant induced the plaintiff to sell the goods by representing to him that the defendant was of right entitled to sell them, and the plaintiff in good faith acted on that representation. The defendant was not entitled to sell the goods, and the true owner recovered the value from the plaintiff, and the plaintiff brought this action against the defendant to recover the amount he had been so compelled to pay. The plaintiff was held entitled to recover. Best, C.J., said, in the course of his judgment: "The plaintiff is hired by the defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale." The circumstances of that case, were such as to raise an implied warranty to indemnify. It was never decided in *Merryweather* v. *Nixan* that one wrongdoer could not in some cases sue another for contribution, but what was decided was that an implied promise to indemnify did not arise from the mere fact of payment of the whole of the joint liabilities by one of several wrongdoers. Where the circumstances are such as to raise a promise to indemnify, then the indemnity may be enforced, except, in the words of Best, C.J., in "cases where the person who seeks redress must be presumed to have known that he was doing an unlawful act." If the person knew that the act he was engaged to do was not only wrongful, but unlawful, then the promise to indemnify is an unlawful contract, in contravention of public policy, and one that cannot be enforced in law. *Betts* v. *Gibbins*, 2 A. & E. 57, is a case of the same character as the one I have last referred to. The plaintiff in that case dealt with goods under the order of the defendant under such circumstances as to raise a promise on the part of the defendant to indemnify the plaintiff. There was nothing clearly illegal in the act of the plaintiff, and he was held entitled to recover on the implied indemnity.

The case of *Pearson* v. *Skelton*, 1 M. & W. 504, was referred to in the argument. The plaintiff and the defendant and several other persons were partners concerned in running a stage coach. A person whose horse was killed by the negligence of a coachman employed by the partner to drive the coach recovered damages against the plaintiff, and the plaintiff sought to recover contribution from the defendant. There appeared to be a partnership fund, out of which expenses were first to be paid, and the residue divided among the proprietors. The principle of *Merryweather* v. *Nixan* did not apply, because there was an express contract regulating the rights of the plaintiff and defendant; but notwithstanding, the action was held not to be maintainable at law, because the rights of the partners could only be adjusted in the Court of Chancery.

An examination of the cases has led me to the conclusion that the actual point decided in *Merryweather* v. *Nixan*, that an implied indemnity does not arise as between tort-feasors simply because of the payment by one of the whole of the joint liability, has never been questioned. Circumstances may exist, as in some of the cases referred to, which give rise to an implied indemnity, or there may be an express indemnity; and where there is such an indemnity, implied or express, it may be enforced, unless the contract of an indemnity relates to the doing of an act which is illegal, and must be presumed to have been known to be illegal by the person seeking to enforce the indemnity. This view of the law is quite consistent with the observation of Lord Herschell, L.C., in the case of *Palmer* v. *Wick Steam Shipping Co.*, to which attention was directed in the argument. The Lord Chancellor is not speaking of the circumstances which may raise an implied promise to indemnify. He is addressing himself to the construction of the alleged doctrine that one joint tort-feasor can never recover from another, and he expresses the opinion that in cases where an express or implied indemnity exists, the doctrine can only

apply to prevent the tort-feasor from recovering when he must be presumed to have known that he was doing an unlawful act. I do not think that his observations were intended to mean that, wherever the act done by joint tort-feasors was not in itself unlawful, an indemnity is to be implied from the mere fact that one tort-feasor has paid, under compulsion, the whole damages arising from the tort. So to lay down the law would be, as it seems to me, to overrule the exact point decided in *Merryweather* v. *Nixan*. That it is clear Lord Herschell did not intend to do, because he says, "It is now too late to question that decision in this country." In fact, Lord Herschell does not seem to have done more than express his approval of the exposition of the law contained in the judgment of Best, C.J., in the case of *Adamson* v. *Jarvis*.

I have come to the conclusion that there are no circumstances in the present case to raise an implied promise of indemnity, and I do not think that the applicants are entitled to the order they seek. I should say, further, that I think that the statute applies only in cases where payment has been made. Had an action been brought by the owners of *The Australia* to compel an assignment of the judgment, the payment of the amount of the joint debt would have been a necessary allegation in the statement of claim.

Further, in this case I do not gather that there has ever been an offer to pay the amount of the damages in which *The Australia* has been condemned. The offer made, as I understand, has been to pay only the balance due after taking into account the counterclaim of *The Englishman*. No doubt, according to the decision in the case of *The Khedive*, 31 W. R. 249, 7 App. Cas. 795, the balance could only be recovered from *The Englishman*, but I see no reason why the owners of *The Australia* should deduct from the amount of their liability the amount due to the owners of *The Englishman* in respect of their claim.

Solicitors for the plaintiffs, *Lawless & Co.*

Solicitors for the owners of *The Australia*, *Cooper & Co.*

Solicitors for the owners of *The Englishman*, *Pritchard & Son.*

Court of Appeal.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — Aug. 5, 6.

CROSLAND *v.* WRIGLEY. (*a.*)

Insurance, Life—Benefit of wife and children—Foreign assurance company—Lex loci contractûs—Lex loci solutionis.

A policy of insurance on the life of a husband for the benefit of his wife and children was effected by an Englishman domiciled in England through the English branch of an insurance company which carried on business in New York.

Held (affirming the decision of Kekewich, J., ante, 572), *that the policy, so far as it consisted of a settlement of the policy moneys, must be construed in accordance with the law of the domicile of the insuring party.*

The decision of Kekewich, J., *upon the construction of the policy, reversed.*

Appeal from the decision of Kekewich, J., reported *ante*, p. 572.

R. Skilbeck, a domiciled Englishman, insured his life in the Equitable Life Assurance Society of the United States, whose principal office was in New York, but having also a branch in England, where the insurance was effected. The moneys assured were expressed to be payable to "Eliza Jane Skilbeck, wife of R. Skilbeck, for her sole use, if living, in conformity with the statute, and, if not living, to the children of said R. Skilbeck or their guardian for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said R. Skilbeck."

The words "in conformity with the statute" referred to a statute of the State of New York relating to the property of married women.

The question was, whether the law of England or of New York was to be applied in construing the policy. Kekewich, J., held that the policy should be construed according to the law of England, and, upon the construction of the policy, held that "children" meant children surviving the insured, and that, as only one child (the defendant) survived the insured she was entitled to the whole fund.

The plaintiff, the legal personal representative of the deceased daughter, appealed.

Marten, Q.C., and *Vaughan Hawkins*, for the appellant.

Renshaw, Q.C., and *W. A. Peck*, for the respondent.

Ex parte Dever, 18 Q. B. D. 660, 35 W. R. Dig. 96; *Winn* v. *Fenwick*, 11 Beav. 438, and *Stevens* v. *Pyle*, 30 Beav. 284, 11 W. R. Dig. 128, were referred to on the construction of the policy.

LINDLEY, L.J.—This is a curious document and one to which we are not accustomed. It is a policy of assurance and a voluntary post-nuptial settlement in one. We are concerned with the settlement aspect of the document, and with that the American law has nothing to do. [His lordship then proceeded to construe the policy, and came to the conclusion, reversing the decision of Kekewich, J., that the two daughters of the assured took equally as tenants in common.]

LOPES and RIGBY, L.JJ., concurred.

Solicitors, *Ramsden, Radcliffe, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield; *Iliffe, Henley, & Sweet*, for *Laycock, Dyson, & Laycock*, Huddersfield.

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — July 24.

In re BIRCHAM & CO. (*a.*)

Solicitor — Costs — Taxation — Debenture trust deed—Mortgage—Scale fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order*, 1882, *r.* 2 (a), (c), *Schedule* 1, *Part* 1.

The costs of the preparation and execution of a debenture trust deed, which was intended to be a mortgage security for moneys advanced, but under which no debentures were in fact ever issued, should be taxed under rule 2 (c) *of the General Order made in pursuance of the Solicitors' Remuneration Act*, 1881.

Decision of Kekewich, J., *reversed.*

(*a.*) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

Appeal from a decision of Kekewich, J., on a summons to review taxation.

By an indenture dated 9th of January, 1894, the Midland Coal, Coke, & Iron Co., assigned certain premises to trustees upon trust to permit the company to retain the same and carry on business until the security became enforceable, and then upon the usual trusts for realization, and it was declared that the principal moneys and interest intended to be secured by the debentures should be a first charge on the mortgaged premises. Pursuant to this indenture certain debentures were sealed and stamped, but none were ever issued nor any money advanced, some money, however, was advanced by Lloyds Bank on the security of an agreement to issue the debentures, the debentures being held in the meantime by the bank. On an order to tax, the taxing master refused to allow the scale fee to the applicants who acted as the solicitors in the above matter, but he offered to allow them costs in respect of the work they had actually done, alleging in his answer to objections, amongst other things, that the deed in question was a deed of trust, not an ordinary mortgage deed, that the solicitors acted for the trustees, and not for the parties who might lend the money, and that the deed was not stamped as a mortgage.

By the General Order, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881, s. 2, it was provided as follows:—(Rule 2) "The remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing . . is to be regulated as follows—namely, (*a*) In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in Part I. of Schedule I. to this order. (*c*) In respect of business not hereinbefore provided for, connected with any transaction, the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed . . . the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." By Schedule I., Part I., a mortgagee's solicitor is entitled to a percentage on the amount of money advanced, for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage.

Kekewich, J., held that the deed of the 9th of January 1894, was a mortgage, and that the solicitors were entitled to charge the scale fee allowed by Schedule I., Part I., for preparing and completing the mortgage.

The company appealed.

Bramwell Davis, Q.C., and *Younger*, for the appellants.—At the most the solicitors are only entitled to the scale fee so far as the transaction is completed: *In re Smith, Pinsent, & Co.*, 38 W. R. 685, 44 Ch. D. 303. If this is a mortgage at all, it is abortive. The mortgage is not of the essense of the transaction: the money could be advanced without this trust deed, which is not the governing deed, and, therefore, is not the mortgage. The completion of a mortgage is not the completion of any particular document within the meaning of the Act, nor is a mortgage a mortgage deed; it is a mortgage transaction. The completion of the mortgage meant the handing over of the money and the title deeds and the execution of the mortgage deed.

Warrington, Q.C., and *Kenyon Parker* for the solicitors.

LINDLEY, L.J.—I have come to the conclusion that the taxing master is right. The question is whether the solicitors are to be paid in one particular way or in another particular way. If we look at the Solicitors' Remuneration Act, 1881, section 2 provides, &c. [His lordship read the section and rules 2 (*a*) and (*c*) of the General Order made in pursuance of section 2 of the Act, and continued:—] We have to determine whether this transaction falls within (*a*) or (*c*). I have no hesitation in saying that it falls within (*c*). [His lordship then stated the facts, and continued:—] Until the debentures are issued the trust is for the benefit of the company. There is no security, and the issue of debentures is precedent to the security. It is not a mortgage. If a mortgage were existent I doubt whether a mortgage to secure further advances would be entitled to be charged for on the scale fee.

The case comes clearly within rule 2 (*c*), and not (*a*), and the result is that the appeal must be allowed.

LOPES, L.J.—I am of the same opinion. The question is whether the solicitors are entitled to be paid by scale or by items for the work which they actually did. Can this be regarded as a completed transaction? No debentures were ever issued. It is said that some were issued to Lloyds Bank; rather the bank said they would hold them as security for money advanced so as to prevent the issue of them to anyone else. I do not think this constitutes a mortgage within the meaning of the Act. It certainly is not a completed mortgage transaction, and the appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. At the date of the execution of the deed it was not a security at all. Not a single debenture was ever issued. You cannot turn into a completed mortgage that which was not intended to be a completed mortgage.

The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant company, *Thorowgood, Tabor & Co.*

Solicitors for the respondents, *Bircham & Co.*

From Q. B. Div. (Lindley, Lopes, and Rigby, L.JJ.) July 19, 22.

ALLEN AND ANOTHER (*Appellants*) *v.* LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Metropolis—"Street, place, or row of houses" in which building situate—Determination of—Superintending architect—Magistrate—Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

For the purposes of section 75 *of the Metropolis Local Management Act,* 1862, *it is the function of the superintending architect, and not of the magistrate, to determine the question in what "street, place, or row of houses" building is situated.*

Barlow *v.* Vestry of St. Mary Abbotts, Kensington, 34 *W. R.* 521, 11 *App. Cas.* 257, *considered and applied.*

Appeal from the decision of the Divisional Court upon a case stated by a metropolitan police magistrate.

A summons was issued against the appellants upon a complaint by the respondents that the appellants did on or about the 13th of November, 1894, unlawfully begin to erect a certain building beyond the general line of building on the north-western side of Birchington-road, without the consent in writing

(*a.*) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

the respondents, contrary to section 75 of the Metropolis Management Act, 1862.

The shop and house to which the complaint related had a frontage of 58 feet to Birchington-road and 22 feet to Kilburn High-road. The door of the shop was intended to face towards the Kilburn High-road, and the shop front to face partly towards the one road and partly towards the other. The superintending architect to the London County Council had by his certificate fixed the general line of buildings on the north-western side of Birchington-road by reference to the existing buildings thereon. The architect in his certificate stated that, "with regard to the erection of a building in Birchington-road, Hampstead, and beyond the face or front of the buildings forming a row of houses on the north-western side of Birchington-road as aforesaid, I have been required to decide the general line of buildings in such road as provided by the statute," and proceeded: "Therefore I decide that the main fronts of the buildings in the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, form the general line of buildings on the north-western side of Birchington-road aforesaid, in which road the building is situated."

The plan annexed to and referred to in the certificate showed that the building extended sixteen feet beyond the prolongation of the building line thus fixed.

The architect's certificate was confirmed on appeal.

The magistrate found the complaint proved, and ordered the appellants within twenty-eight days to demolish so much of the building as was beyond the general line of buildings on the north-western side of Birchington-road, as defined in the certificate and confirmed by the appellate tribunal.

Upon the case stated by the magistrate the Divisional Court (Wills and Wright, JJ.) were of opinion that the superintending architect must be taken to have decided that the appellants' house was situate in Birchington-road, and that that decision was binding on the magistrate. The latter point their lordships decided in deference to the case of *London County Council* v. *Cross*, 61 L. J. M. C. 160, 40 W. R. Dig. 148, and the interpretation put in that case upon the judgment of the House of Lords in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington*, 34 W. R. 521, 11 App. Cas. 257.

The owners appealed.

Channell, Q.C., and *Macmorran*, for the appellants.—(1) The certificate does not decide that the building is in "the street, place, or row of houses" for which the building line is determined. (2) It is for the architect to settle the general line, but for the magistrate to settle whether a particular building is in the "same street, row," &c., in which the general building line is. That was the view taken by Lord Bramwell in *Barlow* v. *Vestry of St. Mary Abbotts, Kensington*, and is to be preferred to the contrary opinion expressed by Lord Watson in the same case. *London County Council* v. *Cross*, upon this point, is wrongly decided.

Horace Avory and *F. F. Daldy*, for the respondents.—No case has decided that this is a question of fact to be decided by the magistrate. The point was raised in *Barlow's case* for the first time in the House of Lords. [LOPES, L.J., referred to *Gilbart* v. *Wandsworth District Board of Works*, 60 L. T. N. S. 150, 37 W. R. Dig. 120.] All the decisions overruled in *Spackman* v. *Plumstead District Board of Works*, 33 W. R. 661, 10 App. Cas. 229, proceeded on the ground of alleged hardship on the owner, and here the hardship is no greater. The section says that "such general line is to be decided by the architect, and that refers back to the general line of buildings in any street, place, or row of houses." The architect, therefore, determine in what street, &c., the building complained of is.

They also referred to the London County Council (General Powers) Act, 1890 (53 & 54 Vict. c. ccxliii.), s. 28, as amended by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) and to the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 143.

Channell, Q.C., in reply.—The answer to the argument based on the word "such" is the judgment of Lord Bramwell in *Barlow's case*. *Gilbart's case* is in my favour, because there the magistrate found the position of the house.

Cur. adv. vult.

LINDLEY, L.J.—This is an appeal from a decision of the Divisional Court in one of those cases of buildings projecting beyond the line of street, and it turns, as usual, upon the true construction of section 75 of the Metropolis Management Act, 1862. I will not pause to read that section, which was read and commented upon, and I take it for granted that we are all in possession of the terms of it. The difficulty arises, as commonly is the case, by reason of a house which is situated at the corner of two roads or streets. The superintending architect has granted a certificate. [His lordship referred to the certificate, and continued:—] Now with reference to the point made by Mr. Channell, turning on the construction of that certificate, and having regard to the terms of it and to the plan to which it refers, I have not the slightest doubt that the true construction of this is that the building in question is certified to be not only in Birchington-road but in the road delineated on the plan. There is no doubt of that.

That being so, I turn to the question which is in controversy and which turns upon the construction of the Act. The question is whether this building projects beyond the building line of houses in Birchington-road, and whether that question is to be decided under the statute by the superintending architect or by the magistrate.

Taking section 75 as read and not pausing to go over it, the following circumstances must co-exist in order to justify an order for demolition under section 75, namely—

First, there must be a "building, structure, or erection," of some sort.

Secondly, such "building, structure, or erection" must be erected with the written consent of the Metropolitan Board of Works, or now of the London County Council.

Thirdly, such building must be in some "street, place, or row of houses."

Fourthly, such "street, place, or row of houses" must have a general line of buildings.

Fifthly, such line of buildings, that is, the line of buildings of the "street, place, or row of houses" in which the building complained of is situated, must be decided by the superintending architect appointed by the Metropolitan Board of Works, or now by the County Council.

Sixthly and lastly, the "building, &c." must be erected beyond the line so decided.

What is left to the decision of the architect is the existence and exact position of the general line of building of the "street, place, or row of houses," if any, in which the "building, &c." complained of has been erected. In case of dispute the magistrate must decide all the other matters referred to. For example, he must decide whether the building complained of is one to which section 75 applies, especially having regard to section 74 whether the necessary consent has been given; whether the building is in a "street,

place, or row of houses," "street" being interpreted as directed in section 112; whether the building has been erected beyond the general line of building for that street as decided by the superintending architect. Such is, in my opinion, the true construction of the section, and of the decision in *Spackman* v. *The Plumstead Board of Works*, which set at rest the doubt whether the magistrate could review the architect's decision as to the general line of building.

So far the interpretation of the statute is reasonably plain, but then it is said that the question still remains who is to determine whether the building complained of is in the particular street, place, or row of houses to which the architect's certificate is applicable? This is the point on which Lords Watson and Bramwell differed in *Barlow* v. *The Vestry of St. Mary's Abbotts*. A careful perusal of Lord Herschell's judgment has led me to the conclusion that he agreed with Lord Watson, and that Lord Fitzgerald took the same view. There is much to be said for this interpretation of the Act, for the object of the Act being to regulate lines of building, the architect rather than the magistrate seems naturally to be the person to say what line of building a particular house should conform to. The general line of building the architect is to decide is "such general line" and by "such" is meant the general line for the "street, place, or row of houses" in which the house in question is. The architect might, no doubt, assume without deciding, that the building complained of was in a particular "street, place, or row of buildings," and simply certify the general line of buildings of that "street, &c.", leaving the magistrate to determine whether, after all, the building was in the "street, &c." to which the certificate applied. But this would be to deprive the architect's certificate of half its value, and the interpretation which leaves him to decide what building line is to be conformed with seems to be preferable to an interpretation which leaves that question to the magistrate.

For these reasons, and thinking as I do that this view of the section is more in conformity with the decision of the House of Lords in *Barlow's case* than the interpretation contended for by the appellants, I have come to the conclusion that this appeal ought to be dismissed.

LOPES, L.J.—I am of the same opinion. There are two questions asked in this special case. The first is whether the certificate of the superintending architect decides that the appellants' house is situated in the "street, place, or row of houses" in and for which the general line of buildings is determined by the certificate. Now I do not mean to say that the certificate is as clear as it might be, but I have come to the conclusion that it does mean to decide that the appellants' house is situated in the "street, place, or row of houses" in and for which the general line of building is determined by the said certificate. Therefore I answer that question in the affirmative. Then a further question is asked by the case, viz.: "Whether it was the duty of the superintending architect under the 75th section of the Act to decide and find by his certificate the situation of the appellants' building within the meaning of the said section, and if so, whether his decision and finding was binding on me." I have come to the conclusion that that question also ought to be answered in the affirmative. That question depends on the 75th section of the Metropolis Management Act, 1862. I do not propose to read that section—it is unnecessary; but some way on in the section are these words: "Such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works"—"such general line of building"; that refers you back to the earlier part of the section, which says that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond"—what?—"beyond the general line of buildings in any street, place, or row of houses in which the same is situated." It seems to me impossible that the superintending architect can determine the building line to which it is to be conformed, without determining in what street the house complained of is.

I think, if I had to decide it for the first time, upon the true construction of the section I should so hold, but the case in the House of Lords (I think it unnecessary to refer to the other cases) of *Barlow* v. *The Vestry of Kensington* is clear, to my mind, in that direction. I think the judgment of Lord Watson in that case right when he says: "In my opinion the function assigned to the superintending architect is, not merely to lay down the general line of buildings in a street, place, or row of houses in which the building or erection complained of is alleged to be situated, but to fix and determine the general line of the street, place, or row in which, according to his professional judgment, such building or erection is actually situated. The question whether a building is or is not, within the meaning of the statute, in a particular 'street, place, or row,' may involve considerations of the same character with those upon which the determination of a general line of buildings often depends, and it appears to me to have been the intention of the Legislature" (these are the important words) "to entrust the decision of both points to the architect, and not to the justice before whom the complaint is brought." That judgment of Lord Watson's is absolutely clear, and if the judgment of Lord Herschell, who delivered the first speech in the House of Lords, is looked at, it will be found that what he says is not inconsistent with anything Lord Watson says, but, in my opinion, is consistent with it; and when Lord Fitzgerald's judgment is looked at, what he says is this: "I have had the advantage of reading the judgment which has been delivered by the noble and learned lord on the woolsack, and also the judgment which has been delivered by my noble and learned friend opposite (Lord Watson), and I entirely agree in the conclusions at which they have arrived, and in their reasoning." Now it will be recollected that Lord Bramwell took a different view. Lord Fitzgerald says nothing about the judgment of Lord Bramwell, but he says he agrees with Lord Herschell and Lord Watson. That case, therefore, to my mind concludes the question we now have to decide, and if that is so I answer the second question in the affirmative. It seems to me, as I have already said, not only is that in accordance with the case in the House of Lords, but to my mind it is in accordance with the true construction of the statute and also what I conceive to be the general convenience of the matter, because there can be no doubt that the architect who goes on the spot and thoroughly considers the position of the house and has to determine the building line, is the person who is best able to form a skilled opinion as to the particular street in which a particular house is situated.

Answering both questions in the affirmative I come to the conclusion that the decision of the magistrate is right.

RIGBY, L.J.—I am of the same opinion. As to the first question I do not think the superintending architect's certificate is really open to doubt. In the certificate he speaks of a road called Birchington-road, and on the plan to which he refers Birchington-road is shown to be a road extending all the way from

Kilburn High-road on one hand to the West End-lane on the other. He decides that the house in question is in Birchington-road, and he decides that the general line of buildings in Birchington-road is the general line of buildings for Birchington-road. If there is any doubt about it, it is set at rest by the plan in which we see the general building line indicated, passing through the houses in question right up to Kilburn High-road, I have no doubt, therefore, that his certificate is a good certificate in the very respect in which in *Barlow* v. *The Kensington Vestry* the certificate was held to be defective.

Now I quite agree with what has been said as to the construction of section 75, but I will not repeat that. I can only say that personally I consider the matter is absolutely settled and disposed of by the decision in *Barlow* v. *The Kensington Vestry*. Vice-Chancellor Bacon had granted an absolute injunction restraining the vestry from proceeding to pull down the buildings. That would have left open no possibility of instituting new proceedings. The House of Lords varied that order by confining it to an injunction against proceeding upon the certificate which had then been made "with the variation that the injunction therein granted should be limited to restraining the respondents, The Kensington Vestry, from demolishing or interfering with the buildings in question, or taking any steps for that purpose in virtue either of the certificate of Mr. Vulliamy, or of the complaint and proceedings following thereon." So that, in point of law, they simply found that the certificate of Mr. Vulliamy, and the complaint and proceedings following thereon, did not form a ground for demolishing the building. Lord Bramwell, no doubt, found as a fact that the appellant's house was not within the row of houses or line of buildings in De Vere-gardens. Now if the House of Lords had jurisdiction or supposed themselves to have had jurisdiction to determine that point they ought to have determined it. It would be idle to send back this when they had all the materials before them, but I do not find that any one of the noble and learned lords who moved the House or spoke on the motion on that occasion takes upon himself to determine the point other than Lord Bramwell. Now if it were the magistrate's duty to determine that point the appeal would lie, and the House of Lords ought to have determined whether the building was within or without De Vere-gardens. They refrained from doing so, and I think in so refraining they affirmed that they had no jurisdiction to determine that; in other words that there was no appeal possible to them, though an appeal from the magistrate's decision would have been open to them. So I consider that very affirmatively they decided the question that it was the architect's duty to ascertain in what line of buildings the house in question was situated, and that his certificate was defective in that he had not so ascertained it. It appears to me a clear decision upon the very point that has been argued before us, and on all the grounds I think that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors, *Last & Sons; Blaxland.*

From Q. B. Div. (Lindley, Lopes, and Rigby, L.JJ.) [and Q. B. Div.] — May 1; July 15, 16.

LAVY AND ANOTHER (*Appellants*) v. LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Metropolis — Building — General line of buildings — "Building, structure, or erection" — Wall and advertisement hoarding — Appeal from architect's certificate — Issue of summons — Metropolis Local Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

The appellants were the owners of a house the forecourt of which had for many years been bounded by a dwarf wall between 2 and 3 feet high, with an iron railing upon it 5 feet 6 inches high. Upon this wall the appellants erected a hoarding for advertisements, which was removed in consequence of a notice from the London County Council. The appellants then replaced the old wall by a new wall 11 feet high and 14 inches thick, to act as a screen for advertisements. A summons was taken out by the London County Council charging the appellants with having erected a structure beyond the general line of buildings, contrary to section 75 of the Metropolis Local Management Act, 1862. *The summons was taken out before the superintending architect had given his decision as to the general building line, and was heard by the magistrate while that decision was still under appeal. The magistrate ordered the demolition of the wall.*

Held, that the magistrate had jurisdiction to deal with the summons, and that the appellants' new wall was a "building, structure, or erection" within section 75 of the Act.

This was a special case stated by a metropolitan magistrate.

The appellants were charged with having, at 391, City-road, Islington, unlawfully erected a certain structure beyond the general line of buildings in the City-road without the consent in writing of the London County Council, contrary to section 75 of the Metropolis Local Management Act, 1862.

The appellants were the owners of the house 391, City-road, which was situate 38 feet from the footway. In front of the house was a forecourt, which for many years had been bounded by a brick wall 2 feet or 3 feet high, 9 inches thick, and with an iron railing on it 5 feet 6 inches in height. The appellants had from time to time applied for leave to build on the forecourt, which had been refused. Prior to 1894 the appellants erected on the dwarf wall a hoarding for advertisements. The hoarding was placed against the iron railings so as to get their support, and obtained additional support from struts.

On the 5th of May, 1894, the hoarding was removed in consequence of notice from the London County Council, and was replaced by a wall which formed the subject-matter of the present charge. This new wall 11 feet high and 14 inches thick, and was put back 4½ inches from the line of the old wall, so as to form a ledge to support the advertisement hoarding.

The summons was taken out on the 11th of July. On the 13th of July the architect gave his decision that the building line was the line of the house.

The appellants gave notice of appeal. On the 24th of July the appellants appeared to the summons, and the respondents asked for an adjournment, which was granted on the terms that the rights of all parties should be preserved as they were on the 24th of July. On the 19th of November the architect's decision as to the building line was confirmed on

(*a.*) Reported by F. O. ROBINSON and ARNOLD GLOVER, Esqs., Barristers-at-Law.

appeal. The summons was then heard by the magistrate.

Section 75 of the Metropolis Local Management Act, 1862, provides that "no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works" (now the London County Council), "be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate . . . such general line of buildings to be decided by the superintending architect."

Section 28 of the London County Council (General Powers) Act, 1890, enacts that "any person deeming himself aggrieved by the certificate of the superintending architect may, within fourteen days after notice of such certificate has been given or served, appeal" to a tribunal to be constituted as mentioned in the section.

The magistrate found that the wall was erected as an advertisement station, but that it was also intended to serve as a boundary wall to the forecourt, and that it was a structure in front of the general line of buildings to the erection of which the respondents had not consented. The magistrate ordered the demolition of the wall, but stated this case for the opinion of the court.

Dickens, Q.C. (*R. C. Glen* with him), for the appellants.—The magistrate had no jurisdiction to adjudicate on the summons, because at the date of the return day an appeal was pending from the decision of the architect as to the line of frontage: *Barlow* v. *Vestry of St. Mary Abbotts, Kensington*, 34 W. R. 521, 11 App. Cas. 257. [WRIGHT, J.—The decision of the architect is a binding decision until it is reversed on appeal.] Secondly, this wall in question is not a "building, structure, or erection" within section 75 of the Metropolis Local Management Act, 1862: *Wendon* v. *London County Council*, 42 W. R. 370, [1894] 1 Q. B. 812. The wall is really only an addition to the former wall. If the addition is a "building, structure, or erection," the former wall was also, and as it was decided in *Lord Auckland* v. *Westminster Board of Works*, 20 W. R. 845, L. R. 7 Ch. App. 597, that section 75 only applies to buildings erected on vacant ground, this case does not come within the section, and the magistrate ought to have dismissed the summons.

Channell, Q.C., (*Daldy* with him), was only heard on the question whether the wall was a building, &c., within section 75.—The question is one of degree, and the magistrate has found as a fact that this wall is a building. No ground exists for interfering with that finding.

He referred to *Ellis* v. *Plumstead Board of Works*, 41 W. R. 496.

DAY, J.—I am of opinion that the decision of the magistrate was right. It is said that at the commencement of the proceedings there was not a final decision of the architect. The architect had given his decision at that time, and the magistrate adjourned the hearing until after that decision had been affirmed on appeal. At no period during the proceedings could it be said that there was no decision of the architect. Then it is argued that this wall is not a "structure, erection, or building" within the Act. I am clearly of opinion that it is. The attack upon the magistrate's decision has failed at all points, and the appeal must be dismissed.

WRIGHT, J.—I am of the same opinion. The substantial question is whether this wall was rightly regarded by the magistrate as a "building, structure, or erection" within the Act. I think that the original dwarf wall was not within the Act, and that being so, the land upon which it stood must be regarded as vacant land, and therefore the case of *Lord Auckland* v. *Westminster Board of Works* does not apply to this case. Then it was said that *Wendon* v. *London County Council* was in point. I do not think it is. The Court of Appeal did not decide in that case that a wall could under no circumstances be a "building, structure, or erection within the Act," but that where the wall was a mere beginning of a building, the land on which it stood ought to be regarded as vacant land.

The question is really one of fact, and this court cannot interfere with the finding of the magistrate unless it is a legally impossible finding. That is not so in this case, and, moreover, the magistrate is supported in his finding by *Ellis* v. *Plumstead Board of Works*, where a distinction was drawn between an ordinary boundary wall and one erected for some other purpose.

From this decision the owners of the house appealed.

McCall, Q.C., and *R. Cunningham Glen*, for the appellants, in addition to the cases cited in the court below, referred to *Spackman* v. *The Plumstead District Board of Works*, 33 W. R. 661, 10 App. Cas. 229, *Bauman* v. *Vestry of St. Pancras*, 15 W. R. 904, L. R. 2 Q. B. 528, and *London County Council* v. *Cross*, 61 L. J. M. C. 160, 40 W. R. Dig. 148.

Forman (*Channell, Q.C.*, and *F. F. Daldy* with him), for the respondents.

Glen replied.

LINDLEY, L.J.—This case raises a question of some importance as to the power of the London County Council to order a structure to be pulled down under the provisions of the Metropolis Management Act. The facts of the case are these. The appellants here are the owners of a house in the City-road, and it is quite obvious that long before there was any controversy about what they might do or might not do, there was, to use the language of section 75 of the Act, a "general line of buildings." It was an old road, and it is impossible to read the facts stated by the magistrate in the case, especially clause (*c*) of paragraph 3, without seeing that there was then a general line of buildings, although there was no architect's certificate. In 1892 the applicants wanted to build over the garden in front of their house which house was in the general line of buildings, and the authorities objected. In 1894 they applied again for liberty to erect some kind of building, and again that was objected to.

Now the state of things at that time was this. As I say, the appellants had a house in a row, and the general line of buildings was obvious to anybody. There was no question at all about it. Their little garden in front was bounded by a dwarf wall two or three feet high and nine inches in width, with a coping, and then iron railings some five feet high at the top. That was the state of things. Now after the authorities had been applied to for consent, and after they had objected, what the appellants did they did with their eyes open. They have pulled down the dwarf wall and have built another wall 14 inches thick of a totally different description eleven feet high, strengthened by piers, and their object is, as the case states, to utilize that wall as a screen for advertisements and so on.

Now on the 11th of July, 1894, the London County Council took out a summons in order to compel them to pull that down. At that time, to my mind, they had clearly erected a new building (I will consider presently the language of the Act) which was in front of the general line of buildings, and there having been

no dispute about it, it appears to me quite apart from the case that they had done that which they had no right to do under section 75.

The summons was taken out on the 11th of July, 1894. Two days afterwards the architect fixed this line, whether it was exactly the old line of buildings or not I do not know; however, he fixed the line. I take it for granted it was there or very close to it. Then there was a dispute about that, and there was an appeal, and ultimately the summons was heard, and now the magistrate, having heard this summons, finds as a fact that "the whole of the said wall is a structure and is in front of the line of fronts of the adjacent houses and of the general line of buildings." Therefore, so far as it is a question of fact, the magistrate finds against the appellants, and the order is made on this summons for the demolition of this wall. Now they appeal, and the points they take on the appeal are these, first of all that the magistrate had no jurisdiction to entertain the summons because, when the summons was taken out, the architect had not defined the line. It is said that that is a condition precedent even to the issue of the summons, and reliance is placed upon the judgment of Lord Selborne in the case of *Spackman* v. *The Plumstead Board of Works* in support of that contention. This is not the first time that I have had to consider the decision of Lord Selborne in that case. It was carefully examined by my brother Kay and myself in the case of the *London County Council* v. *Cross*, and we came to the conclusion then (as I have certainly come to the same conclusion again, because I read the case last night) that Lord Selborne's judgment does not go anything like the length contended for by the appellant. The case of *The London County Council* v. *Cross* is a decision which I not only think is correct, but it is a decision of this court which I should have to follow, of course, whether I thought it right or not. That is a decision to the effect that where you have, as you have here, a clear general line of buildings, the section is contravened by anybody who, without the consent of the local authority, builds beyond the general line. I agree that it was held that the penalty cannot be imposed or an order cannot be made for the demolition of buildings unless the general line is certified before the penalty is imposed or the order has been made. That, I think, does follow, not only from the language of the section, but from the two decisions upon it. Therefore, the first point I consider is covered by the decision to which I have referred in the case of *The London County Council* v. *Cross*, which decision I am prepared to abide by and to follow.

Now the next part of the case is this: It is said that this wall (the nature of which I have described) is not a "building, structure, or erection" within the meaning of section 75 of the Metropolis Management Act, 1862, and reliance is placed upon the case of *Wendon* v. *The London County Council*, in which it was held that a particular wall was not within that section. Now our position is this, the magistrate finds as a fact that this is a "building, structure, or erection" erected beyond the general line. We are asked to say, I suppose as a matter of law, that it cannot be. It seems to me that it would be perfectly absurd to say that. When you know the nature of this erection, this wall—it seems to me we should be stultifying ourselves if we said, as a matter of law, it could not be a "building, structure, or erection." I have not the slightest doubt myself that the finding of the magistrate was perfectly right on the facts.

Now reliance was also placed with reference to this particular part of the case, which is an important one, upon the decision of the Court of Appeal in the case of *Lord Auckland* v. *The Westminster Board of Works*, where a construction was put, I rather think for the first time, upon section 75 of the Act. What the Court of Appeal held there was not only good sense, but is obviously correct on the true construction of the Act of Parliament, and it was to this effect that the county council cannot avail themselves of section 75 to get out of their obligation under section 74. If they are bound to make complaints under section 74, they cannot condemn under section 75. James and Mellish, L.JJ., pointed out that in order to avoid such a result as that the 75th section would have to be read in substance as if it ran, "No new building, structure, or erection shall be made," and so on. Then Mr. Glen said "Well, but if we had only raised the old boundary wall we should not have contravened section 75." I do not say that they would. Therefore, I think it does become a question in each case of what has been done. In *Wendon's case* the Court of Appeal found, having regard to the facts of that case, that the wall which was there under consideration did not come within the words "a building, structure, or erection." Of course in one sense every wall, everything erected is a building, structure, or erection, but, of course, that section must be construed reasonably and with reference to the object for which it is passed. That is apparent from the case of *Ellis* v. *The Plumstead Board of Works*, to which Mr. Forman referred, where it was said (and I have no doubt correctly said) that if a man merely puts up a fence to mark off his boundary and preserve his rights as the owner, although in one sense it may be a "building, structure, or erection," it is not necessarily a "building, structure, or erection" which falls within the mischief aimed at by the Act and avoided by section 75.

Now we must look at this case and not at the effect of other cases. In this case we must ask ourselves, as men of the world, whether such a new wall as this is not a "building, structure, or erection" within the meaning of section 75. I have not the slightest hesitation in saying that I think it is. I do not hesitate to say that I think repairing an old dwarf wall and putting on new rails instead of the old ones, if worn out, would not be an infringement of the section, but this is an entire structure or building of a totally different character from what was there before, and for a totally different purpose, and it is merely an attempt to throw dust in the eyes of the court to say that it is only a boundary wall. It is nothing of the sort, it is a big wall. It is a fourteen-inch wall which answers the purpose of a boundary wall, of course, but is not wanted in that shape to that extent or of that height for the reasonable preservation of that little bit of yard behind it. It is wanted for a totally different purpose, and is erected and is adapted for a totally different purpose. I think the appeal fails on every point, and must be dismissed with costs.

LOPES, L.J., after stating the facts, said: Two points arise. It is contended by the appellants, in the first place, that no offence has been committed, because at the time that the complaint to the magistrate was made no general line of building had been defined by the architect.

It is said that the defining of that line by the architect was a condition precedent to any proceeding being instituted, and, therefore, that this offence is not made out.

Now, in my opinion, the defining of that line is not a condition precedent. I should have said so myself if I had had to construe the Act for the first time, but the point has been considered more than once. It was most carefully considered in the case of *The London County Council* v. *Cross*, and I find my

brother Lindley, L.J., used these words, which have strong reference to the point: "But it is contended that there was not then any offence or matter of complaint, because the architect's certificate defining the line of building was not then in existence, and we are asked to say that there is no offence until the architect's certificate is made." Then the Lord Justice proceeds: "That appears to me contrary to the construction of the section, if we look at it apart from authority, and contrary to the construction which has always been put on that section by the court." To my mind that clearly disposes of that point. I quite agree with what has been said, that before a conviction is obtained that line would have to be defined; but it is not a condition precedent. It has been also suggested that adopting that view creates a hardship, inasmuch as the person may not know what the line may be, and, therefore, may build and afterwards find that he is subjected to being convicted and having his building demolished. Really, that is not so when you look at the whole of the provisions. Then they have to obtain the consent of the London County Council. In this case, so far as I recollect, they had endeavoured to obtain it, and failed to obtain it, and it cannot possibly be said that they did what they did with their eyes shut. Their eyes were open, and they knew perfectly well what they were doing. I do not think, therefore, they are to be commiserated with regard to that which has happened to them.

Now the next point taken, the material point, the main point, is this: that this wall is not a "building, structure, or erection within section 75. Now when we have to determine that question, it seems to me to be all-important to bear in mind what the object of these provisions is. The object of these provisions is this: maintain in new streets a uniform line of frontage. It cannot be said for one moment that all walls, whether high or low, are not "buildings, structures, or erections." They obviously are such, but there are walls and walls. There is a wall of a certain height, two or three feet high, which would not in any way, I take it, disturb the uniformity of a street; then there are walls of a greater height, twelve or fourteen feet or even more, which would absolutely destroy the uniformity of the frontage and absolutely defeat the purposes of these provisions. The question in every case is a question of fact and a question for the magistrate to decide—namely, whether the wall in question is such a wall as to be a "building, structure or erection, within the meaning of this Act and within the mischief of this Act. That is a question of fact for the magistrate to determine; it is a question of degree, and I think that is very well stated indeed by Lord Coleridge in the case of *Ellis* v. *The Plumstead Board of Works*, where he says: "I think, however, that the particular wall shown to us in the photograph and plans annexed in this case is such an erection as the section applies to. In saying that, I am not prepared to go the length of saying that every possible 'building, structure, or erection' which a man might put up for the purpose merely of ascertaining and bounding his own property and separating it from the public road would necessarily come within the section." Then he goes on to say that it is a question for the magistrate in each case, and: "In this case, as far as I can judge, the magistrate had to deal with something which he might very well find, upon the facts before him, to be a 'building, structure, or erection' such as the section was intended to prevent."

In my opinion these words exactly apply to the present case. I think, therefore, the decision of the court below is right.

RIGBY, L.J.—I am of the same opinion. Long before the acts complained of there was in the City Road, in this part of it, a general line of buildings, apparent to everyone who passed through and along the road. Assuming, for a moment, that the wall which has been built is a "building, structure, or erection" within the meaning of section 75, the appellants built that in front of the general line of buildings, and thereby committed an offence. It was quite right, therefore, for the London County Council to take out a summons, which they did on the 11th of July, because an offence had been committed. I do not see that there is anything in Lord Selborne's speech in the House of Lords, in *Spackman's case*, at all requiring that there should be a certificate by the superintending architect as a condition precedent in regard to the offence committed or proceedings taken.

The Act itself provides that he shall finally decide, and I think that that certificate, given two days after the commencement of the taking out of the summons, quite fulfils the requirement of the statute. Well, then, this is not a case in which there is merely a boundary wall. It appears to be something far different from a boundary wall. We are asked, on the strength of the authority of *Wendon's case*, to say that a wall cannot be a structure. That appears to me to be nearly approaching to an absurdity. I can quite see that the wall that was being built in that case was not a structure, it was only a commencement of a structure; it was not a complete wall, it was a wall that had been left half finished; it was a commencement of a structure, but not a structure which would prevent the building that was actually completed afterwards from being a new structure. As regards the present one, I have no doubt at all about it. Ordinary boundary walls may be outside section 75, and I think they have been treated as being so; it is a question of degree in every case. If a man has a dwarf wall round a garden, or something of that kind, outside of the general building line, if that be the mere means of marking off his property to keep it private, and not substantially interfering with the general line of buildings, that might very well be outside section 75; but if he builds a great wall which is for that purpose an interference with the uniformity of the street, that is as objectionable as an actual building for the purpose of habitation or use—such a thing, for instance, as a photographer's studio, or something of that kind. If he builds a wall which is, for all purposes, as objectionable as that, I do not see why it should not be brought within section 75. I have no doubt that this wall does fall within section 75, and I think, therefore, that the appeal fails altogether, and ought to be dismissed.

Appeal dismissed.

Solicitors, *Morgan & Upjohn; W. A. Blaxland.*

From Q. B. Div.
(Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — July 11.

MEUX v. GREAT EASTERN RAILWAY CO. (a.)

Railway—Passenger's luggage—Negligence—Ticket taken by servant—Luggage belonging to master—Right of master to sue.

The plaintiff's servant took a ticket as a passenger by the defendants' railway, and handed his portmanteau as his personal luggage to one of the defendants' servants, who, in carrying it to the train, negligently dropped it

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

on to the line, and it was run over by a train, and th portmanteau and its contents were destroyed. The portmanteau contained a suit of livery, which was the property of the plaintiff, and which the plaintiff had provided for the servant to wear while in her service. In an action by the plaintiff to recover damages for the loss of the livery,

Held, that, though there was no contract between the plaintiff and the defendants, the defendants were liable to the plaintiff for the misfeasance of their servants which caused the loss.

Appeal from the judgment of Mathew, J., at the trial of the action without a jury.

The action was to recover damages for injury to goods while in the defendants' possession, owing to the negligence of their servants.

It was admitted that a portmanteau containing the livery of the plaintiff's servant was handed by that servant into the custody of the defendants' servants at Waltham Cross Station, to be carried by the defendants by the 3.40 p.m, train to Liverpool-street Station as passengers' luggage, the livery being the property of the plaintiff; that the portmanteau was overturned in front of the train by one of the defendants' servants and the livery was damaged and became useless to the plaintiff; and that the plaintiff's servant took a ticket as a passenger by the said 3.40 p.m. train from Waltham Cross Station to Liverpool-street Station, and was travelling as the servant of and upon the request and at the expense of the plaintiff.

Mathew, J., held that the plaintiff could not recover, and gave judgment for the defendants.

The plaintiff appealed.

J. A. Foote, for the plaintiff.

Jelf, Q.C., and *F. H. Coller*, for the defendants.

The following cases were referred to:—*Marshall* v. *York, Newcastle, and Berwick Railway Co.*, 11 C. B. 655; *Mears* v. *London and South-Western Railway Co.*, 11 C. B. N. S. 850, 10 W. R. C. L. Dig. 17; *Alton* v. *Midland Railway Co.*, 13 W. R. 918, 19 C. B. N. S. 213; *Austin* v. *Great Western Railway Co.*, 15 W. R. 863, L. R. 2 Q. B. 442; *Martin* v. *Great Indian Peninsular Railway Co.*, L. R. 3 Ex. 9, 16 W. R. C. L. Dig. 18; *Becher* v. *Great Eastern Railway Co.*, 18 W. R. 627, L. R. 5 Q. B. 241; *Hayn* v. *Culliford*, 27 W. R. 541, 4 C. P. D. 182; *Foulkes* v. *Metropolitan District Railway Co.*, 28 W. R. 526, 5 C. P. D. 157; *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 40 W. R. Dig. 11; *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, *ante*, p. 120 [1895] 1 Q. B. 134; *Kelly* v. *Metropolitan Railway Co.*, *ante*, p. 497, [1895] 1 Q. B. 944.

Lord ESHER, M.R.—In this case the plaintiff brings an action against the railway company on the ground that certain property of her's in a portmanteau, while in the possession of one of the company's servants, was carried so carelessly that it fell upon the line and was injured by a train. That was an active piece of negligence on the part of the company's servant. It was not a mere omission to do something. It was a misfeasance, and not a mere nonfeasance. The company say in answer that the portmanteau was brought to the station by the plaintiff's servant; that the servant took his ticket and handed the portmanteau to them as his personal luggage, to be carried under that ticket; and that the contract was made with the servant personally, and was not a contract made, or assumed to be made, for the plaintiff; and that the servant and the company being the only parties to the contract, the plaintiff cannot sue for any breach of that contract. That seems to me to be a true proposition. The portmanteau being accepted as the servant's personal luggage, the contract was with him alone, and was not made on the plaintiff's behalf. This is on the ground that the luggage was accepted for carriage as the personal luggage of the servant. If, therefore, there was a mere omission on the part of the railway company to deal with the luggage with due care, or if there was a mere omission to deliver it at the end of the journey, that would be a breach of duty dependent on the contract, and the plaintiff, who was no party to the contract, could not sue. But that does not deprive the plaintiff of any right to sue independently of the contract; that is to say, of any right which she would have if there were no contract. The existence of a contract with somebody else cannot deprive her of a right of action apart from the contract. There being then no contract with the plaintiff, she can get no right of action from the contract.

But, in my opinion, there is right of action in the plaintiff by reason of her property being placed in the possession of the defendants, and being injured by a negligent act of commission on their part. If goods are put in the possession of a person without his knowledge, as, for instance, if luggage is put secretly into a railway van without the railway company knowing that it is there, and the company in dealing with the van do something which injures the luggage, then I should say that the company would not be liable. But if luggage is placed openly in the van or on the platform for the purpose of being carried by train, then the company, having allowed it to be there, must not do any wrongful and negligent act towards it. If they by their servants undertake to carry it, they must not do any negligent wrongful act in the nature of an act of commission towards it which will injure it, and if they do, the owner has a right of action against them, though there is no contract between them and the owner, and though there is a contract between them and another person. There is authority upon the point. In *Hayn* v. *Culliford*, Bramwell, L.J., said that "the goods were lawfully with the defendants' licence in their ship"—it seems to me that the word licence is quite sufficient without the word lawfully—"and they tortiously so dealt with them that the goods were injured. It was found as a fact that the loading of the oxide was negligent. It was, therefore, wrongful, not as a breach of contract, but as a wrongful act in itself. . . . It may be asked, where is the duty of care? I answer, that duty that exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of; it is a misfeasance; an act and wrongful." That is the proposition of law laid down as clearly as possible, and it is obviously correct. The same proposition was again laid down by the same learned judge in *Foulkes* v. *Metropolitan District Railway Co.*, where he said that "there would be that duty which the law imposes on all—namely, to do no act to injure another." The law as laid down is that the right of a person whose property is damaged by an act of misfeasance does not depend upon contract. It depends upon the fact that one person deals actively with another person's property. As to the case of *Alton* v. *Midland Railway Co.*, I do not think that it touches this case at all. It was decided upon demurrer, and does not in any way affect what I have said as to the right of the plaintiff to sue. The plaintiff's right to sue does not depend upon contract, but depends upon the fact that her goods have been injured by a negligent act of the defendants.

The judgment of Mathew, J., must, therefore, be reversed, and the appeal must be allowed.

KAY, L.J.—This action is brought to recover damages for injury to the plaintiff's property while in the defendants' possession. The property consisted of the livery of one of her servants, and at the time when it received the damage it was in the portmanteau of that servant, who was a passenger on their railway. It does not appear that the plaintiff was a passenger, and, therefore, the case is that the plaintiff's servant was about to travel by one of the defendants' trains and took with him as his personal luggage a portmanteau, which seems to have belonged to him, containing his livery. Undoubtedly, that livery was the property of the plaintiff, though delivered into the custody of the servant for the purpose of his wearing it while in the plaintiff's service. The livery was damaged by being overturned by one of the defendants' servants in front of a train. That was an act of commission, not a mere omission or neglect of duty. It was an active interference with the luggage; a negligent act. The law as to that has been well summed up by Lindley, L.J., in *Taylor* v. *Manchester, Sheffield, & Lincolnshire Railway Co.*:—"Having studied those cases with care, it appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere nonfeasance, it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance, it was positive negligence in jamming his hand. Contract or no contract he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case." The observations of A. L. Smith, L.J., are to the same effect. The only question there was whether the action could be treated as an action of tort so as to determine what the costs ought to be. The learned judges treated it as an action of tort, an action entirely independent of any contract made with the plaintiff, and held that the plaintiff could recover on account of an active tort of that kind.

First, were these goods lawfully on the defendants' premises? The learned judge said that, in his opinion, the goods were not lawfully there. They were in the servants' portmanteau, they were his livery, and he was travelling as a passenger by the train. The portmanteau was accepted as his personal luggage, which the defendants undertook to carry, receiving no payment except for the ticket which he took for himself. It seems to me impossible to say that this livery was not lawfully on the defendants' premises. I think that the test is this. Supposing they had known that the portmanteau contained his livery, could they have refused to carry it as his personal luggage? It seems to me clear that they could not, and in that respect the case differs from the case of a portmanteau containing goods belonging to other persons in which the person who is travelling has no kind of interest whatever. The servant, having this livery for his personal use while in the plaintiff's service, rightly put it in his portmanteau when he was travelling. It was as clear an article of personal luggage as any goods belonging to him absolutely could be. Therefore it follows that the livery was lawfully upon the defendants' premises, and the defendants could not have refused to have accepted it even if they had known that the portmanteau contained the livery.

I differ, therefore, from the learned judge on this point. I am not going to express any opinion upon the question whether, if the goods had not belonged to the servant at all, but had belonged to somebody else, they would have been lawfully on the company's premises or not. It seems to me rather strong to say that, where the company make no inquiry whatever as to what is in the portmanteau, they should be able to say, after they have by an act of negligence destroyed the goods, that the goods were not the passenger's. I express no opinion upon it.

The goods, then, being lawfully there, and being injured by an act of misfeasance, the authorities seem clear to the effect that the owner of the goods has the right to sue for damages for that tort, because, being lawfully there, the company were bound to the owner (whether they knew who the owner was or not) not to injure the goods by any act of theirs.

Therefore I think that the judgment of the learned judge must be reversed.

A. L. SMITH, L.J.—I am of the same opinion. I am not going to decide what cause of action the footman may have had and what damages he could recover, on account of *Claridge* v. *South Staffordshire Tramway Co.*, which I think may possibly some day require further consideration. But I feel convinced of this, that the footman who had taken the ticket, although with the plaintiff's money, could have sued the railway company either in contract or in tort. What damages he could have recovered it is not necessary to decide now.

Then comes the question, can the plaintiff sue? Her property has been destroyed by the active negligence of the defendants while it was lawfully on their premises. It is said that the plaintiff cannot sue because there is no contract between her and the company. I agree that there is no such contract. But she has a right of action irrespective of contract, her goods being lawfully on the defendants' premises, and being damaged whilst there by the active negligence of the defendants' servants. That is a good cause of action, irrespective of any contract and irrespective of whether any ticket had been taken by the servant. It is said that *Alton* v. *Midland Railway Co.* has decided otherwise. I do not think so. In that case the master was suing for the loss of the services of his servant, and the declaration averred that the servant had contracted with the company that they should safely and securely carry him. The plea was that the contract was between the servant and the company, and that the plaintiff could not sue because he was no party to the contract. There was a demurrer to the plea. The sole point which appeared upon the pleadings was whether the master could take advantage of the contract between the servant and the railway company, and sue on it for damages for having lost the servant's services. The court held that he could not. That case is no authority for the proposition for which it has been cited. If authority were wanted on the other side there is plenty of it. *Marshall* v. *York, Newcastle, and Berwick Railway Co.*, *Hayn* v. *Culliford*, *Foulkes* v. *Metropolitan District Railway Co.*, *Taylor* v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, and *Kelly* v. *Metropolitan Railway Co.*—the bulk of which cases have been decided in this court. It is impossible, therefore, to say, upon the facts of this case, that the plaintiff has not a good cause of action against the railway company.

Appeal allowed.

Solicitors for the plaintiff, *Upton & Britton.*

Solicitor for the defendants, *E. Moore.*

High Court of Justice.

Chan. Div. } July 17.
Chitty, J. }

In re BURROWS.
CLEGHORN *v.* BURROWS. (*a.*)

Will—Construction—"Issue living"—Child en ventre sa mère.

A testator by his will gave one moiety of his estate, after the death of his wife, to his daughter K. absolutely in case she had issue living at the death of his wife; but in case she had no issue then living, then a life interest only in such moiety to K. The wife died on the 9th of March, 1895, *and on the* 10*th of March,* 1895, *K. was confined of a living child.*

Held, that K. had issue living at the death of the wife, and, therefore, took the moiety absolutely.

Dictum *of* Lord Eldon *in* Thellusson *v.* Woodford, 11 *Ves.* 112, *at p.* 149, *followed.*

Summons.

John Valentine Burrows, by his will dated in October, 1893, devised and bequeathed one-half part of his real and personal estate after the death of his wife, Jane Burrows, to his daughter, Kate Cleghorn, for her absolute use and benefit in case she had issue living at the death of his wife; but in case she had no issue then living, then he directed his trustees to pay the income only of the said half share to his said daughter during her life, and from and after her decease to pay the said income to her husband during his life, and from and after his decease equally between the children of the testator's son.

The testator died on the 26th of November, 1894, and his will was proved on the 7th of January, 1895.

The testator's widow, Jane Burrows, died on the 9th of March, 1895.

On the 10th of March, 1895, a first child was born alive to the testator's daughter, Kate Cleghorn, who now claimed to be absolutely entitled to the above-named moiety of the testator's real and personal estate.

Mulligan, for the appellant, relied on *Clarke* v. *Blake*, 2 Bro. C. C. 320, 2 Ves. jun. 673, and sub nom. *Doe* v. *Clarke*, 2 H. Bl. 399, 3 R. R. 431, and the *dictum* of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves. 112, at p. 149.

C. Gurdon, for the defendants.—The word "issue" implies separate existence, it was, therefore, necessary that the issue should be born at the death of the wife for there to be "issue living" within the meaning of this will. *Blasson* v. *Blasson*, 13 W. R. 113, 2 De G. J. & S. 665, is in my favour. [CHITTY, J.—The question here is not so much whether the law treats unborn children as actually born but as actually living.] In all the cases except *Blasson* v. *Blasson* the infant *en ventre* was directly interested in the gift. There is a distinction in favour of the infant in those cases, but it does not extend to a case where the infant is not benefited by the gift: see Jarman on Wills, 5th ed., vol. 2, 1042, Theobald on Wills, 4th ed., p. 259. Lord Eldon in *Thellusson* v. *Woodford* was considering a case of divesting an infant of an interest it would otherwise take.

Mulligan, in reply.—The distinction is not sound. The words in *Blasson* v. *Blasson* are "born and living," and *Doe* v. *Clarke* was not cited there.

CHITTY, J., after reading the will and stating the facts, continued: This is a remarkable will, and the facts are, perhaps, even more remarkable. There was a child *en ventre sa mère* at the time of the grandmother's death. Now the gift is to the daughter in case she has issue living at the grandmother's death, and the child *en ventre sa mère* was plainly living at that time. Then it was said that the term "issue" imports that the child must be born. But this is, in my opinion, too refined a construction. There is no sufficient authority for the contention that there must be birth. I take my stand on the language of the testator, and the word that he has used is "living."

Then it was said that to satisfy such a condition the child must be actually born, except in the cases where the benefit was directly to the child. There is some ground for this contention in the text writers, but I think that the question is covered by authority as well as by good sense.

I have the great authority of Lord Eldon in *Thellusson* v. *Woodford*, where, after referring to *Gulliver* v. *Wickett*, 1 Wils. 105, he stated a hypothetical case: "The devise was to a child *en ventre sa mère*, and to go over if that child should die under the age of twenty-one leaving no issue. In the construction of that limitation, expressly to a child *en ventre sa mère*, suppose that child had at the age of twenty married, and died six months afterwards, leaving his wife *enciente*, that property, absolutely given to him, would not be divested merely because the child was not born till three months after his death. In fair reasoning, therefore, that is the construction of the words" (11 Ves., p. 149).

The Lord Chancellor put the exact case there. The second child *en ventre sa mère* was not to take for his own benefit, but for the benefit of his own father. The gift was to go over in the event of the first child leaving no issue. Lord Eldon's words, therefore, extend to the case before me. The judges delivered a unanimous opinion by the Chief Baron, and *Gulliver* v. *Wickett* is mentioned as well as *Doe* v. *Clarke*, Eyre, C.J.'s opinion being correctly stated as follows: "In *Doe* v. *Clarke*, Eyre, C.J., holds that, independent of intention, an infant *en ventre sa mère* by the common order of nature is then living, and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases in which a provision has been made for children generally and where the testator has been supposed to mark a personal affection for children who happened to be actually born at the time of his death" (11 Ves., p. 140).

Eyre, C.J., after his judgment in *Doe* v. *Clarke*, added, almost in the terms stated in *Thellusson* v. *Woodford*: "The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever."

Blasson v. *Blasson* is clearly distinguishable, but it is proper that I should notice the case. The point was on the words "born and living," which seems to show that the testator contrasted birth with life, and the Lord Chancellor's judgment is, in my opinion, directed solely to the word "born," and the passages cited by him from the Digest and Voët relate to born and unborn children, and not to unborn children as living or not. If it had been a mere question whether a child was living for the purpose of conferring a benefit upon the mother, I take it as a matter of course that *Clarke* v. *Blake* would have been cited in *Blasson* v. *Blasson*.

I hold, therefore, that Kate had issue living at the death of her mother, and that she is, in consequence, absolutely entitled to the moiety.

Solicitor for all parties, *Wm. Morley*, for *Dale*, Leeds.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Chan. Div. }
Stirling, J. } July 23.

MIDDLETON v. BRADLEY. (a.)

Patent—Action for infringemente—Discontinuane—Costs of particulars of objections—Patent Act, 1883, *s.* 29, *sub-section* 6—*Patent Amendment Act,* 1852, *s.* 43.

Sub-section 6 *of section* 29 *of the Patent Act of* 1883 *is not confined in its application only to those cases where an action is brought to trial; and the costs of particulars of objection will not be allowed unless there be a certificate by the court or a judge that the same were reasonable and proper.*

This was an adjourned summons by the defendant in an action for the infringement of certain patents asking that he might be allowed the costs of certain particulars of objections which had been disallowed by the taxing master, on the ground that there was no certificate by the court or a judge that the said particulars were reasonable and proper, in accordance with sub-section 6 of section 29 of the Patents Act of 1883, which is in the following terms:—

"On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant, and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same is certified by the court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case."

The facts of the case were as follows:—

The plaintiff by his action sought for damages for infringement of certain patents, an injunction to restrain any further infringement, and also an injunction to restrain the issue of certain advertisements.

The defendant duly delivered his defence, and with it his particulars of objections, and some time later the plaintiff amended his statement of claim by striking out therefrom the clauses dealing with the infringement of the letters patent and the injunction to restrain the said infringement, leaving only the claim for the injunction to restrain the issue of the advertisements.

At a later stage the whole action was discontinued, and an order was made to tax costs so far as they related to the infringements of the letters patent.

On taxation the master disallowed the costs of the defendant's particulars of objections as above mentioned.

W. N. Lawson, for the summons.

Sub-section 6 of section 29 does not apply to the present case, but only to a case where the action has been brought to trial. It is obviously unjust that the defendant should be put to the expense of furnishing particulars of objections, and that the plaintiff by discontinuing the action should throw that expense on the defendant.

Sub-section 6 of section 29 is practically a re-enactment, although not identical in words, of section 43 of the Patent Act of 1852, which was in the following terms:—

"In taxing the costs in any action in any of Her Majesty's superior courts at Westminster or in Dublin commenced after the passing of this Act for infringing letters patent, regard shall be had to the particulars delivered in such action, and the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular unless certified by the judge before whom the trial was heard to have been proved by such plaintiff or defendant respectively without regard to the general costs of the cause."

In a case of of *Greaves* v. *The Eastern Counties Railway Co.*, 7 W. R. 453, 28 L. J. Q. B. 290, 1 E. & E. 961, identically the same question arose as arises in the present case, and it was held there that where the plaintiff, having given notice of trial, abandoned the action, the defendant was entitled to his costs of particulars of objections, and that section 43 of the Patent Act of 1852 applied only to cases where there had been a trial. Lord Campbell, at p. 965, 1 E. & E., said: "The defendants here would be clearly entitled under the Statute of Gloucester to the costs of preparing these particulars. Is there anything in the Patent Act of 1852 to deprive them of these costs? I think not. Section 43 applies only to cases where there has been a trial; where there has been no trial, as in the present case, the law stands as it did before."

The Act of 1883 has not altered the law on that point, and it is only where an action has gone to trial that a certificate is necessary. Where the action is discontinued the defendant is entitled to the costs of the particulars as a matter of course.

Here there has been no trial; the plaintiff has brought these particulars upon himself by his conduct of the action, and under these circumstances sub-section 6 of section 29 of the Act of 1883 does not apply to the present case.

A. J. Walter, for the plaintiff.

Sub-section 6 of section 29 of the Act of 1883 applies to all proceedings before the court, and in no case can the costs of particulars be given unless they are certified for by the judge. Otherwise what is the use of the words "certified by the judge." The taxing master has no discretion in the matter. I rely on *Mandelberg* v. *Morley*, *ante*, p. 266, and *Longbottom* v. *Shaw*, 37 W. R. 792, 43 Ch. D. 46.

W. N. Lawson, in reply.

Neither *Longbottom* v. *Shaw* nor *Mandelberg* v. *Morley* are authorities against me, for in this case nothing has been before your lordship, and the whole matter has been withdrawn. We were bound to put in these particulars, and consequently we ought to be allowed the costs of them.

STIRLING, J.—This is a question of costs of particulars of objections in a patent action. [His lordship stated the facts and arguments as above set out, and continued:—] The whole subject of particulars is now dealt with by section 29 of the Patent Act of 1883, and, according to that, it is essential that, in order that the costs of particulars may be obtained, there must be a certificate from the judge or the court that the particulars are reasonable and proper. It is said here that there has been no chance of obtaining such a certificate because the plaintiff discontinued his action, and that, therefore, the section does not apply. In support of this the case of *Greaves* v. *The Eastern Counties Railway Co.* has been cited, a case which was decided under the Act of 1852. Now, by section 43 of that Act, the certificate was to be given by the judge before whom the action was tried, and it was held that where the action did not come to trial the defendant was entitled to his costs under the general statute. The ground of the decision was that section 43 only contemplated a case where the action was brought to trial and tried, and the general right to costs, conferred by the Statute of Gloucester, was not taken away in cases where the action was not brought to trial.

At the present time, however, I have to deal with a different Act expressed in different language. Under sub-section 6 of section 29 of the Act of 1883, the certificate must be given "by the court or a judge."

(a.) Reported by ARTHUR MORTON, Esq., Barrister-at-Law.

Now, it is said that this case has not been brought to trial or has not been before the court or a judge, and that, consequently, there have been no materials before me which would justify me in certifying that the particulars are reasonable and proper. I am not quite satisfied about that, for it may be that a motion in the action or some other interlocutory application has been made at the hearing whereof evidence on the point might have been given. The general language of section 29 is clearly not limited to cases where the action has been tried.

The certificate is to be given (sub-section 6) "by the court or a judge," and that is the language of the preceding sub-sections. All these refer to interlocutory applications, and therefore I think that I ought not to limit the application of sub-section 6, only to cases where the action is actually brought to trial. Consequently, I confirm the view taken by the taxing master; and, therefore, I am unable to follow the decision of the Queen's Bench in *Greaves* v. *The Eastern Counties Railway Co.*, for the ground upon which that decision was based has been cut away by the new Act of 1883.

Solicitors, *Vincent & Vincent*, for *Middleton & Sons*, Leeds.

Chan. Div. }
Romer, J. } July 6.

BEIGHTON *v.* BEIGHTON. (*a.*)

Title—Copyhold—Admittance of tenant—Right of lord to seize quousque—*Possession of tenant—Admission of title—Statutes of Limitations* (3 & 4 *Will.* 4, *c.* 27; 37 & 38 *Vict. c.* 57).

The Statutes of Limitations do not run as against a lord of a manor so as to deprive him of his quit-rents or to make the copyhold hereditaments freehold until after the usual three proclamations or such a neglect of the copyhold tenant to come in after an express notice as amounts, in fact, to a refusal.

Trial of action.

This was an action in which George and William Beighton, two brothers, of Skegley, in the county of Nottinghamshire, were plaintiffs, and a third brother, Thomas M. Beighton, was defendant. The plaintiffs claimed as against the defendant that they were entitled on the death of their father, Richard Beighton, intestate, as his customary heirs, to equal shares with the defendant, who was the eldest son of the said Richard Beighton, in certain copyhold hereditaments in the manor of Skegley aforesaid, the custom of the manor as to distribution of property on an intestacy being the same as the Kentish gavelkind and for an account of the rents and profits on partition. The facts of the case were as follows:—

The copyhold hereditaments subject of the action consisted of—

(1) Four closes of land in Skegley, called Tullsicks, containing 10 acres 3 roods, or thereabouts; and

(2) A piece of land containing 1 rood 7 perches.

By his will, dated September, 1784, T. Morley devised "those four closes in Skegley, called Tullsicks, to Ann Morley for life, with remainder, on and after the determination of that estate, unto and to the use of trustees to preserve contingent remainders during the life of Ann Morley, and, after the death of Ann Morley, to the use of the first son of the body of Ann Morley, and the heirs male of such son," with remainders over. The will was enrolled in the court rolls of the manor, and, in 1786, at a court of the manor, Ann Morley, who had married Richard Beighton, was admitted tenant of the copyholds, and surrendered the same in accordance with the uses of the will, and trustees, to preserve the contingent remainders, were admitted tenants, according to the custom of the manor. Up to the date of the present action no later admittance had been made in respect to these hereditaments, nor had any disentailing deed been executed. Mrs. Beighton died in 1796, and her son, Richard Beighton, entered into possession of the property. In 1823, under an award made by the Skegley Inclosure Commissioners, the piece of land containing 1 rood 7 perches, in lieu of certain commonable rights possessed by him over certain lands, was directed to be enclosed. In 1859 a family arrangement was made whereby Richard Beighton allowed his son, who was also called Richard Beighton, to enter into possession of all the property on the manor to which the Beighton family were entitled. By a document stamped as an agreement, and dated 6th February, 1866, and made between the last-named Richard Beighton of the one part, and his eldest son, the above-named defendant, Thomas M. Beighton, of the other part, it was witnessed that the said Richard Beighton did bargain and agree to give up two of the four fields which he had in his possession to his son, Thomas Beighton, "to have and to hold the same without any molestation or denial of the said Richard Beighton, or any other person or persons acting under him, for his natural life, for and in consideration that he, the said Thomas Beighton, his son, shall, from the date of this agreement, pay all the poor rates, taxes, and tithes chargeable upon the said land." And it was also agreed that, if the said Thomas Beighton failed in any part of the obligations to be performed, the agreement was to be absolutely void and of none effect. The defendant subsequently was allowed by his father to take possession of the other two fields, on which he built a small house. He paid to his father £14 in several small sums, which the judge held was paid as rent in respect thereof. Richard Beighton (No. 2) died in 1869 intestate, and, in 1876, the lord of manor at a court made proclamation for the heir to come in to be admitted. In 1877 a second proclamation was made, and the lord's solicitors had some correspondence with Richard Beighton (No. 3) and his solicitors, in which letters they pointed out that it was his duty to come into and be admitted. Richard Beighton accordingly attended the court; but, as he failed to make out a title, he was not admitted. It appeared on the evidence that the defendant had, subsequently to this, endeavoured to induce Richard Beighton (No. 3), who died intestate in October, 1890, to devise the property to him. It also appeared that in 1891 the defendant's solicitor had considered the barring of the customary entail to which part of the property was subjected, and that, subsequently to his father's death, the defendant had entered into some negotiations with a view to be admitted as tenant on the rolls.

The defendant in his pleadings maintained that he had a good title under the Statutes of Limitations both as against the plaintiffs and the lord of the manor, and that, consequently, the property was now freehold, and descended to him as his father's heir. A good deal of somewhat conflicting evidence was offered, the general effect of which will be found stated in the judgment.

A. Ingpen, for the plaintiffs.—The defendant is not entitled to the copyholds as against his brothers the plaintiffs. His father came into possession of the copyholds by a family arrangement, and he, as his

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

father's tenant of these copyholds, cannot set up a title against the plaintiffs. The land has also been throughout treated as copyhold, and was so considered by the defendant in 1891, when he thought of getting rid of the customary entail.

W. H. Stevenson, for the defendant.—If the lord of the manor's title is gone the only person who can have a title is the person in possession. If the lord's rights are gone the property is freehold and would naturally pass to the defendant as his father's heir. In this case the lord has stood by for more than twelve years and not enforced his quit rents, and consequently his right to recover them is gone: *Attorney-General* v. *Tomline*, 15 Ch. D. 150; *Howitt* v. *Earl of Harrington*, 41 W. R. 664 [1893] 2 Ch. D. 497. It is an undisputed fact that the defendant was let into possession of all the fields, and he denies that he ever paid any rent in respect of the same. The fact that he has built a house on the land is a strong corroboration of his story.

A. Ingpen, in reply.—This is not a case in which enfranchisement can be presumed. The lord of the manor is not a party to the action, and it cannot be shown that he has waived his rights. Two proclamations were made, but no express notice was ever given to the tenant to come in, nor was there a third proclamation. Consequently it cannot be held that the lord had waived his rights, and if he has not, the property remains copyhold and the plaintiffs are entitled.

ROMER, J.—The first question in this action is whether as between the defendant and the plaintiffs the defendant has acquired a title to the fields, the subject of this action, by the Statutes of Limitations, as against the plaintiffs, who claim as their father's heirs.

With regard to two of the fields in dispute I have fortunately in writing the agreement come to between the defendant and his father, under which the defendant obtained possession and under which he retained possession until his father's death. This agreement is dated the 6th of February, 1866. It is a very informal and badly worded document; but I think on full consideration its meaning is sufficiently clear, and seeing that the defendant obtained possession on the footing of it, and that it has been acted upon by both parties for so long, it is the duty of the court to give effect to it if it can be done. And I myself see no sufficient reason why that agreement is not to be regarded as a valid one, enforceable during the lifetime of the father by a court of equity. The agreement is in substance a lease of the two fields by the father to the defendant for the life of the father on the terms that the son shall, during the tenancy, pay all outgoings for rates, taxes, and tithes, payable in respect not only of the two fields but of the two other fields in dispute, which then belonged to the father. And there is a provision in effect for determining the tenancy if the defendant shall not make the payments above mentioned. That agreement was acted on during the father's life, and until it was determined by the death of the father the possession of the son was as tenant of the father under an agreement, which was one that a court of equity would deem to be specifically enforced.

Now at law, not considering the equitable rights, the position of the defendant was that of a tenant at will. I say tenant at will, because the payments to be made during the tenancy by the defendant, not being to the father direct, there was no payment of rent to the father under the agreement before me that could be laid hold of as constituting a tenancy from year to year. But in equity the defendant was tenant for the lifetime of the father, and if the father had attempted by action to recover possession against the son, the latter could have relied on the agreement, and the court would have had regard to it, and specifically enforced it if necessary. Under these circumstances the son could not, under the Statutes of Limitation, up to the death of his father, have acquired a title to the two fields as against the father and those claiming under him. The father's equitable title in reversion was not barred: see *Archbold* v. *Scully*, 9 H. L. Cas. 360, 10 W. R. H. L. Dig. 5; *Drummond* v. *Sant*, 20 W. R. 18, L. R. 6 Q. B. 763; *Walsh* v. *Lonsdale*, 31 W. R. 109, 21 Ch. D. 9; *Lowther* v. *Heaver*, 37 W. R. 465, 37 W. R. 55, 41 Ch. D. 248. The defence, therefore, of the Statute of Limitations, so far as it concerns these two fields, fails as against the plaintiffs claiming under the father. With regard to the remaining land, the subject of this action, the evidence is very conflicting, but on consideration I have come to the conclusion that, in fact, the defendant acquired the land, not (as he states) as a gift from the father, but as a tenant to the father on terms of paying rent for it, and that the sums which are proved to have been paid by the defendant to his father extending down to shortly before the father's death, were paid in respect of this land and as rent for it.

And in considering the evidence I have thought it safer in favour of the defendant to disregard so much of the evidence of the plaintiffs as depended on statements made by the father not in the presence of the defendant. I need not go through the evidence in detail to show how it is I have arrived at this conclusion, but I wish to point out the noticeable fact that until the defence in this action the defendant never claimed to be the owner of the land as against his father. On the contrary, shortly before the death of the father he was taking advice as to how he could acquire the land by obtaining a will of it from the father, and spoke of making an arrangement with his father by which he might obtain the property, and after the father's death he was seeking to obtain admission to the land as copyhold on the footing of the land being his father's, and of his being entitled as heir to the father. Upon the above findings of fact the Statute of Limitations is not available to the defendant, for his payments on account of the rent have been made within the statutory period. This being so, I have now to consider whether the land was copyhold of the manor of Skegley at the father's death. If it was, then the plaintiffs are entitled as claimed by them, for the custom of the manor as pleaded by them has been proved.

But before I consider this question, I must first deal with a point taken on behalf of the defendant. It was said that the father, Richard Beighton (No. 3), was not entitled to the land, inasmuch as he was only one of several sons living at the death of his father, Richard Beighton (No. 2), who died in September, 1869. But as between Richard Beighton (No. 3) and his brothers and those claiming under the brothers, the former (under a family arrangement) had been in possession as owner of the property by himself and his tenant, the defendant, for so many years that a perfectly good title had been acquired by possession; and, moreover, the defendant, having acquired and held possession as tenant of the father, cannot set up that possession as giving him a title against the father or those claiming under the father. At the father's death the father was entitled to the property as against the defendant, and those claiming as customary heirs of the father's (if the property be copyhold) are entitled in right of the

father to enforce his title as against the defendant. I therefore proceed to consider the question whether the land is really copyhold. That it was originally copyhold is not in dispute. And it is admitted that under the circumstances no enfranchisement can be presumed, so that I need not give my reasons for holding that no enfranchisement can be presumed, and that this case is quite distinguishable from *In re Lidiard & Jackson* v. *Broadley's Contract*, 37 W. R. 793, 42 Ch. D. 257. But the defendant says that by the Statute of Limitations the lord is barred from asserting his rights, and the land must, therefore, be regarded as freehold. But down to the commencement of this action the land has been regarded and treated as copyhold both by the lord and by the defendant and his father, and within recent times the defendant and his father in the father's lifetime, and the defendant since his death, have recognized the lord's title, and sought to obtain admission on the rolls as copyhold tenants of the manor. And the lord is no party to this action, and has not seized and is not seeking to seize the land *quousque* or for any forfeiture, but is willing to admit a tenant on the rolls for this land on being satisfied of the title of the tenant. And, under these circumstances, I do not see how I could in this action well decide, on the ground of the Statute of Limitations, that the lord's rights were all barred at the father's death, and that the land must, therefore, be treated as descending by the common law as ordinary freehold.

But assume that I have now to consider the question of the statute, how does the matter stand? Before the case of the *Ecclesiastical Commissioners* v. *Parr*, 42 W. R. 561, [1894] 2 Q. B. 420, it was supposed by some that in a case like the present the statute ran from the time when the lord might have perfected the right to seize after he knew of the death of the last admitted tenant; but by the Court of Appeal in that case it was decided that the time ran only from the time when the tenant, who ought to take admittance, refused to come in after the lord had made the necessary three proclamations, or given notice to the tenant to come in. The Master of the Rolls in that case says ([1894] 2 Q. B., at p. 431): "In other words it seems to me that there is no forfeiture, nothing upon which an action of ejectment against the right heir can be maintained, unless there have been three proclamations; or unless, as it is afterwards put, there is express notice to the heir to come in. If that is so, it is the refusal to come in which works a forfeiture. Even after the proclamations or notice, as the case goes on to point out, there is no forfeiture unless it be shown that the heir has refused to come in. It is the refusal to come which works the forfeiture, and thus there is no cause of action until such refusal. If so, the Statute of Limitations against a right of entry or against a right to bring the action only lies between the time when the cause of action arises and the time when the action is brought; that is to say, between the time when, after proclamation or notice, the heir has refused to come in and the time when the action for ejectment is brought." And Kay, L.J., says, at p. 433, "The question is when the right to make an entry or bring an action first accrued. It has been argued, and I suppose that is the view which impressed me on the former occasion, that the right to make an entry, at any rate, accrued when the copyhold tenancy became vacant, and that the making of proclamations giving notice are only machinery to obtain entry. Is that so? As to an action, it could not be brought until after notice given or proclamations made, and the tenant has refused or declined to come in. The passage read by the Master of the Rolls is, I think, conclusive upon this point. Until such refusal there is no forfeiture, and, therefore, upon further consideration I have come to the conclusion that until such refusal there is no right of entry or right of action on the part of the lord to seize the land *quousque* in order to compel the tenant to come in to be admitted."

I think that when Kay, L.J., spoke of neglect on the part of the tenant in coming in, he meant such a neglect as amounted to a refusal—something that put the lord at arms length, and fairly gave him notice that the tenant was challenging his right as lord. And, if I may respectfully say so, there are cogent grounds for this. It ought not to be that a lord should be bound to seize, or be bound to bring an action in a case where the tenant in no way challenges the lord's rights, and the lord has no desire to seize, or to bring a hostile action against the tenant. Now in the present case clearly the statute did not run. For not only were there no three proclamations, but if and so far as any of the letters written to Richard Beighton (No. 3) or his solicitors are to be regarded as formal notices by the lord to him to come in, they were met, not by a refusal, but by a recognition on his part of the lord's rights, and were followed by proceedings having as their object his admittance on the rolls, which proceedings have hitherto not been followed by admittance because of the difficulty attending the title to admittance of Richard Beighton (No. 3). Therefore, in my opinion, the defence of the statute fails. It follows that as between the parties to this action the plaintiffs are entitled to two-thirds of the lands, and the defendants to the remaining third, for the estate in them of Richard Beighton (No. 3) at the time of his death. And as the defendant as substantially failed in the action, he must pay the costs so far as increased by his denying the plaintiff's title.

Action dismissed.

Solicitors, *Johnson, Weatherall, & Sturt*, for *W. G. Eking*, Nottingham; *Swann & Co.*, for *James Wearing*, Mansfield.

Q. B. Div. (Pollock, B., and Wright, J.) — July 29.

REG. v. INCORPORATED LAW SOCIETY. (*a*.)

Solicitor—Application to committee of Incorporated Law Society—Allegations against solicitor—No primâ facie *case of professional misconduct—Jurisdiction of committee—Discretion—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.

On an application under section 13 *of the Solicitors Act*, 1888, *to the committee of the Incorporated Law Society appointed under the Act, that a solicitor might be required to answer allegations of professional misconduct contained in an affidavit, the committee were of opinion that the affidavit disclosed no* primâ facie *case of professional misconduct, and the committee declined to proceed further with the hearing of the complaint.*

Held, that an application for a mandamus *to the committee to hear and determine the matters complained of, failed on two grounds—first, that the committee had a discretionary power to decline to proceed with the hearing if they were of opinion that the applicant's affidavit disclosed no* primâ facie *case of professional misconduct; secondly, that there was another remedy open to the applicant equally convenient and beneficial—viz., an application to the court.*

Rule *nisi* for a *mandamus* to the committee of the

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Incorporated Law Society appointed under the Solicitors Act, 1888, to hear and determine a complaint against a firm of solicitors.

An application was made to the Incorporated Law Society that two solicitors might be required to answer allegations of professional misconduct contained in an affidavit of the applicant, and that the solicitors in question might be struck off the rolls or suspended, or that such order should be made as the court should think fit.

The committee of the Law Society appointed under the Solicitors Act, 1888, having considered the allegations contained in the affidavit, and without calling on the solicitors charged to appear and answer the allegations, were of opinion that the applicant had not made out a *primâ facie* case of professional misconduct against the solicitors, and the committee declined to hold any further inquiry on the case.

The applicant obtained a rule *nisi* as above.

The Solicitors Act, 1888, s. 13, enacts that an application to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee in accordance with rules to be made under the authority of this Act. The committee, after hearing the case, shall embody their finding in the form of a report to the High Court of Justice except where the application is made at the instance of the solicitor himself, in which case the report shall be made to the Master of the Rolls, who shall make such order thereon as he may think fit. If the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, the society need not take any further proceedings, but if the committee are of opinion that there is a *primâ facie* case, it shall be the duty of the society to bring the report of the committee before the court. The report shall have the same effect and shall be treated by the court in the same manner as a report of a master of the court; and the court may make such order thereon as the court may seem fit.

Provided that any person who, but for this Act, would have been entitled to apply to the court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the court.

Sir E. Clarke, Q.C., and *Hollams*, for the committee of the Incorporated Law Society, showed cause against the rule. The committee have a discretion after reading the applicant's affidavit to say whether the affidavit discloses a *primâ facie* case of professional misconduct against the solicitor charged. If the committee are of opinion that a *primâ facie* case is not made out they are not bound to call upon the solicitor to appear and answer the allegations. To do so would be most unnecessary and oppressive.

Finlay, Q.C. (*Levett, Q.C.*, and *A. T. Lawrance*, with him), for the solicitors charged, also argued against the rule, and in addition to the above arguments contended that the granting of a *mandamus* was discretionary, and was never granted when there was another remedy open to the applicant. In this case there was another remedy because, under section 13, the applicant had power to apply to this court.

Willis, Q.C., and *Rose Innes*, for the applicant.—The committee have no discretion in a matter such as this. The terms of section 13 are explicit. The committee are to hear the application in accordance with the rules made under the Act. The rules require that notice of the hearing shall be given to the solicitor charged. After the hearing the committee must, in every case, report to the society, and it is only if the committee report that there is no *primâ facie* case against the solicitor that no further proceedings need be taken. In this case the committee have held no hearing at all. The committee have taken upon themselves the power to decide that there is no case made out, but the only jurisdiction of the committee is to hear the application and then report to the court.

POLLOCK, B.—This case raises a very important question as to the jurisdiction of the Incorporated Law Society. By the Act of 1888 a committee of the society was substituted for the master, whose duty it had formerly been to inquire into the facts and report on the facts to the court. It is quite clear that the master had only a subsidiary duty to perform. Any question as to the necessity of holding an inquiry was for the court itself. Now, since the passing of the Act, the application for an inquiry is made in the first instance to the committee, and not to the court; but I do not think it was intended that the committee should be obliged to hold an inquiry and report to the court if the committee were of opinion that no *primâ facie* case for inquiry had been made out. In my opinion the Act has been so framed as to give the committee a discretion in the matter. Section 13, after providing for the hearing of the case, enacts that: "If the committee are of opinion that there is no *primâ facie* case of misconduct against the solicitor, the society need not take any further proceedings." That precludes any further proceedings. The section continues: "But if the committee are of opinion that there is a *primâ facie* case it shall be the duty of the society to bring the report of the committee before the court." That maintains the distinction of the old practice. The section concludes with the proviso that any person shall be entitled to apply to the court, although the committee is of opinion that there is no *primâ facie* case of misconduct, "and shall be entitled to be heard if the society brings the report of the committee before the court." Mr. Willis dealt with these last words as if bringing the report before the court was a condition precedent in all cases: but in my opinion that is not so. There does not appear to me to be any great difficulty in so construing the Act as to give a reasonable construction to its provisions. This really disposes of the case, but it is right that I should add that I am clearly of opinion that the court ought for another reason to refuse to grant a *mandamus* in this case. It is a well-known rule that this court will not grant a *mandamus* where there is another remedy equally beneficial and convenient applicable to the case.

That being the law, how does it apply to this case, which is one of an essentially domestic character, for this court has always exercised authority over its own officers. The only alteration effected by the Act of 1888 is that a part of that authority has been delegated to the committee of the Law Society. But the Act further provides by section 19 that the Master of the Rolls or any judge may, notwithstanding anything in the Act, exercise any jurisdiction over solicitors which he might have exercised if the Act has not been passed. Therefore there is another mode of proceedings in this case, and one which is not only equally beneficial and convenient, but more so than a *mandamus*. For these reasons I am of opinion that the application fails, and the rule nisi must be discharged.

WRIGHT, J.—I am of the same opinion. On a true construction of the Act of 1888 its effect is to substitute an application to the committee of the Law Society instead of as formerly to the court. The court in the exercise of its discretion used to refuse to grant a rule *nisi*, and the committee has to a certain extent the same jurisdiction. If the matters alleged are not matters of professional misconduct, the committee not only may, but ought to refuse to proceed with the case. But in any case this court will be slow to interfere with the manner in which the committtee exercises its discretion. The committee are in a position analogous to that of a magistrate who is asked to grant a warrant. The court will not issue a *mandamus* to a magistrate to grant a summons unless the magistrate has declined jurisdiction on wrong grounds, and so with the committee.

I agree also that this application should be refused on the other ground. The Court of Appeal in *In re Weare*, [1893] 2 Q. B. 439, adopted this view that section 19 preserved the jurisdiction of the court to act without the intervention of the committee, and that is a more convenient way of proceeding than by *mandamus*. I wish to add, however, that in certain cases the court might order the committee to proceed to hear the case.

Rule discharged.

Solicitor for the applicant, *R. Chapman.*

Solicitor for the committee of the Incorporated Law Society, *S. P. B. Bucknill.*

Solicitors for the respondents, *Trower, Freeling, & Parkin.*

Court of Appeal.

From Q. B. Div. (Lord Esher, M.R., and Kay, and A. L. Smith, L.JJ.) — July 12, 30.

THOMAS *v.* LULHAM. (*a.*)

Landlord and tenant—Lease—Forfeiture—Distress—Waiver of forfeiture—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 210.

In an action of ejectment under section 210 *of the Common Law Procedure Act,* 1852, *on a right of re-entry for non-payment of rent, the levying a distress after the right of forfeiture has accrued is not a waiver of the forfeiture if, after the distress and before the issue of the writ in the action, there remains one half-year's rent due.*

Brewer *v.* Eaton, 3 *Doug.* 230, *followed.*

Cotesworth *v.* Spokes, 9 *W. R.* 436, 10 *C. B. N. S.* 103, *distinguished.*

Appeal from the judgment of Mathew, J., at the trial without a jury.

The action was brought to recover possession of a house and premises and arrears of rent due under a lease.

By lease dated the 14th of January, 1884, the premises were demised by the plaintiff to the defendant for a term of twenty-one years from Christmas, 1883, at a yearly rent of £130.

The lease contained a covenant by the defendant to pay the rent on the usual quarter days, and a proviso entitling the plaintiff to re-enter in case the defendant should make default in any covenant by the defendant to be performed.

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Upon the 25th of March, 1894, a quarter's rent was due and unpaid, and at Midsummer and Michaelmas two further quarters' rent also became due and remained unpaid.

On the 22nd of November the plaintiff distrained for the arrears of rent, but was only able to realize such an amount as left more than half a year's rent still due.

The writ in this action was issued on the 26th of November.

Mathew, J., held that the plaintiff by levying a distress had waived the forfeiture; and gave judgment for the defendant on that point.

The plaintiff appealed.

Section 210 of the Common Law Procedure Act, 1852 (which is a re-enactment of 4 Geo. 2, c. 28, s. 2), provides that: "In all cases between landlord and tenant as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due hath right by law to re-enter for non-payment thereof, such landlord or lessor shall and may, without any final demand or re-entry serve a writ in ejectment for the recovery of the demised premises, . . . and if it be proved upon the trial . . . that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found upon the premises countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case, the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made."

Cavanagh, for the plaintiff.

Aeneas Mackintosh, for the defendant.

The arguments are stated in the judgments.

Cur. adv. vult.

July 30.—KAY, L.J., read the following judgment:—The statute 15 & 16 Vict., c. 76, section 210, seems to me to mean that a landlord who has power to re-enter for non-payment of rent may recover in ejectment, notwithstanding that he distrained for such rent if such distress did not produce sufficient to pay such rent, but left half a year's rent still due. In this case the landlord had a right of re-entry if any quarter's rent should be in arrear twenty-one days. Three quarters' rent were due. The landlord distrained. The distress was not sufficient to pay one quarter's rent. Therefore, when he brought this action, half a year's rent was due, and the statute applies and enables him to recover notwithstanding the distress. This was the construction put upon the statute in *Brewer* v. *Eaton*, 3 Doug. 230. It was argued that putting in the distress waived the right of re-entry at common law, and that the statute does not apply where a distress has actually been levied. The material words are "if it shall be proved upon the trial that half a year's rent was due before the said writ was served and that no sufficient distress was to be found on the demised premises countervailing the arrears then due." How could it be said that no sufficient distress was to be found without distraining? Goods on the premises are not a distress until they are distrained, and the landlord cannot tell what is to be found on the premises without putting in a distress. He has no right to enter merely to see what goods are there. The statute evidently contemplates an actual distress, and expressly authorizes the ejectment under the power for re-entry, notwithstanding such distress, if half a year's rent remains due. But reliance was placed upon the language used by the late Williams, J., in his judgment in *Cotesworth* v. *Spokes*, 9 W. R. 436, 10 C. B. N. S. 103. In that case a lessor,

having a power of re-entry, distrained for three quarters' rent, and after realizing the distress, less than half a year's rent remained due. He then brought ejectment, but it was held that, as half a year's rent was not due, the case was not within the statute, and that the action was not maintainable. The power of re-entry, by the terms of the lease, was if a quarter's rent should be in arrear for twenty-one days. The three quarters' rent were due at Michaelmas, 1860—*i.e.*, the 29th of September. The distress was put in on the 2nd of October, that is, within twenty-one days from that date. Ejectment was brought on the 2nd of November, after the expiration of twenty-one days, but part having been paid by the distress there was not a right of re-entry for half a year's rent at the end of the twenty-one days after Michaelmas, and Williams, J., said that the distress was a waiver, because it was for the rent up to Michaelmas, as to the last quarter of which there was no right of re-entry at the time of the distress, because the twenty-one days had not expired. But if the distress had been confined to the rent due at Midsummer, there would have been no waiver, because as to that the forfeiture had actually occurred. It is unnecessary to express any opinion as to this part of the judgment, which was not the ground of the decision.

In the case before us three quarters' rent was due on the 29th of September, and the distress was put in on the 22nd of November, more than twenty-one days after the last of the three quarters' rent became due, and, therefore, that point does not arise.

A. L. SMITH, L.J., delivered a written judgment, in which, after stating the facts as above set out, he proceeded as follows:—Mathew, J., has held that by distraining upon the 22nd of November, 1894, the plaintiff had waived the forfeiture, and gave judgment for the defendant. It is conceded by the plaintiff that at common law the distress operated as a waiver of the forfeiture which occurred on the non-payment of the rent, and the question is whether, notwithstanding this distress, the plaintiff by reason of the provisions of section 210 of the Common Law Procedure Act, 1852, is entitled to maintain this action. This section, which is a re-enactment of 4 Geo. 2 c. 28, s. 2, enacts as follows: [His lordship read the section, and proceeded:—] To bring himself within the section the landlord must prove, first, the relationship of landlord and tenant; secondly, that he has by law the right to re-enter for nonpayment of rent; thirdly, that, having distrained, he has been thereby unable to satisfy the rent due; and, lastly, that there was half a year's rent due when he served the writ of ejectment. Upon proof of this by the landlord, then, in my judgment, the section enacts that he may proceed against his tenant and recover in ejectment, whether he had legally demanded the rent or not; but to avail himself of the section the above-mentioned four requisites must be proved. That this is the true reading of the section appears from the case of *Brewer* v. *Eaton*, in the year 1783, when Lord Mansfield and the Court of King's Bench, upon 4 Geo. 2, c. 28, s. 2 (an equivalent section to section 210 of the Common Law Procedure Act, 1852), held that though at common law the distress would have operated as a waiver of the forfeiture incurred by the non-payment of the rent, yet in a case which came within the statute it was not so, for the statute required the landlord to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, and that a distress, which it was necessary for the landlord to make in order to complete the title given him by the statute, was no waiver. It is said, however, that this case was overruled by the Common Pleas in the case of *Cotesworth* v. *Spokes*, but this is not so. This case decided that for a landlord to bring himself within the section, he must prove that half a year's rent was in arrear at the time of the service of the writ. A passage at the end of the judgment (which was delivered by Williams, J.) was pressed upon us to show that the forfeiture was waived in the present case by what the landlord had done, but, in my judgment, though the passage is hard to understand, it does not decide this, and I must point out that it was not competent for the Court of Common Pleas to overrule the Court of King's Bench, and it is not correct to say that it has done so. It should be noted that in *Cotesworth* v. *Spokes* the distress was within twenty-one days, which is not so in the present case, but be this as it may, in my judgment the case leaves that of *Brewer* v. *Eaton* untouched upon the point now under consideration. The Court of King's Bench put the true construction upon the section, which has apparently been acted upon for over 100 years, and as the plaintiff has fulfilled the requirements of section 210, he is entitled to judgment, and this appeal must be allowed and judgment given for the plaintiff, with costs here and below.

Lord ESHER, M.R.—I agree with the judgments which have been read. In my view the old common law has not been altered, and receiving rent after a forfeiture has accrued is, at common law, a waiver of the forfeiture. But the statute has given a new and independent right to the landlord, which right entitles him to act as he did in this case.

Appeal allowed.

Solicitor for plaintiff, *A. J. Thomas.*

Solicitor for the defendant, *A. N. Walker.*

From Q. B. Div.
(Lord Esher, M.R., and Kay, and A. L. Smith, L.JJ.) July 9.

SARSON v. ROBERTS. (*a.*)

Landlord and tenant—Furnished lodgings—Agreement to let—Implied promise—Fitness for occupation—Sanitary condition.

In an agreement to let furnished lodgings and to supply ordinary household attendance there is no implied promise that the lodgings shall be in a sanitary condition throughout the period for which they are let.

Appeal from a judgment of Mr. Commissioner Chalmers at Chester Assizes.

The defendant let some rooms in his house as furnished lodgings to the plaintiff and his family. The defendant further agreed to supply the plaintiff and his family with ordinary household attendance, and to allow them the use of the kitchen. While the plaintiff and his family were staying in the house, a grandchild of the defendant, who was living in the same house, became ill with scarlet fever. The plaintiff was not informed of this, and subsequently his wife and one of his children were found to be suffering from scarlet fever.

The plaintiff brought this action against the defendant in respect of the breach of an implied promise that the lodgings were at the time of the letting, and would be during the period for which they were let, fit for habitation, and he sought to

(*a.*) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

recover by way of damages the expense he had incurred in consequence of such breach. At the trial the jury found that the lodgings were healthy at the time of the letting, but were not healthy during the time of occupancy; that the defendant did not inform the plaintiff of the fact that there was an infectious disease in the house; and that the plaintiff's wife and child contracted scarlet fever from the defendant's lodgings. The learned commissioner gave judgment for the plaintiff.

The defendant appealed.

Marshall Q.C., and *W. B. Yates*, for the defendant.

E. Honoratus Lloyd, for the plaintiff.—The following cases were cited:—*Smith* v. *Marrable*, 11 M. & W. 5; *Wilson* v. *Finch Hatton*, 25 W. R. 537, 2 Ex. D. 336; *Holder* v. *Soulby*, 8 W. R. 438, 8 C. B. N. S. 254; *Ward* v. *Hobbs*, 27 W. R. 114, 4 App. Cas. 13.

Lord ESHER, M.R.—In this case we are asked to read into a contract to let furnished lodgings an implied condition imposing on the landlord a duty which was not in fact stipulated for in the agreement between the parties. The judge at the trial said that he would imply such a condition into the contract, because it was reasonable that it should be there. The only ground, however, on which a condition can be introduced by implication into a contract, is that such a condition must have been present to the minds of both the parties, at the time when they entered into the contract, as being a condition which was necessary to the carrying out of the contract. Was this so in the present case? It is said that the mere existence of the relationship of landlord and tenant was enough to give rise by implication to a condition that the premises were sanitary at the beginning of the tenancy, and would continue to be so throughout the tenancy, thereby giving the tenant a right, in case they proved to be insanitary, to rescind the contract and go out. There is no ground for implying such a condition from the mere relation of landlord and tenant. Then it is said that if such a condition does not arise from the mere relation, it at any rate arises from such an agreement as was entered into by the parties in this case. The landlord had agreed to attend on the plaintiff and his family while they were staying in his house, and to do various household services for them. But it is impossible to get out of these stipulations an implied covenant that the house was and would continue to be sanitary. In my opinion the judgment is wrong, and the appeal must be allowed.

KAY, L.J.—The cases which have been cited show that in the case of an agreement to let furnished lodgings there is an implied condition that the lodgings are at the time in a reasonably fit condition for the purpose for which they are hired. But to carry that rule further and extend it so as to imply a warranty that the lodgings shall remain in that condition throughout the occupancy seems to me to be contrary to the cases and most unreasonable. It is to be noticed that the rule as it exists at present is quite an artificial rule, inasmuch as it does not apply to unfurnished lodgings. I am not inclined to extend it further than it has already been laid down in *Smith* v. *Marrable* and *Wilson* v. *Finch Hatton*. It was contended by the plaintiff that there was a duty on the part of the defendant to communicate to him the fact that scarlet fever had broken out in the house. But from what did such duty arise? It is clear that it could not arise from the mere relation of landlord and tenant. The landlord might have been away during the tenant's occupancy, and have been quite ignorant of the fact that there was scarlet fever in the house. The plaintiff, however, gave up that point and relied on the fact that in this case the landlord agreed to supply him with household attendance. But we cannot imply from the combination of the agreement to let the lodgings and the agreement to supply attendance such a duty or condition as the plaintiff seeks to establish.

A. L. SMITH, L.J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno.

Solicitors for the defendant, *Rowcliffes, Rawle & Co.*, for *Griffith & Allard*, Llanrwst.

From Q. B. Div. (Lord Esher, M.R., and Kay and A. L. Smith, L.JJ.) — July 8.

MONTGOMERY v. FOY, MORGAN, & CO. (*a*.)

Practice—Parties—Joinder of defendants—Shipowner—Freight—Declaration of lien—Action against consignees — Joinder of shippers — Counter-claim — R. S. C., ord. 16, *r.* 11—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493-496.

The owners of a cargo of timber shipped it under a bill of lading for consignment to agents for sale. The shipowner warehoused the cargo with a dock company under the provisions of the Merchant Shipping Act, 1894, *with a notice that it was to remain subject to a lien for freight. The consignees deposited the amount of freight claimed with the dock company, with a notice to retain it. The shipowner brought an action against the consignees claiming a declaration that he was entitled to a lien on the sum so deposited and an order that it should be paid to him. The shippers were desirous of making a claim against the shipowner for damage to the cargo and for short delivery. The defendants (the consignees) and the shippers joined in an application that the shippers might be added as defendants under ord.* 16, *r.* 11.

Held, that the shippers might be added as defendants.

Appeal from an order made by Mathew, J., under ord. 16, r. 11.

The plaintiff was a shipowner, and by a bill of lading made between him and the British Saw Mills Co. a cargo of timber was shipped on board his ship in British Columbia for carriage to London. The British Saw Mills Co., who were the owners of the goods, endorsed the bill of lading to the defendants, who were their agents for the sale of timber in this country. On the arrival of the ship in the port of London the plaintiff landed the cargo and placed it in the custody of the Surrey Commercial Docks Co. under section 493 of the Merchant Shipping Act, 1894, and at the same time gave a notice, under section 494, that it was to remain subject to a lien for £276 9s. 7d. for freight. The defendants paid this sum by way of deposit to the dock company, under section 495, and gave them a notice, under section 496, to retain it and not to pay it to the shipowner, stating that they did not admit any sum to be so payable. The plaintiff brought this action claiming a declaration that he was entitled to a lien on the sum so deposited by the defendants and an order that it should be paid to him.

The defendants and the British Saw Mills Co. made an application at chambers under ord. 16, r. 11, for an

(*a*.) Reported by F. G. RUCKER, Esq., Barrister-at-Law.

order that the company should be substituted or added as defendants, on the ground that the cargo was their property, that the sum of £276 9s. 7d. was paid by the defendants to the dock company as their agents, and that they desired to be made defendants to the action for the purpose of raising a counter-claim for damage to the cargo and for short delivery.

Matthew, J., made an order that the British Saw Mills Co. should be added as defendants.

The plaintiff appealed.

H. Boyd, for the appellant.—The learned judge had no jurisdiction to make this order. If he had jurisdiction he exercised his discretion wrongly. The question which it is sought to raise in the proposed counter-claim is not a question involved in the cause or matter. Neither is there power to add a person as defendant merely for the purpose of enabling him to bring a counter-claim against the plaintiff.

He cited *Norris* v. *Beazley*, 25 W. R. 320, 2 C. P. D. 80; *Moser* v. *Marsden*, 40 W. R. 520, [1892] 1 Ch. 487; *Smurthwaite* v. *Hannay*, *ante*, p. 113, [1894] A. C. 494; *White & Co.* v. *Furness, Withy, & Co.*, [1895] A. C. 40.

Leck, for the respondents, was not called upon to argue.

Lord ESHER, M.R.—In this case there was one contract, and one contract only—viz., a contract of affreightment contained in a bill of lading made between the British Saw Mills Co. and the plaintiff. The British Saw Mills Co. were the shippers and the real owners of the goods, and they were the people who would eventually have to pay the freight. The defendants were mentioned in the contract as consignees, but they did not themselves make the contract; they could, therefore, only be made liable for freight as consignees, and they could only be made so liable in a particular way. The plaintiff cannot make out his case against them except by relying on his lien. The goods having been warehoused under the Merchant Shipping Act, and a sum of money deposited with the warehouseman in respect of the freight, the shipowner has to bring his action against the consignees in this form—viz., by claiming a declaration that his lien is good as against the consignees. If he obtains such a declaration, he at the same time obtains an order that the money shall be paid out by the warehouseman to him. Here the plaintiff has brought such an action against the consignees. It is clear that in this action the consignees cannot raise a set-off or counter-claim in respect of short delivery. That is a matter in which the shippers, the real principals of the consignees, are concerned, and if they are left out of the action, there is no defence, and the warehouseman must pay the money to the shipowner. The freight, however, must in the end come out of the shippers' pockets, and it is open to them to bring an action in the nature of a counter-claim against the shipowner for damages for short delivery. If they were to bring a separate action for that purpose, and that action were tried on the same day as the original action, the court might certainly say that the one claim should be set off against the other, and the question now is, whether the court may not, for the purpose of preventing the unnecessary expense of having two separate actions, order the shippers to be added as defendants to the original action, so that the whole matter may be settled under one writ and with one trial.

By ord. 16, r. 11, the court has power to make an order that "the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." Here there is one matter before the court—viz., the contract of affreightment, and the disputes which have arisen with regard to that matter are disputes between the plaintiff and the defendants and the persons who are sought to be added as defendants. I am of opinion that the words of the rule are large enough to admit the joinder of the shippers as defendants to this action; for it seems to me that the question which has arisen between them and the plaintiff is a question involved in the cause or matter within the meaning of the rule, the only question in dispute really being what is the plaintiff's right under this contract of affreightment. When the shippers have been added as defendants, the case will stand thus: the plaintiff will be entitled to judgment against the first defendants for a declaration of lien, and the second defendants will be entitled to judgment on their counter-claim if they succeed in establishing it; and the result will be that the warehouseman will be ordered to pay over to the plaintiff the difference between the sum deposited and the amount of damages so recovered on the counter-claim. I am of opinion that this case is not governed by any of the authorities which have been cited. The appeal must, therefore, be dismissed.

KAY and A. L. SMITH, L.JJ., concurred.

Appeal dismissed.

Solicitors for the appellant, *W. A. Crump & Son.*

Solicitors for the respondents, *Lowless & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — June 26.

BAERLEIN & CO. v. CHARTERED BANK OF INDIA, LONDON, AND CHINA. (a.)

Practice—Court established for trial of commercial causes—Rules of evidence—Transfer—Judicature Act, 1894, *s.* 3.

The court established for the trial of commercial causes has no greater power than any other court to dispense with the technical rules of evidence. All its powers are derived under the Supreme Court of Judicature (Procedure) Act, 1894, *and the rules made thereunder.*

The circumstances under which the court will order the transfer of an action commenced in the Chancery Division to the Queen's Bench Division for trial, considered.

This was an appeal of the plaintiffs from a refusal of Kekewich, J., to order the transfer of the action, which had been commenced in the Chancery Division, to the Queen's Bench Division, so that it might be tried in the Commercial Court by Mathew, J. The action was commenced in 1892, long before the Commercial Court had been established.

On the 8th of May, 1894, a summons was taken out by the plaintiffs asking that the action might be transferred to the Queen's Bench Division, the object being that the case might be tried in the special court for the trial of commercial cases, over which Mathew, J., had been selected to preside. It was alleged that the case related to complicated commercial transactions, with which a judge who was specially skilled in such matters would be able to deal more effectively, expeditiously, and economically than any other judge, and that the case was pre-eminently one of the class

(a.) Reported by W. SHALLCROSS GODDARD, Esq., Barrister-at-Law.

for the trial of which the Commercial Court was established. It was also suggested that, under the regulations which had been made, that court had larger powers of dispensing with the technical rules of evidence than any other court.

The defendants opposed the application on the ground that, as intricate questions of account would have to be considered, the Chancery Division was the proper tribunal for the trial of such an action.

Kekewich, J., refused the application, and made the costs of that application the defendants' in any event. He also refused leave to appeal.

The Court of Appeal, however, gave leave to appeal.

Sir Richard Webster, Q.C., and *T. M. Whitehouse*, for the appellants.

R. M. Bray and *W. D. Rawlins*, for the respondents.

LINDLEY, L.J.—The case is one of very considerable importance, and I am not sorry after this discussion that we gave leave to appeal, in order that we might consider the principles upon which cases of this kind should be transferred from one division to another.

In the first place, I hope that nothing I may say will be supposed to be based upon the superiority of one judge over another. It is not a question between judges at all. The question we have to consider is how this case—the nature of which I will allude to presently—can be tried in the cheapest and best way for both parties. That is the only question we have to consider.

With respect to the Commercial Court, there is no Act of Parliament applicable to that court. The Commercial Court is merely for convenience in the disposal of business. The Commercial Court has no more power to dispense with evidence or to depart from the administration of the law in the ordinary way than any other court or judge. Whatever other power it has depends entirely upon the Supreme Court of Judicature (Procedure) Act, 1894, and the rules which have been made under one of the sections of that Act of Parliament. The important section in the Act is section 3 (it has nothing to do with the Commercial Court especially): "It is hereby declared that the power to make rules conferred by the Judicature Acts, 1873 to 1891"—that means on the Rule Committee—"includes power to make rules for regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given." Then comes this: "(*a*) On any application in any matter or proceeding relating to the distribution of any fund or property, whether in court or not; and (*b*) on any application upon summons for directions pursuant to such rules." Under the power given to the Rule Committee by that Act of Parliament, certain rules have been promulgated, which are to be found, or some of them at all events, in the "Annual Practice," (1895) at pp. 602 and 603. They are rules relating to summonses for directions. Summonses for directions may be taken out before any judge of the High Court. Thereupon rule 7 of order 30 is specially made under the power to which I have first referred. It provides as follows: "On the hearing of a summons"—that is a summons for directions—"the court or judge"—that is, any judge of the High Court or any divisional court—"may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books or by copies of documents or entries or otherwise as the court or a judge may direct."

The object of that is obviously to dispense with the technical rules of evidence in those cases in which such dispensation has been authorized by the Judicature Act, 1894, and that is all. The regulations which have been referred to and are before us, which have been issued with reference to the Commercial Court, are nothing more than expressions of what is to be adopted and understood by the practitioners in that court; but they do not go a bit further than the rule which I have mentioned. It is very true that rule 6 of these commercial regulations, as I will call them, is a little differently worded, because it runs thus: "Application may be made to such judge"—that is, the judge of the Commercial Court—"under the provisions of the Judicature Act, 1894, and the rules thereunder." Then the words "or by consent" are put in. There is no magic in that; you can always dispense with the technical rules of evidence by consent, and it has been constantly done. Then rule 6 continues thus: "to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise." That does not in the least increase the power of the judge of the Commercial Court to do that which another judge of the High Court cannot do. They can all do precisely the same thing under the power conferred by the Judicature Act, 1894, and the rules, and, of course, by consent, evidence can be taken without technicality.

Having made these preliminary remarks, the real question which we have to consider in this case is, what is the best method, having regard to the new practice which has sprung up quite lately, of trying a case like this? Now, certainly, I am not prepared to say that every commercial cause ought to be transferred from the Chancery Division to the Queen's Bench Division of the High Court. If you can find a particular case in which you are satisfied that peculiar knowledge or habitual practice in commercial matters and dealing with commercial documents and correspondence between commercial men will greatly facilitate the trial of that particular case, that is a reason for it. But to say that because a case relates to a bill of lading or stoppage *in transitu* it ought, therefore, to go to the Commercial Court and be transferred from the Chancery Division of the High Court, is to say that which cannot be supported for a moment. [His lordship then stated why he considered this particular case should be transferred, and continued:—] It is not because it is a commercial cause, but because of the special features of this particular case, that I think this is a proper case to be transferred to the Queen's Bench Division. Of course, the consents of the two presidents of the two divisions will have to be obtained in the usual way.

LOPES, L.J.—It is to be recollected that at the time this action was brought no commercial court was in existence, and I am strongly inclined myself to think that if the commercial court had been in existence at the time this action was brought, the plaintiffs would originally have brought this action in that court.

I wish to say that in determining this matter as we do determine it, I cannot consider for one moment that it is any question between the personality of judges. Everyone must know that there are some judges who are more conversant with certain branches of the law than they are with others. Take, for instance, patent law; there are judges who are specially conversant with that. Take company law, take real property law, and others which could be mentioned. That is not really a matter which comes at all into this case. The real question to be decided here is, where can this cause be effectively, most

quickly, and at least expense, tried? That is the material question which we have to consider.

I quite agree with what has been said by Lindley, L.J., with reference to paragraph 6 in the rules with regard to the trials of commercial causes. Paragraph 6 is this: [His lordship read it, and continued:—] That is not applicable in any special way to any one court more than to another. It is to be observed that the application is to be made "under the provisions of the Judicature Act, 1894, and the rules thereunder," and if the application in any way is outside the Act or those rules, I think it would be *ultra vires*. Every judge of the High Court has the same and similar powers, having regard to the dispensing with technical evidence, and so on.

We have now a commercial court established, and the learned judge who has been selected to preside in that court has been selected I presume (and there is no doubt) because he has special knowledge with regard to commercial causes.

Now what is this cause? I will not refer again to these rules with regard to commercial causes, because it is admitted I think on both sides that this is essentially a commercial cause. Mr. Bray says that this court was only established for the purpose of trying short commercial causes. The phrase he used was, I think, that they could be "roughly and readily disposed of" in that court, I do not agree with that at all. I think it was established not only for trying causes that could be quickly disposed of—I do not use the words "roughly and readily"—but that it was established especially to try all difficult commercial cases—cases which might take a long time to try elsewhere, and cases that require special knowledge for their proper determination.

I do not for a moment say it would be right that every cause that might be called a commercial cause should be transferred from the Chancery Division into the Queen's Bench Division for the purpose of having it decided there. Every cause must be regarded, when an application of this kind is made, in respect of its particular features and its particular elements, and in each case it is for the court to determine whether or not in their opinion it would be more effectively, more quickly, and at less expense, tried in the Commercial Court than elsewhere. Directly the court is able to arrive at the conclusion that it will in their opinion be so tried in the Commercial Court, then I think the court ought to exercise the discretion reposed in it and direct the cause to be transferred to the Queen's Bench Division for the purpose of application being made to the judge of the Commercial Court, for the cause to be tried before him. I again say here we have a judge in the Commercial Court who is specially conversant with that particular kind of business and the particular kind of issues that are raised in this action, and I am of opinion we ought to reverse the decision of Kekewich, J., and to hold that the transfer should take place.

RIGBY, L.J.—I am of the same opinion. In the general principles that have been enunciated by the Lords Justices I entirely agree.

With respect to this particular case (and it must be always in respect of the particular case that the decision is arrived at) it appears to me so far as I can get an insight into the case, which is not quite so complete as that of Lindley, L.J., who has heard of this matter before, it appears to me there are complications and great complications. If those were complications of matters of account and so on I should be disposed to think the Chancery Division would be a better tribunal for unravelling them than the Commercial Court. But it seems to me that the complication arises from a series of arrangements, not very perfectly understood it may be by the parties themselves, when they were entered into. Some of them were found to be unworkable, and had to be supplemented. There are other questions of that kind in which the great probability arises that on any applications for directions the judge of the Commercial Court may be in a position to unravel them himself, then and there, or to put matters in a course for very early determination. I think that is the great probability, and on that ground I think it desirable that this particular case should be sent to the Queen's Bench Division, in order that the commercial judge, or the judge for the trial of commercial causes, may have the opportunity of taking seisin of it.

Appeal allowed.

Solicitors for the appellants, *Romer & Haslam*, for *Farrer, Morgan, & Co.*, Manchester.

Solicitors for the respondents, *Clarke, Rawlins, & Co.*

From Chan. Div. (Lindley, Lopes, and Rigby, L.JJ.) — June 24, 25.

SCOTT v. ALVAREZ (No. 2). (a.)

Vendor and purchaser—Condition restricting objections to title—Specific performance—Bad holding title—Deposit—Right to return of.

The plaintiff offered for sale by auction a leasehold house which was purchased by the defendant. One of the conditions of sale provided that the purchaser should make no objection or requisition as to the title between the date of an under-lease and the date of an assignment of that under-lease, but should assume that the assignment vested in the assignee a good title for the residue of the term.

The defendant discovered that, owing to a breach of trust and the fraudulent concealment of a will during the period covered by the condition, the title offered by the plaintiff was positively bad even as a holding title. He therefore refused to complete.

The plaintiff brought an action for specific performance, and the defendant counter-claimed for a return of the deposit which he had paid.

Held, that the plaintiff was not entitled to specific performance; and that the defendant was not entitled to a return of the deposit.

The plaintiff, Robina Scott, was the second mortgagee of a leasehold house, No. 47, Rectory-square, Mile End-road, which was held for a term of ninety-nine years from the 25th of March, 1865.

The property was put up for sale by auction by the plaintiff, who purported to sell an underlease granted in 1867 of the term, less twenty-one days.

Condition 6 provided that "the purchaser shall be furnished with an abstract of the underlease dated the 25th of June, 1867, and made between Mark Bean of the one part, and Mary Ann King, widow (since deceased), of the other part, under which the property is held, and of an assignment of such underlease, dated the 11th day of August, 1891, and made between John Bardu Batchelor, of the one part, and Harry Banks and Sarah Jane Banks, his wife, of the other part and the subsequent title, and shall not make any objection or requisition in respect of the intermediate title to the premises between the grant-

(a.) Reported by ARNOLD GLOVER, Esq., Barrister-at-Law.

ing of the lease and the execution of the said assignment, notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignee a good title for the residue of the said term."

Condition 9 provided that "The vendor, being a mortgagee selling under a power, shall not be required to enter into any covenant or undertaking, except the usual express or statutory implied covenant that she had not incumbered, and the mortgagors shall not be required to join in any assurance for the purpose."

An abstract of title having been furnished in accordance with the contract, objections were raised by the purchaser which ultimately led to the issue of a summons by the purchaser under the Vendor and Purchaser Act, 1874, asking for a declaration that the title was not such as the purchaser ought to be compelled to accept and for the consequent relief. That summons was heard first before Kekewich, J., and subsequently by the Court of Appeal, who, in reversing the decision of Kekewich, J., dismissed the purchaser's summons with costs.

The vendor thereupon commenced this action asking for specific performance of the contract. The defendant applied for and obtained from Kekewich, J., leave to bring an action of review by way of counterclaim in the action, notwithstanding the order of the Court of Appeal on the vendor and purchaser summons, on the ground that since the date of the said order the defendant had discovered certain new facts material to his defence in the action. It appeared that the defendant's solicitor had since ascertained that Sarah Jane Banks, who had as beneficial owner mortgaged the premises to the vendor, was a trustee of the property for other persons who were now about to claim it, and that she had only a life interest in one-third of the property, and had in fact without the knowledge of the beneficiaries fraudulently mortgaged the property. The defendant counterclaimed for the return of his deposit and costs of investigating the title.

Kekewich, J., dismissed the action for specific performance without costs, and on the counter-claim ordered the return of the deposit with interest at four per cent. until payment, and the costs of and incidental to investigation of the plaintiff's title, with the costs of the counterclaim.

The vendor appealed.

Farwell, Q.C., and *F. T. Duka*, for the appellant.—The purchaser is bound by condition 6, the latter part of which, "notwithstanding any recital, &c.," does not restrict the earlier part.

They referred to *Corrall* v. *Cattell*, 4 M. & W. 735; *Cattell* v. *Corrall*, 3 Y. & C. Exch. 413; *Duke* v. *Barnett*, 2 Coll. 337; *Hume* v. *Bentley*, 5 De G. & Sm. 520; *Best* v. *Hamand*, 27 W. R. 742, 12 Ch. D. 1; *Waddell* v. *Wolfe*, 23 W. R. 44, L. R. 9 Q. B. 515; *In re National Provincial Bank and Marsh*, 43 W. R. 186, [1895] 1 Ch. 190; *In re Huddersfield Bank and Lister*, 43 W. R. 567, [1895] 2 Ch. 273.

Renshaw, Q.C., *Byrne, Q.C.*, *Ingpen*, and *F. Russell*, for the respondent.—*Duke* v. *Barnett*, *Hume* v. *Bentley*, and *Cattell* v. *Corrall* go nearest to thrusting a bad title on the purchaser, but they are very special cases. In the present case the title is not only bad, it is a lawsuit, and specific performance will not be granted when there is the certainty of a lawsuit: *Pegler* v. *White*, 12 W. R. 455, 33 Beav. 403. [LOPES, L.J., referred to *Harnett* v. *Baker*, 23 W. R. 559, L. R. 20 Eq. 50]. As to the deposit, it is inequitable that the vendor should be allowed to retain money paid on the footing of a good title when there is no title at all; and the Court of Equity, at any rate since the Vendor and Purchaser Act, has jurisdiction to make an order for the return of the deposit. [LOPES, L.J., referred to *Gosbell* v. *Archer*, 2 Ad. & Ell. 500.]

Farwell, Q.C., in reply, referred to *Haywood* v. *Cope*, 6 W. R. 304, 25 Beav. 140.

LINDLEY, L.J.—This is an appeal by a plaintiff in a specific performance action against an order made by Kekewich, J., which dismisses the action without costs, and also goes on to direct the plaintiff to repay to the purchaser a deposit of £30 with interest, and certain costs of and incidental to the investigation of the plaintiff's title.

The question arises under a very unfortunate litigation. It appears that a small leasehold property was put up for sale, and was described in attractive form as "a small, safe investment, arising from a certain dwelling-house," held for a term of 99 years from the 25th of March, 1865, 70½ years unexpired, at a moderate ground-rent of £5 a year; and the defendant has bought this for a sum of £300 odd, and, instead of finding he has bought "a small, safe investment," he is embarked on two lawsuits and two appeals, and is threatened with more. So much for the small safe investment.

Now, upon the question which we have to decide, some of the conditions of sale are important. The property itself was leasehold, and it was held under an underlease, and condition 4 says that "the underlease under which the property is held and the counterpart of the underlease or agreement with the tenant or copies thereof will be produced at the sale, and may be inspected." and the purchaser shall be deemed to have full notice at the time of the sale of the contents thereof. There is no doubt that the property sold was an underlease. There is no attempt here to describe this small, safe investment as a lease, and to compel the purchaser to take an underlease. It is described as an underlease. Then condition 6 is the most important of all. [His lordship read the condition, and proceeded:—] It is to be observed that there is clearly something like twenty-four years between the date of the underlease and the assignment of the 11th of August, 1891, and with respect to that interval of twenty-four years condition 6 says: [His lordship read the provision as to this in condition 6; and also read condition 9, and continued:—]

Now it appears that the purchaser took objections to this title, objections applying to the dealings with this property between the 25th of June, 1867, and the 11th of August, 1891, and in consequence of what the purchaser discovered, he refused to complete the purchase. Then a summons was taken out under the Vendor and Purchaser Act in order to have the objections adjudicated upon, and that came first before Kekewich, J., and afterwards before the Court of Appeal (see [1895] 1 Ch. 596). It appeared at the time to the Court of Appeal that the purchaser could not establish that the title was a bad one. So far as appeared from the materials before the court at that stage, the court came to the conclusion that, although there were objections to the title, so serious that a title could not be forced on the purchaser but for this condition, yet that, having regard to this condition a good title was made. The court was very careful to point out that which I have just referred to, that it did not appear that the title was a bad one. On the contrary, the court came to the conclusion that the title appeared to be what is called a good holding title. One would have hoped that there would have been an end of it; but the purchaser appears after that to have found out something more, and now unquestionably the purchaser has found out that the title is positively bad, and that

the vendor cannot make a good title. I do not think it necessary to go into the details of that. We have had the reason given to us. A fraudulent concealment of a will and a gross breach of trust have come to light, and the consequence is, it is apparent, that the vendor cannot make a title. Under those circumstances the vendor still seeks to rely on the 6th condition, and to compel the purchaser to complete. He has brought an action for specific performance (it is a pity that was not done before), and the purchaser, notwithstanding the decision of the Court of Appeal, obtained leave to re-open that case, and has availed himself of that, and he says that, notwithstanding the decision of the court, these facts which are new and could not have been discovered with reasonable diligence when the case was before the court before, entitle him to re-open the case, and the case has proceeded on that principle, and the purchaser by his counter-claim asks to have his deposit returned.

We have to decide what is the real legal consequence of this new discovery. Kekewich, J., has held that the new discovery is so important that the plaintiff is not entitled to a decree for specific performance, and, as a result, is not entitled to retain the deposit; and he has ordered the deposit to be returned. From that the vendor appeals.

The first question we have to consider is, What is the true construction of the 6th condition—is it to receive a narrow construction, or is it to receive that construction which Mr. Farwell says is the natural one, having regard to the language in which it is couched? Kekewich, J., has construed it rather narrowly. He leans to the view that the expression "the purchaser shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment," are rather controlled and cut down by what follows: "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignee a good title for the residue of the said term." I confess my own impression is that the learned judge has put rather too narrow a construction upon that condition. I should read it in this way, that, "notwithstanding the recital of or reference to such title, although we tell you there are difficulties there, you are not to make any objection in respect of the intermediate title between the 26th of June, 1867, and the 11th of August, 1891, but you are to assume, for all purposes, that that assignment vested in the assignees a good title." I think that is the true view of that condition, and that being the true view, it becomes rather an important condition.

Now, if that is the true view of the condition, the first question is, whether under those circumstances an action at law could be maintained by the purchaser to get back his deposit. There is no question of discretion in such a case as that, and I dissent entirely from the proposition contended for by Mr. Byrne that since the Vendor and Purchaser Act, or since the Judicature Act, there is any difference between the law on that point now and the law before. We know perfectly well that when persons enter into a contract for the sale of lands there are or may be—I may say there are—two remedies open. One is an action at law for damages, and the other is the extraordinary remedy of a suit for specific performance. I am now addressing myself to the legal aspect of the case, and, addressing myself to the legal aspect of the case, if once we construe the 6th condition in the sense in which I construe it, it appears to me the purchaser would fail if he brought an action at law to recover his deposit; and I must say the case Mr. Farwell has referred to of *Corrall* v. *Cattell* is decisive on that point. The legal answer is this: "There is no breach of contract at all. You have taken your chance with respect to your deposit and unless you show a breach by the vendor of his bargain, you are not entitled to have that deposit back." That is the answer, in that view, to the action at law. Therefore it appears to me that the appeal must succeed as far as the counter-claim is concerned.

But when we get to the remedy by specific performance we get into an entirely different region of law. The extraordinary remedy by specific performance is always more or less open to discretion, and I am not aware of any case in which, unless the condition has been extremely clear, a court of equity has ever forced a purchaser to take a title which is obviously bad and which will expose the purchaser if he does take it to an immediate lawsuit against which he will have no defence. That is what we are asked to do under the stringency of this condition. Mr. Farwell referred us to several cases which I have looked at, and among them is *Hume* v. *Bentley*, *Duke* v. *Barnett* and *Cattell* v. *Corrall*, but on looking at them I am not satisfied that in any one, the court thought the title which it did force the purchaser to take would be a bad title in the sense in which this title is bad. When you say a title is bad, the expression is ambiguous, and must be contrasted with what is called a good title. I understand a good title to be one which an unwilling purchaser can be compelled to take. Contrasted with that, any title which an unwilling purchaser cannot be forced to take is a bad one. But there are bad titles and bad titles. Bad titles which are good holding titles, although they may be open to objections which are not serious, are bad titles in a conveyancer's point of view, but good in a business man's point of view; but I do not know of any case in which a court of equity has decreed specific performance of and compelled the purchaser to pay his money for, nothing at all, when he shows the court that the title he is asked to have forced on him is bad in this sense, that he can be turned out of possession to-morrow. I do not say that a condition might not be made so clear and explicit as to remove the difficulty, but I am not aware of any case of the kind, and so far as those cases referred to by Mr. Farwell are concerned, I am convinced they are cases in which the title was bad in a technical conveyancing point of view, but not in a business point of view, and did not expose the purchaser to immediate eviction as it does here. When, therefore, we are asked to decree specific performance of this contract we are asked to do that which the court does not do as a matter of course; but the court has to consider whether it is right to adopt such a course. In a case like this it appears to me the true rule is, to leave the parties to their legal remedies. If they have a contract, let them fight it out at law. There are remedies open which we are all familiar with, but the vendor must not come and invoke the extraordinary jurisdiction of the Court of Chancery to do what would be a manifest injustice.

It, therefore, appears to me that Kekewich, J.'s view was right so far as he refused to grant specific performance, but wrong as to the return of the deposit. I confess such a result is not satisfactory. It arises from the double jurisdiction in courts of law and equity and the extraordinary jurisdiction which is exercised by courts of equity. We reverse the decision on the counter-claim without costs.

LOPES, L.J.—This is a suit for specific performance, and I need not say that having been brought up in the courts of common law I approach it with respectful diffidence, and I shall not venture to differ from the judgment that has already been delivered by Lindley, L.J., and the one which I know will be presently delivered by Rigby, L.J. But I should like to say this, that it does seem strange to me that, while we hold that there has been no breach of contract by the vendor, and the purchaser cannot therefore recover his deposit, yet, at the same time, we hold that the vendor is not entitled to have that contract specifically performed, but must have recourse to his remedy at law. It is said that specific performance is discretionary, and that a court of equity will not decree it where the title is obviously a bad title as distinguished from a doubtful or holding title. No doubt there is authority for that proposition. I bow to that authority and to the better judgment of my learned brothers, though it does seem to me to be most anomalous and unfortunate. I venture to think that there might be a condition so framed as to preclude a purchaser from objecting to an obviously bad title and specific performance of the contract granted; and I would add that, in the present case, if I had been left to my own unaided judgment, I should have thought the 6th condition was sufficiently stringent to cover even a bad title, an intermediate bad title, I mean, between the periods of time so specifically and carefully mentioned in that condition.

RIGBY, L.J.—In this case, after consideration of the conditions of sale, especially condition 6, I am unable to say there is not a contract binding at law, and as to the construction of which courts of equity must take the same view, of course, that a court of law would take. I think that is enough to show that in this case there can be no recovery of the sum which has been paid under the legal contract.

But when we come to the question of specific performance, I think it is a question which cannot be decided by any such process as saying that if there is a contract good in law a court of equity ought to apply its own remedy. From the very first time when specific performance was introduced it has been treated as a question of discretion whether it is better to interfere and give a remedy which the law knows nothing at all about, or to leave the parties to their rights in a court of law.

Now the foundation of the doctrine of specific performance was this: that land as a matter of right has quite a character of its own, and the real meaning between the parties was not that there should be a contract with legal remedies only, but that the purchaser should get the land, and he could not be put off in an ordinary case by offering him damages. That is the main part of the doctrine of specific performance, that the purchaser is actually to get the land; and if a case arises in which he cannot get the land in any substantial sense, it seems to me the doctrine of specific performance is not applicable. After all, the question to what extent a court of equity will go is very largely one of authority as to what has been done before; and if I found that there were cases in which, although the purchaser was not to get the land which he offered to buy, a something, a semblance of a title, was nevertheless forced on him, I should have to construe those cases very carefully, and see whether we are not bound by them. But so far as the authorities that have been cited to us are concerned, I do not think a single case has been cited in which a purchaser was bound to take a mere semblance of a title, or in which he did not practically get the land with such a title as the judge directing specific performance looked upon as a holding title—as a title, in all probability at any rate, which he could set up so as to enable him to retain the possession actually given him. I will not go through the cases in detail; but I find that some which appear at first sight to be rather startling; as, for instance, that in which an owner for life was entitled to force a title upon the purchaser of the fee, appears to go a long way; but when you examine that case you find that it was by no means certain that the vendor was not the owner in fee. The vendor claimed under a will of very considerable antiquity at the time. Under the will the vendor took certain properties for life and certain other properties in fee; but the descriptions in the will (I think it was about thirty years old) founded as they were upon occupation for a long time were such that no one could tell—the vendor could not tell, and I gather from the facts of the case no one else could tell—at that time which were the fee simple properties and which were the properties to which the vendor was entitled for life only. There was a very stringent condition that the purchaser should take, and, under those circumstances, it appearing reasonably plain that the purchaser would get a good holding title, specific performance was decreed. In the case of *Hume* v. *Bentley*, which was also cited by Mr. Farwell, there were leases granted by a canal company, and it was argued that the canal company had no right to make the leases. I consider there that the learned judge who decided that case says distinctly (5 De G. & Sm., p. 527) that the objections raised to the title were such as did not interfere with the safety of the purchaser. That that was the foundation of his decree for specific performance is I think pretty plain; and, without attempting to go through the other cases, I may say that I have not found a single case in which a court of equity has ever been so far led astray from the original doctrine as to say that in cases where the real intention was that the purchaser should get the land, he should be treated as though he were going to get the land, though we know he was not.

In the present case it is unquestionably plain, upon the evidence as it now stands, that Sarah Jane King, afterwards Sarah Jane Banks, could not make a title to this property, and that it would be a mere delusion to say to the purchaser, "You have got what you bargained for." He will not get it—that is certain—and he will not get, as far as I can see, a single sixpence in value out of it. Mrs. Banks would be entitled to a third, but she has mortgaged the whole for her own purposes, and her one-third would have to be subject to the whole of the mortgages in addition to the costs which would plainly swallow up the whole of her one-third. The court is asked to go through what would be the idle form of making over to the purchaser, property in which he will not take the slightest beneficial interest, but which, if he were imprudent enough to accept it, would involve him in litigation quite beyond any value he can possibly get. I do not think the original idea of specific performance covered such a case as this, and I am not aware of any authority in which the court, knowing that it cannot give the subject-matter of the contract in any substantial sense to the purchaser, has yet said, "We will give it when we know we cannot give it." I think it is quite enough that the parties should be left in such a case to their remedies at law, and I am persuaded that the judges who have recently gone into the question of specific performance have taken a similar view, and that there has been no alteration in this respect.

Solicitors, *C. Etherington; Rodgers & Co.*

High Court of Justice.

Chan. Div.
Chitty, J. } July 17, 25.

BROOK v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. (a.)

Lands Clauses Acts—Railway company—Notice to treat—Part of a building—"House"—"Manufactory"—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.

Where a railway company gives notice to treat for part of a building, another part of which building is used together with the adjacent land and premises for the purposes of a manufactory, the company is, in fact, requiring the sale of a part of the manufactory within the 92nd section of the Lands Clauses Act, and cannot resist a counter-notice calling upon the company to take the whole manufactory.

Motion.

The plaintiffs, who were waste and shoddy manufacturers, were the lessees of certain land and buildings and manufacturing premises at Nottingham numbered 1 to 8 on the plan produced.

Number 3 was a three-story brick building. The ground floor was divided into three portions by half-brick partition walls, and was underlet by the plaintiffs. The first and second floors were divided about the middle by a temporary wooden partition, the northern portion of which floors was occupied by a tenant at will of the plaintiffs and the southern portion by the plaintiffs for the purposes of their business.

In April, 1895, the defendants, requiring part of the plaintiffs' premises for their undertaking, gave notice under their Act of 1893, with which the Lands Clauses Act was incorporated, to treat for the part, which contained 224 square yards, something less than a quarter of the whole thereof, and included the said northern portion of number three.

The plaintiffs in the same month gave the defendants a counter notice requiring them to purchase the whole of their interest of and in the lands and premises shewn in the plan and numbered 1 to 8, and claimed £7,740 as the purchase-money and compensation.

The defendants refusing to accede to this claim the plaintiffs commenced this action asking for a declaration that the defendants were not entitled to take any part of the above premises without taking the whole or paying the purchase-money or compensation for the whole, and for an injunction to restrain the defendants from entering on the part comprised in the notice to treat.

It was agreed that the hearing of the motion should be taken as the trial of the action.

Whitehorne, Q.C., and *Edward Ford*, for the plaintiffs.—The land in question, upon a part of which number 3 stands, is part of the manufactory within section 92 of the Lands Clauses Act, and part at least of number 3 is in actual use for the purposes thereof. It is not necessary that every part of a manufactory should, at the time of the notice to treat, be in actual use. The counter notice is therefore good.

They referred to *Spackman* v. *Great Western Railway Co.*, 1 Jur. N. S. 790, 4 W. R. Ch. Dig. 83; *Grosvenor* v. *Hampstead Railway Co.*, 5 W. R. 812, 1 De G. & J. 446; *Richards* v. *Swansea Tramways Co.*, 26 W. R. 764, 9 Ch. D. 425; *Sparrow* v. *Oxford Railway Co.*, 2 D. M. & G. 94; *Furniss* v. *Midland Railway Co.*, L. R. 6 Eq. 473, 17 W. R. Ch. Dig. 145; *Harvie* v. *South Devon Railway Co.*, 23 W. R. 42, 202.

Farwell, Q.C., and *C. Macnaghten*, for the defendants.—The property to be taken is let off, and is not used by the plaintiffs at all. What the company requires is, therefore, no part of the manufactory. At most it is part of a "building" within the section.

They referred to *Loosemore* v. *Tiverton Railway Co.*, 30 W. R. 628, 31 *ib.* 130, 32 *ib.* 929, 22 Ch. D. 25, 9 App. Cas. 480.

Whitehorne replied.

CHITTY, J.—The plaintiffs claim an injunction founded on the rights which they assert are vested in them under the 92nd section of the Lands Clauses Consolidation Act, 1845.

The railway company have given notice to take a part of a property. The plaintiffs have given them a counter-notice to take the whole of the property, and they must stand or fall by their counter-notice. The defendants say the counter-notice is bad because it requires them to take more than they are bound to take under the 92nd section.

The plaintiff's case is that the defendants require part of a manufactory, and they assert that they are entitled, by virtue of their counter-notice and the section, to require the defendants take the whole of the manufactory. It is not necessary that I should give a detailed description of all the different parts of the property. I will deal at once with the part numbered 3 on the plan. Now number 3 may be taken to be and looked upon structurally as one house. The ground floor is in the occupation of two tenants of the plaintiffs. It is divided by an internal wall only. Passing to the first and second floors, the southern portion is occupied by the plaintiffs as part of their manufactory. The northern part of those floors is occupied by a tenant at will of the plaintiffs, and these two floors are divided by rough wooden partitions so as to mark off the part occupied by the plaintiffs and the part occupied by the tenant, and in the wooden partitions there is a door of communication. The rough partitions, and the wall on the ground floor can be readily removed in the course of a few hours.

The defendants, by their notice to treat, propose to take the northern portion of number 3, no part of which portion is used by the plaintiffs as part of their manufactory. It is plain that if the plaintiffs had given a counter-notice requiring the defendants to take the whole of number 3, such counter-notice would have been good, because the defendants in that case would be proposing to take a part of a house. But the defendants say that they do not require to take part of a manufactory, because they only require part of the house in which the manufacture is carried on, that part which they require being a part of the house in which the manufacture is not carried on.

Now to ascertain what is a manufactory, regard must be had, and perhaps principally, to the user at the time of the notice to treat. It would not be necessary that every part of what would be reasonably called a manufactory should actually be in use at the time for the purpose of manufacture—e.g., there might be a large manufactory, and some part of it, say a large room, might not be required for the purpose of the business, still, it being all within the walls, although not then in use for the purpose of the business, in my opinion that would make no difference as to that part being part of the manufactory. I say this to guard myself against appearing

(a.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

to overstrain the question of user. Practically it must be used as a manufactory.

Now are the defendants right in their contention? I agree that all Acts of Parliament must be construed fairly and according to the intention of the Legislature as shown in the Act itself. Hall, V.C., in *Richards* v. *The Swansea Tramways Co.*, says, "As was said by Lord Westbury, who, to use his own expression, was favourable to companies rather than to the individual, 'you must construe it, that is the 92nd section, in a liberal sense.' I, construing it in a liberal sense, hold that all the premises have something to do with and fairly constitute part of the manufactory within the terms of the Act," 9 Ch. D., at p. 429. Cotton, L.J., on the appeal, said, "Although I do not at all think that we ought to construe this liberally, to favour the landowner, yet we ought to construe it reasonably and fairly, having regard of course to previous decisions, and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners, to persons whose property was taken away from them against their will, so that no person should be required to sell a fraction only of that which ought to be regarded as a unit, when he might be very materially prejudiced by having left on his hands certain fractions only of that unit, not capable of being used efficiently when one fraction had been taken away from it. What we have to do is to construe the section fairly," 9 Ch. D., at pp. 437-8. Endeavouring to construe the section fairly I come to the conclusion on this point that the counter-notice is good. I think that Mr. Farwell's argument is ingenious and refined, but in my opinion when a railway company proposes to take part of a building, another part of which building is used as a manufactory, they are in substance claiming to take part of the manufactory within the fair meaning of the 92nd section; and I do not think it reasonable to adopt Mr. Farwell's refined construction.

It is not necessary for me to travel through all the authorities. It is quite plain that the southern portion of number 3 is used and was used at the time of the notice to treat as part of the manufactory, and I hold that the other portions of the property are part of the manufactory.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Lee, Ockerby, & Everington*, for *J. & A. Bright*, Nottingham.

Solicitors for the defendants, *Cunliffes & Davenport*, for *Lingard Monk*, Birmingham.

Chan. Div. North, J. } May 30, 31.

In re DEBENHAM & WALKER. (*a.*)

Solicitor—Costs—Taxation on solicitor's application—Money due from client—Enforcing payment.

A solicitor who has obtained in the Chancery Division the common order to tax his bill of costs cannot, on a summons, get payment of the amount found due from his client, but must bring an action for the purpose.

Summons.

Messrs. Debenham & Walker, solicitors, had obtained in the Chancery Division the common order to tax their bill of costs delivered to their client. This order does not contain a direction that the client should pay the amount (if any) found due from the client to the solicitors, but does contain a direction that the taxing-master should certify the amount (if any) due from the client [see form 4 in vol. 1 of Seton on Judgments, p. 132].

The taxing-master, by his certificate, found that a sum of £72 was due from the client to the solicitors.

This was an application by the solicitors that the client might be ordered to pay within four days the amount found due by the certificate.

Mulligan, for the applicants.—It is not necessary to bring an action to recover this amount. Before 1883 the common form of order in the Chancery Division, on a solicitor's application, contained a direction for the payment of the amount found due by the party from whom, to the party to whom, the same shall be certified to be due (Daniell's Chancery Forms, 1879 edition, p. 1,136, Seton, edition 1877, p. 606). Since that date such direction has been omitted, see *In re Harcourt*, 32 SOLICITORS' JOURNAL 92, but that does not prevent the solicitor applying by summons. No doubt the order in this case was in the right form, but it does not imply that the solicitor has to bring an action; but leaves the solicitor in the same position as if the taxation had been on the same footing as in the Queen's Bench Division, where, after the allocation, either party may obtain a judge's order for payment of the amount found due from the other: Chitty's Archbold Practice, 14 Ed. 159. Every order which is not final implies liberty to apply: *Fritz* v. *Hobson*, 28 W. R. 459, 722, 14 Ch. D. 542.

Methold, for the client, was not called upon.

NORTH, J.—In my opinion this application is misconceived. When a client applies to tax his solicitor's bill of costs, the petition contains an undertaking by him to pay what is found due from him to the solicitor upon the taxation, and the order proceeds upon that undertaking, and so the court has jurisdiction over him, and can enforce payment. In the case, however, of a solicitor applying for taxation, there is no such undertaking by the client, and no order can be made for payment by the client, because there being no undertaking by him, the court has no jurisdiction over him. Under the former practice the order made upon a solicitor's petition directed the master to ascertain what was due from the client, and that upon payment the solicitor should hand over all deeds and documents in his possession; but there was no direction for payment. There seems for a short time to have been forms in use containing such a direction, but that has been altered since 1883. In *In re Harcourt* the order which had been made on a solicitor's petition did not provide for payment by the client, and the client applied that it might be altered so as to contain such a direction probably in order to gain time. Stirling, J., declined to accede to the application, because the order as drawn up was right. No case has been cited in support of this summons, and actions by solicitors on bills of costs are common in the other division of the court, especially since the introduction of order 14. In such cases the right order was settled by the Court of Appeal in *Smith* v. *Edwardes*, 37 W. R. 112, 22 Q. B. D. 10. If the same object could be obtained by summary proceedings in the Chancery Division, in which the client would have no opportunity to set up any defence he might have to the bill of costs, no such actions would ever have been brought.

Solicitors, *Debenham & Walker; Vizard & Nicholson.*

(*a.*) Reported by R. SILLEM, Esq., Barrister-at-Law.

Q. B. Div.
(Lord Russell of Killowen, C.J.,) May 22; Aug. 3.

ATTORNEY-GENERAL v. LORD SUDELEY AND OTHERS. (a.)

Inland revenue—Probate duty—Personal estate invested in mortgage securities abroad.

When a testator, domiciled in England at the time of his death and possessing as part of his personal estate mortgage securities on lands abroad, bequeaths his residuary estate upon trust as to part of it for his wife, and she dies while the estate is being administered, and bequeaths her personal estate to trustees for sale and conversion, that portion of such estate as consists of the mortgage securities abroad remains a foreign asset, and is not subject to probate duty under the Customs and Inland Revenue Act, 1881.

Information by the Attorney-General.

The facts of the case as set out in the judgment of the court were as follows:

This information sought to charge the executors of Frances Louisa Tollemache with duty upon certain property in New Zealand, which had been bequeathed to her as part of the residuary estate of Algernon Gray Tollemache, her husband.

He died on the 16th of January, 1892, domiciled in England, and at the time of his death he possessed a large personal estate, including sums amounting to upwards of £400,000 invested in mortgages of real estate in New Zealand.

By his will dated the 31st of January, 1874, after bequeathing various specific legacies to his wife, Frances Louisa Tollemache, and to others, he devised and bequeathed the residue of his real and personal estate to trustees upon trust to distribute it as provided in the will and in six codicils thereto subsequently executed, and at the time of his death his wife became absolutely entitled, by virtue of these testamentary dispositions, to one-fourth of the residue.

The executors and trustees of A. G. Tollemache proceeded to administer his personal estate, and paid probate duty upon it, excluding therefrom the personal property in New Zealand.

Before the residue had been distributed, and whilst the estate was in course of being administered, Frances L. Tollemache died, leaving the defendants to this information her executors and bequeathing to them her personal estate upon trust for sale and conversion.

The defendants proved her will in May, 1893. They included as part of her estate the fourth share of the residue of A. G. Tollemache's estate, exclusive of the New Zealand mortgages, which they claimed to leave entirely out of account.

The estimated value of Mrs. Tollemache's fourth of the New Zealand property was upwards of £111,000, and it was upon this sum that the Crown now sought to recover duty.

The information prayed that it be declared that the sum of £111,850 15s. 7d. (being one-fourth of £447,403 2s. 5d., the value of the said mortgage securities in New Zealand forming part of the personal estate of A. G. Tollemache) ought to have been included in the value for the purposes of probate duty of the personal estate of Frances L. Tollemache, and that such sum was liable to duty under the Customs and Inland Revenue Act, 1881, as part of the estate and effects of the said Frances L. Tollemache in respect of which probate of her will was granted to the defendants, and that the defendants be ordered to pay the amount of such duty.

Sir R. Reid, Q.C., A.G., and *Vaughan Hawkins*, for the Inland Revenue.

Channell, Q.C., and *Bremner*, for the defendants.

The arguments of counsel sufficiently appear in the following written judgment.

Cur. adv. vult.

August 3.—Lord RUSSELL, C.J., read the judgment of the court. After stating the facts of the case as set out as above, the learned judge proceeded:—Whilst admitting that the executors of A. G. Tollemache had rightly excluded the New Zealand property from their return, it was contended that the share of Frances L. Tollemache (including the money invested in New Zealand mortgages) was an "asset" of her estate recoverable by her executors in England *virtute officii*, and that they ought, therefore, to take probate of that asset here and pay duty on the full value thereof, notwithstanding that some of the assets of A. G. Tollemache (those already mentioned) were not locally situate in this country.

The claim of the Crown was mainly rested upon the authority of the case of *In the Goods of Ewing*, 29 W. R. 474, 6 P. D., 19. There William Ewing died possessed of property of small value in England and entitled under the will of John Orr Ewing to large assets in Scotland, which were being duly administered in that country by his executors, who had availed themselves of the provisions of 21 & 22 Vict., c. 56, which enabled the executors of a domiciled Scotchman to include in the inventory of his effects all his property, wherever situate in the United Kingdom. The will of William Ewing was proved in Scotland only. A legatee under the will having applied in England for a grant of administration of William Ewing's estate in England, the court declined to accede to the application, on the ground that the grant was unnecessary, it not having been shown that the executors were not doing their duty. It will thus be seen that in expressing the opinion presently mentioned, the President (Sir James Hannen) was not pronouncing judgment on a point which it was necessary to decide. He says:—"The main ground on which this application has been based is that the claim of the estate of William Ewing on the estate of his uncle, John Orr Ewing, is an asset of W. Ewing's estate in England by reason of some of the assets of the uncle's estate having been in England at the time of the death of W. Ewing, and, therefore, that the executors of W. Ewing's will ought to take probate in respect of these assets here. It is not disputed that the deceased John Orr Ewing was a domiciled Scotchman, and that his will was properly proved in Scotland and is being administered there in accordance with Scotch law. The claim of the executors of William Ewing in respect of the interest of their testator under his uncle's will is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to William Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing *virtute officii*, but it appears to me that it is an asset in Scotland and not in England. . . . I am not aware that the point has been the subject of judicial determination, but all analogies seem to lead to the

(a.) Reported by T. MATHEW, Esq., Barrister-at-Law.

conclusion that Scotland is the local situation of this asset of W. Ewing. Thus the share of a deceased partner in a partnership asset is situate where the business is carried on (Hanson on Probate Acts, p. 161), and shares in a company are locally situate where the head office is: *Attorney-General* v. *Higgins*, 2 H. & N. 339, 5 W. R. Dig. 227. And the fact that some of the assets of John Orr Ewing are situate in England does not appear to make any difference. If I were to constitute the applicant administrator with the will annexed of W. Ewing he could not in that character take possession of or recover the outstanding assets of the uncle's estate, he could not claim those assets themselves, *virtute officii*, his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered."

Now, applying these *dicta* to the present case, it was, on the part of the Crown, submitted that they established the proposition contended for by the Crown. Algernon Gray Tollemache's executors were, it is said, in the same position towards Frances Louisa Tollemache's executors as was occupied by John Orr Ewing's executors towards William Ewing's executors, and just as *In the goods of Ewing* William Ewing's executors' asset was the right to sue for his legacy in Scotland, so here the asset of Frances L. Tollemache's executors was the right to sue the executors of Algernon G. Tollemache in England. With great respect for any *dicta* of that very learned judge, Sir James Hannen, we cannot accept this as a correct statement of the law. Moreover, that case differs in one material particular from the present. In *Ewing's case* the executors of William Ewing could not only have sued the executors of John Orr Ewing for his share, but could have recovered it without any further probate (21 & 22 Vict. c. 56). In the present case, it is true that the executors of Frances Louisa Tollemache could claim an account in an action here against the executors of Algernon Gray Tollemache, but they could not recover her share of the New Zealand estate without recourse being had on their behalf by the executors of Algernon Gray Tollemache to the courts of New Zealand to clothe themselves with the legal title to the residuary estate, which it was their duty to distribute. The New Zealand estate remained a foreign asset in the hands of the executors of Algernon Gray Tollemache, as trustees for the executors of Frances L. Tollemache as to her share in it, and at the time of her death it was not within the jurisdiction of the English Court. Her executors could not have recovered it here *virtute officii*, it was no portion of her estate in England, and the general rule of law appears to us to be applicable by which the amount of probate duty is to be regulated, not by the value of the assets which an executor or administrator may lawfully administer by virtue of the will or letters of administration, but by the value of such part as is in the death of the deceased within the jurisdiction of the court by which the probate is granted ("Williams on Executors," 9th ed., vol. I., p. 542). The reason of the rule is that probate duty only attaches on assets within the jurisdiction of the Ordinary at the time of the testator's death, which he would forthwith have had himself to administer in case of intestacy, and which must, therefore, be so situated that he would have disposed of them *in pios usus* ("Williams on Executors"). Thus it has been held that no estate duty is payable upon the produce of the sale of French Rentes standing in the testator's name at the time of his death, although afterwards brought into England and received by the executor: *Attorney-General* v. *Dimond*, 1 Cr. & J. 356.

It was pointed out in the judgment of the Court of Exchequer in that case that probate could not have been granted in respect of these Rentes, because at the time of the death of the testator they were in a foreign country, and consequently out of the jurisdiction of the Spiritual Court, and the distinction was drawn between the liability to probate duty and to legacy duty; and it was pointed out that it is not the administration of assets which renders probate duty payable, but the local situation of the assets at the testator's death. In *Attorney-General* v. *Hope*, 2 Cl. & F. 84, the same principle was applied to United States stocks, the Lord Chancellor stating in the course of his judgment that he had made enquiries "of very learned parties, two very competent authorities—one the learned judge of the Prerogative Court, and the other the King's Advocate"—and that they both confirmed the view he took of the ordinary's office, a view which limited the ordinary's jurisdiction to goods of a deceased person within the diocese at the time of his death. Facts similar to those in the present case, raising the same or similar points, must have been of frequent occurrence; the absence of any authority, except the *dictum* referred to, tells strongly against the present contention of the Crown, for there is no ground for saying that duty had been usually paid here in such circumstances as the present.

We are, therefore, of opinion that the share of Frances L. Tollemache in the mortgage securities in New Zealand is not an asset of her estate in England, and that her executors are not compellable to take probate in respect thereof. They have, it may be observed, already paid administration duty on the estimated value of the share in the colony, where it is locally situate. The mere right to sue the executors of A. G. Tollemache in this country for an account and for payment of the share does not, in our judgment, alter the character of the asset. It remains a foreign asset, of which the executors could not possess themselves without the intervention of the Colonial Court.

Our judgment, for these reasons, is for the defendants, with costs.

Solicitors, *Solicitor of Inland Revenue; J. A. Bertram.*

Q. B. Div. (Lord Russell of Killowen, C.J., and Charles, J.) — May 21, 22; July 31.

ATTORNEY-GENERAL *v.* WENDT. (*a.*)

Inland revenue—Account duty—Voluntary settlement—Articles of partnership—Annuity payable out of gross profits—Property within meaning of section 38, *sub-section* 2 (c) *of the Customs and Inland Revenue Act,* 1881 (44 *Vict. c.* 12), *and section* 11 *of Customs and Inland Revenue Act,* 1889 (52 *Vict. c.* 7).

Where by articles of a partnership deed it is declared that, on the death of one of the partners, his share shall be sold to the surviving partner subject to an annuity payable to the widow of the deceased partner out of the gross profits of the business, such annuity is property passing under a voluntary settlement, and is part of the deceased partner's personal estate within section 38, *sub-section* 2 (c) *of the Customs and Inland Revenue Act,* 1881, *and section* 11 *of the Act of* 1889, *and account duty is payable in respect of such annuity.*

Information by the Attorney-General.

(*a.*) Reported by T. MATHEW, Esq., Barrister-at-Law.

The facts of the case, as set out in the judgment, were as follows:—"By a partnership deed dated the 24th of June, 1886, Ernest Emil Wendt and William Arnold covenanted to enter into a partnership during their joint lives. The capital was to be £2,000, contributed as follows, £1,250, brought in by Wendt, and £750 brought in by Arnold. The net profits were to be divided during the first five years in the proportion of seven-tenths to Wendt and three-tenths to Arnold, and afterwards in the proportions of three-fifths and two-fifths respectively. Power was given in article 29 of the deed, to Wendt to nominate his son to succeed to a proportion of his share, not exceeding one-half, and in case of such nomination it was provided that after the death of Wendt, Arnold and the son should each be entitled to a half share during their joint lives.

Article 30 provided for the contingency (which occurred) of the son not being nominated, and authorized the executors or administrators of Wendt, in certain events which have since happened, to sell his share to Arnold "subject to the annuity hereinafter mentioned, such annuity being payable out of the gross profits of the business."

Article 34 provided that "upon the death of E. E. Wendt, W. Arnold, before he shall be entitled to divide and receive any share in the profits consequent upon such decease, shall execute and deliver to the executors or administrators of E. E. Wendt a bond in a sufficient penalty to pay the wife of E. E. Wendt out of the profits of the business a clear annuity of £700; and the same shall be paid and borne by and out of profits alone, and before any division of profits, provided always that if the profits to be divided in any year shall be less than £2,800, the annuity shall abate proportionately—that is to say, for every £100 of divisible profits the annuity shall abate £20."

Ernest Emil Wendt died on the 30th of November, 1892, and W. Arnold had since bought E. E. Wendt's share in the business, and was still carrying the business on.

The defendant, the widow, had from time to time received the annuity mentioned in article 34 out of the profits, and a bond had been executed by W. Arnold to secure its payment."

The information prayed that the said annuity might be declared to be personal or movable property within the meaning of section 38, sub-section 2 (*c*) of the Customs and Inland Revenue Act, 1881, and section 11 of the Customs and Inland Revenue Act, 1889, an account whereof ought to have been delivered by the defendant, pursuant to section 39 of the said Act, and that account duty was payable by the defendant on such property.

Sir R. Reid, Q.C., A.G., and *Vaughan Hawkins*, for the Crown.—The annuity here was an annuity passing by a "past voluntary settlement" under a partnership deed. The Crown is entitled to an account: *Attorney-General* v. *Gosling*, 40 W. R. 366, [1892] 1 Q. B. 545; *In re Thorley, Thorley* v. *Massam*, 39 W. R. 565, [1891] 2 Ch. 613.

Robson, Q.C., and *E. Ford*, for the defendant.—The word "property" in section 38 of the Act of 1881 cannot include profits made after death. It is submitted that this annuity is not "property" for the purposes contemplated by section 38; if it is "property" it does not pass by a "voluntary settlement"; and the Act of 1889 does not apply to this case: *The Empress Engineering Co.* 29 W. R. 342, 16 Ch. D. 125, see p. 129.

Counsel referred to section 2, sub-section 1 (*c*) and (*d*) of the Finance Act, 1894, 57 & 58 Vict. c. 30.

Sir R. Reid, Q.C., A.G., in reply, cited *Attorney-General* v. *Chapman*, 40 W. R. 79, [1891] 2 Q. B. 532.

Cur. adv. vult.

July 31.—Lord RUSSELL, C.J., read the following judgment of the court. After stating the facts of the case as set out above, the learned judge proceeded:—In this case the Commissioners of Inland Revenue seek to charge the defendant, the widow of Ernest Emil Wendt, deceased, with account duty under the Customs and Inland Revenue Act, 1881, s. 38, sub-section 2 (*c*), and the Customs and Inland Revenue Act, 1889, s. 11, in respect of an annuity of £700 payable to her on the death of Ernest Emil Wendt under a deed of partnership between him and William Arnold, dated the 24th of June 1886.

Section 38, sub-section 2 (*c*), of the Act of 1881 (44 Vict. c. 12) enacts that personal and movable property liable to account duty shall be (amongst other property) "any property passing under any past or future voluntary settlement made by any person dying on or after the 1st of June, 1881, by any deed or other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right, by the exercise of any power to restore to himself or to reclaim the absolute interest in such property."

Section 11 of the Act of 1889 (52 Vict. c. 7) enacts that sub-section 2 of section 38 of the Act of 1881 should be amended as follows: "The description of property marked (*c*) shall be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of the sale thereof."

The first question to be determined is whether this annuity was given out of the estate of the testator. It was said that it was not, because it was payable out of the profits made after Wendt's death by Arnold in a business he was not bound in any way to carry on. We cannot assent to this view of the case. We think the annuity out of the profits of the business was, beyond all question, a part of Wendt's personal estate of which he could dispose. He might, had he thought fit, have left his share in the business to trustees upon trust to pay the profits to his widow during her life. A gift of that kind would have been perfectly legitimate, and if he had made it he would in fact have been dealing with the subsequent profits of the business for her benefit. But if he could give the subsequent profits to her, it follows that he could give her a part of those profits in the form of an annuity payable out of them. These profits and the annuity payable out of them were in truth the fruits of his interest in the business which had belonged to him. In *Thorley* v. *Massam*, 39 W. R. 565, [1891] 2 Ch. 627, Kay, L.J., in dealing with a similar question, points out the undoubted power of a testator to dispose in favour of a legatee of the subsequent profits of a business, and that an annuity payable thereout is only a part of those profits. He puts the illustration of a testator owning an orchard of fruit trees: "Suppose he had said that he gave all the fruit of those trees for ten years after his death to A. He could have done that. The fruit would not have been existing in his lifetime

but nevertheless he would have had power to dispose of it, and in that sense it would have been his, because it would have been the fruit of his estate: that which at the time of his death he could dispose of, giving a limited interest in it."

Assuming then that this annuity was given out of the testator's estate, the next question is whether it was property passing under a voluntary settlement made by deed not taking effect as a will whereby a life interest in such property or an interest for any other period determinable by reference to death is reserved either expressly or by implication to the settlor (44 Vict. c. 12, s. 38, sub-section 2 (c)).

Now, as we have said, we regard this annuity as part of the testator's personal estate. It was, therefore, his "property"—a right to receive £700 per annum from the profits of the business. By the partnership deed, this, in our judgment, "passed" to the wife as soon as she became a widow. W. Arnold could have been compelled by the executors of E. E. Vendt to pay it. That she was a volunteer is clear, and by the Act of 1889 the settlement is none the less voluntary though it be contained in a deed made for valuable consideration between the settlor and any other person.

We adopt the observations of the court in *Attorney-General* v. *Chapman*, 40 W. R. 79, [1891] 2 Q. B. 32, as to the meaning of the words "passed under" this Act of Parliament. It is not a phrase of art such as "devise," "grant," "estate in fee," and the like, but a phrase of a comprehensive nature which may be fairly used in respect not only of dispositions which are effected by the words of the instrument creating them, but of those which are effected by the subsequent execution of a power created by the instrument in question."

The annuity, therefore, was "property" and property which "passed" under a voluntary settlement; and the only remaining question is whether the settlor had reserved an interest in it, within the meaning of section 38, sub-section 2 (c), of the Act of 1881. We are of opinion that he did so. He reserved his sole interest in the business and the profits thereof, including this annuity, over which, as over the other profits arising from his interest in the business, he had during his lifetime entire control. It was further suggested that as the deceased was only entitled to three-fifths of the profits, the duty, if payable at all, was only payable on three-fifths of the annuity. But this contention seems to us to be untenable. The testator controlled the whole £700 per annum, and what the exact proportion of profit received by him as compared with his co-partner is, we think, wholly immaterial.

The conclusion, therefore, at which we arrive is that the Crown is entitled to the judgment of the Court.

Solicitors, *Solicitor of Inland Revenue*; *Stokes, Saunders, & Stokes.*

Prob. Div. & Adm. Div. Admiralty. } Jan. 16.

"THE NAUTIK." (*a*.)

Admiralty—Jurisdiction—Action in rem—*Service of writ* in rem—*Removal of foreign vessel beyond the territorial jurisdiction before service of warrant—Judgment by default—Rules of the Supreme Court, ord.* 11, *r.* 3; *ord.* 13, *rr.* 12, 13.

A plaintiff instituted an action in rem *against a foreign vessel, and, on negotiations taking place between him and the underwriters of the vessel with regard to putting in bail to answer his claim in the action, such underwriters informed him that they were willing to give an undertaking that the vessel should not leave the jurisdiction without twenty-four hours' notice being given to the plaintiff. Subsequently, after service of the writ of summons in the action, the underwriters gave notice to the plaintiff that they withdrew their undertaking, and the marshal, though instructed to arrest the vessel, was unable to do so in consequence of her having left the territorial jurisdiction of the court. No appearance having been entered, and the time usual in default cases having elapsed from the service of the writ, the action came on for hearing.*

Held, that the court had jurisdiction to pronounce for the plaintiff's claim.

This was an action *in rem*, instituted on behalf of Messrs. Knowles & Foster, the consignees of cargo lately laden on board the Norwegian vessel *Nautik*, against that vessel.

The writ of summons in the action had been served on the 17th of August, 1894, and the time usual in default cases having long since elapsed, the action now came on for hearing before the judge in court—Mr. Justice Bruce.

It appeared from an affidavit filed in support of the plaintiffs' claim that on negotiations taking place between the solicitor for the plaintiffs and the underwriters of the vessel proceeded against, with respect to the plaintiffs' claim and the putting in of bail to the action, the solicitors for such underwriters had, on the 15th of August, 1894, written to the plaintiffs' solicitor stating that the underwriters were willing to give an undertaking that the vessel should not leave Liverpool, the port where she then was, without twenty-four hours notice to be given to the plaintiff; that on the 20th of August the underwriters' solicitors had written that this undertaking could not be carried out, and that the marshal, on subsequently attempting to arrest the vessel was unable to do so, the master having sailed away from Liverpool and beyond the territorial jurisdiction of the court.

Aspinall, Q.C., for the plaintiffs.

The following cases and authorities were referred to:—*The Parlement Belge*, 28 W. R. 642, 5 P. D. 197; *The Lady Blessington*, 34 L. J. Adm. 73, 13 W. R. Adm. Dig. 24; Blackbook of the Admiralty, vol. 1, p. 348, 362; Williams & Bruce Adm. Practice, p. 243; and it was contended that, having regard to ord. 5, r. 7; ord. 11, r. 3; and ord. 13, rr. 11 and 12 of the Orders and Rules of the Supreme Court, the court had, in the circumstances of the case, jurisdiction to pronounce for the plaintiffs' claim, notwithstanding that the vessel proceeded against had never been under the arrest of the court.

Cur. adv. vult.

Jan. 16.—BRUCE, J.—In this case the plaintiffs seek to obtain judgment by default against *The Nautik*, a Norwegian vessel, in an action for damage to cargo. A writ *in rem* in the ordinary form was served on the 17th of August on the vessel whilst she was lying in the Princes Dock at Liverpool.

After the service of the writ, and before the barque was arrested, the master of the barque clandestinely sailed at night from the Port of Liverpool, and

Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

the barque has not since been within the jurisdiction.

The usual time having elapsed since the date of the service of the writ to entitle the plaintiffs to have the case heard, the question arises whether, the property not having been under the arrest of the court, the court has jurisdiction to pronounce judgment by default.

I am of opinion that it has. Service of a writ *in rem*, upon property within the jurisdiction of the court, is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit *in rem* was commonly commenced by a warrant arresting the property, just as, in still earlier practice, a suit *in personam* was commonly commenced by a warrant arresting the person.

But all that is necessary to found jurisdiction is to give formal notice to the persons interested that a claim is made against them or against their property in a court of competent jurisdiction, and that, if they do not appear to vindicate their rights, judgment may be given in their absence.

The rules of the supreme court for the first time directed that actions *in rem* should be commenced by writ, and I think the service of the writ on the property has the same effect, so far as notice to the persons interested is concerned, as service of a warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject matter of a suit, should be in the possession of the court, or under the arrest of the court. It is enough that it should, according to the words of Lord Chelmsford, in the case of *Castrique* v. *Imrie* (19 W. R. 1, L. R. 4 E. & I. 414), be within the lawful control of the State under the authority of which the court sits.

The same view is expressed by Jessel, M.R., in the *City of Mecca*, 6 P.D. 106, where that learned judge says: "An action for enforcing a maritime lien may, no doubt, be commenced without an actual arrest of the ship."

I therefore give judgment for the plaintiff's claim, with costs.

Solicitor for plaintiff, *J. R. Watkins*.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

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WITH

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FROM THE 24TH OF OCTOBER, 1894, TO THE 12TH OF AUGUST, 1895.

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1895.

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*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; Q.B.D., the Queen's Bench Division; BKCY., the Queen's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved; C.A. (Ir.), the Court of Appeal in Ireland; M.R. (Ir.), the Master of the Rolls in Ireland; V.C. (Ir.), the Vice-Chancellor of Ireland; Q.B.D. (Ir.), the Queen's Bench Division, Ireland; P.D. & AD.D. (Ir.), the Probate and Matrimonial Division, Ireland.

*** *This Digest contains a Tabular Index of the Names of all Cases Reported up to the end of August,* 1895, *as well in this Volume* (43) *of the* WEEKLY REPORTER, *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports will be found in the Tabular Index to the Names of Cases.*

ACCEPTANCE.—See SALE OF GOODS, 2.

ACCUMULATIONS.—See WILL, 1.

ADMINISTRATION:—

1. *Assets—Marshalling assets—Debts—Pecuniary legacy—Real estate charged with debts.*—A testator, after directing payment of his funeral and testamentary expenses and debts, gave a pecuniary legacy and devised the residue of his personalty and all his realty to his executors upon trust for realization and conversion. The general personal estate was insufficient to pay the legacy in full after payment of the funeral and testamentary expenses and debts, but there was a surplus arising from the proceeds of real estate.

Held, that the legatee was entitled to have the assets marshalled, so as to stand in the shoes of creditors against proceeds of real estate.

In re Stokes, Parsons v. *Miller*, 67 L. T. N. S. 223, 41 W. R. Dig. 3, followed.

In re Bate, Bate v. *Bate*, 43 Ch. D. 600, 38 W. R. Dig. 6, not followed.—*Salt, Re, Brothwood* v. *Keeling*, CH.D. CHITTY, J. 500.

2. *Assets—Marshalling—Will—Specific devise and bequest—Charge of debts on real estate—General direction for payment of debts—Stock specifically bequeathed, charged by testator in lifetime.*—Where the general personal estate of a testator not specifically bequeathed is not sufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance, and a general direction in the will that the testator's debts shall be paid after his

death, is not sufficient to throw any part of such burden on the specific devisees of real estate.

In re Bates, 43 Ch. D. 600, considered.—*Butler, Re, Le Bas* v. *Herbert*, CH.D. KEKEWICH, J. 190.

3. *Bankruptcy—Costs—"Testamentary expenses"—Payable in full—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125 (7).—The words "testamentary expenses" in section 125, sub-section (7) of the Bankruptcy Act, 1883, include the costs incurred by an executrix in connection with an action brought to administer the deceased's estate by creditors, and such costs are payable in full out of the estate.—*Chapman, Re, Clark, Ex parte*, BKCY.

4. *Contract—Option to purchase real estate—Option exercisable only after death of grantor of option—Intestacy—Conversion.*—The principles of *Lawes* v. *Bennett*, 1 Cox 167, applies to the case of an intestacy, even though the option to purchase be exercisable only after the grantor's death.

I, owner in fee of a house demised to C. for the life of I., and covenanted that after I.'s death C. should have the option of purchasing for £750. I. afterwards died intestate, and C. thereupon elected to purchase.

Held, on above principle that, as between I.'s real and personal representatives, the exercise of the option had the effect of converting the property, and consequently that the personal representative was entitled to the £750.

Emuss v. *Smith*, 2 D. G. & Sm. 722, distinguished.—*Isaacs, Re, Isaacs* v. *Reginall*, CH.D. CHITTY, J.

5. *Domicile—Foreign domicile—Personal estate—Change in foreign law after death of deceased.*—In the administration of the personal estate of a person dying domiciled in a foreign country, the English court will apply the law of the place of domicile as it stood at the time of the death of the deceased; any subsequent change, though retrospective, which the legislature of the foreign country may make in that law, will not be regarded by the English court.

Lynch v. *Provisional Government of Paraguay*, L. R. 2 P. & D. 268, approved.—*Aganoors Trusts, Re*, CH.D. ROMER, J.

6. *Exoneration — Charge — Locke King's Acts* (17 & 18 *Vict. c.* 118—30 & 31 *Vict. c.* 69).—A contract to buy improved ground-rents from her lessee by a reversioner was carried out after her death.

Held, that the purchase-money was a charge, within Locke King's Acts, on the improved ground-rents so purchased.—*Kidd, Re, Brooman* v. *Withall*, CH.D. NORTH, J., 51.

7. *Probate suit—Costs—Payable out of personal estate only.*—The costs of a probate suit are not payable out of real estate, except under special circumstances.—*Shaw, Re, Bridges* v. *Shaw*, CH.D. KEKEWICH, J., 159.

8. *Insolvent estate—Married woman—Loan to husband for business purposes—Application of rules in bankruptcy—Costs of administration action—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3—*Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—Section 3 of the Married Women's Property Act, 1882, is a statutory rule postponing a wife's claim against her husband's estate in bankruptcy to the claims of his other creditors, and is, therefore, one of those rules as to debts provable which, by section 10 of the Judicature Act, 1875, has to be observed in administering the estates of deceased insolvents.

Section 10 of the Judicature Act, 1875, applies to the estate of a testator which, though solvent at the time of his death, is insolvent if the costs of an administration action are taken into account.—*Leng, Re, Tarn* v. *Emmerson*, C.A. 406.

See also BANKRUPTCY, 9, 10; CHARITY, 1; COUNTY COURT, 1; INLAND REVENUE, 1; PARTNERSHIP, 1, 2; PRACTICE, 9.

ADMIRALTY:—

1. *Practice—Consolidation of actions—Salvage—Agreement to tow for half an hour for a fixed sum.*—The master of the defendants' steamship, the engines of which had broken down, in the expectation of getting the engines to work again, signed an agreement with a passing steamer (the first salvors) to pay £500 for half an hour's towage. Just after the expiration of that time the hawser broke, killing the chief officer of the first salvors, injuring others, and doing damage. The first salvors thereupon declined to render further assistance, and the attempt to get the engines to work again failing, a mail steamer (the second salvors) which had in the meantime come up, towed the defendants' vessel to a place of safety. The first and second salvors commenced separate action for salvage, and the defendants applied to consolidate,

Held, that the court had jurisdiction in the exercise of its discretion to order consolidation on the ground of convenience and economy, without the consent of the plaintiffs.

Jacob Landstrom, The, 4 P. D. 191, 193, dissented from.—*Strathgarry, The*, P.D. & AD.D.

2. *Practice—Costs of appeal—Salvage action—Amount of salvage reduced on appeal.*—It is the general practice of the court, where the amount awarded for salvage service is reduced on appeal, not to allow any costs of the appeal. There is, however, no fixed rule upon the subject, and the court still has a discretion in any particular case to allow the costs of the appeal.—*Gipsy Queen, The*, C.A. 359.

3. *Practice — Damage — Jurisdiction —"Damage done by any ship"—Personal damage caused by fall down hatchway of ship within the body of a county not recoverable in admiralty—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7.—A seaman belonging to a vessel moored in the Regent's Canal, within the body of a county, whilst attempting to reach the quay by crossing the deck of *The T.*, a vessel moored alongside, fell down one of the hatchways of such last-mentioned vessel, and was injured.

At the time of the accident the hatchway was merely covered with a tarpaulin. The seaman, to recover for the injury he had sustained, instituted an action *in rem* against *The T.* Thereupon her owners entered an appearance under protest in the suit, and moved to set aside the writ of summons, on the ground of want of jurisdiction.

Held, that the motion must be granted, as the damage proceeded for in the suit was not "damage done by a ship" within the meaning of section 7 of the Admiralty Court Act, 1861.—*Theta, The*, P.D. & AD.D., 160.

4. *Practice—Damage—Tender—Assessment of damages less than the amount tendered—Refusal to pay out whole of tender to the plaintiff—Rules of the Supreme Court, ord.* 22, *rr.* 1-5; *ord.* 72, *r.* 3.—The rules of order 22 of the Rules of the Supreme Court with respect to payment into court have not altered the practice as to tenders by act in court in admiralty actions, except so far as they affect the manner of lodging the money in court: and, accordingly, where, in a damage suit, a sum tendered by act in court after admission of liability was not accepted, and the registrar reported that

a certain sum was due to the plaintiffs in respect of the damage proceeded for, the court, on it appearing that the sum so reported due was less than the sum tendered, refused to order the whole amount of the tender to be paid out to the plaintiffs.—*Mona, The*, P.D. & AD.D. 173.

5. *Practice—Damage—Tug and tow in collision with third vessel—Rule in Admiralty as to division of damage—No contribution amongst tort feasors.*—The common law doctrine of contributory negligence has no application in an admiralty action of damage, where the damage proceeded for arises out of a collision between ships.

Accordingly, where the owners of a ship damaged in a collision with a steam-tug—at the time of the collision towing a ship—proceeded in this court against both the tow and the tug, the latter of which counter-claimed against the plaintiffs, and it appeared that each of the three vessels was to blame for the collision, although the vessel towed was not in collision with the plaintiffs' vessel, the court condemned the owners of the steam-tug and the owners of the vessel towed in a moiety of the damage sustained by the plaintiffs' vessel, and the owners of the plaintiffs' vessel in a moiety of the damage sustained by the steam-tug.

The Avon and Thomas Joliffe, 39 W. R. 176, [1891] P. 7, followed.—*Englishman, The*, P.D. & AD.D. 62.

6. *Practice—Jurisdiction—Action* in rem—*Writ served but not warrant—Judgment by default—R.S.C.*, 1883, *ord.* 11, *r.* 3; *ord.* 13, *rr.* 12, 13.—A writ *in rem* for damage to cargo was duly served against a foreign vessel whilst within the jurisdiction, but before a warrant for arresting the vessel could be served, the vessel clandestinely sailed, and had since remained, beyond the jurisdiction. Upon motion for judgment by default,

Held, that the court had jurisdiction to pronounce judgment.—*Nautik, The*, P.D. & AD.D. 703.

7. *Practice—Jurisdiction—Necessaries supplied to foreign ship in foreign port—Action* in rem—*Admiralty Court Act*, 1840 (3 & 4 *Vict. c.* 65), *s.* 6—*Admiralty Court Act*, 1861 (24 & 25 *Vict. c.* 10), *s.* 5.—The Admiralty Division of the High Court has jurisdiction over a foreign ship, when in this country, for the price of necessaries supplied to her in a foreign port.

The India, 11 W. R. 536, overruled.—*Mecca, The, Cory* v. *Mecca* (*Owners of*), C.A. 209.

8. *Practice—Jurisdiction—Prohibition—Injunction Restraint of proceedings in inferior court.*—Salvage services were rendered by a Liverpool tug to a Spanish vessel of the value of £30,000, and a sum of £3,500 was awarded.

The mate of the tug brought an action in the Liverpool Court of Passage for apportionment of the salvage award.

On motion by the owners of the tug, who were plaintiffs in a salvage action in the High Court of Admiralty, to restrain the proceedings in the Court of Passage.

Held, that a judge of the Admiralty Division has power to grant a prohibition with reference to a matter pending before an inferior court, and that he has power to issue an injunction to a party proceeding in an inferior court to restrain him from going on with such proceedings.—*Hedley* v. *Bates*, 13 Ch. D. 498, followed.—*Teresa, The*, P.D. & AD.D.

9. *Practice—Limitation of liability—Sailing ship—Registered tonnage—Merchant Shipping Act*, 1862, *s.* 4; *and* 1894, *ss.* 79, 503—*Merchant Shipping Tonnage Act*, 1889, *s.* 3 (1), (*a*), (*b*).—In an action for limitation of liability the owner of a sailing ship, in calculating the registered tonnage upon which his statutory liability in damages under section 54 of the Merchant Shipping Act, 1862, is based, can deduct the navigation spaces mentioned in section 3, sub-section (*a*), (*b*), (1) (*ii*) of the Merchant Shipping Tonnage Act, 1889.—*Pilgrim, The*, P.D. & AD.D.

10. *Practice—Tortfeasors—Contribution—Right to assignment of judgment confined to cases where express or implied contract of indemnity in existence before satisfaction of judgment—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.—By the judgment in an action of damage *in rem* instituted on behalf of the owners of a steamship, against a barque, and a steamtug by which the barque was being towed at the time of the collision with the plaintiffs' steamship, all three vessels were found to blame, and the owners of the barque and the owners of the steamtug were condemned in a moiety of the plaintiffs' damages, and the owners of the steamship were condemned in a moiety of the damage sustained by the steamtug, the owners of that vessel having claimed such damages by way of counter-claim in the action.

After the reference in the action had been heard, the owners of the barque applied by way of summons in the action that the owners of the steamship might be ordered under section 5 of the Mercantile Law Amendment Act, 1856, on payment to them by the owners of the barque of the moiety of the damages done to the steamship, together with interest and certain costs due to them, but less the moiety of the steamtug's damages, to assign to the owners of the barque the judgment so satisfied by such payment.

Held, that the application must be dismissed, as the owners of the barque "were not liable for any debt or duty" within the meaning of the section; that the section pointed to the assignment of something in the nature of a security for a debt or duty for the performance of which an obligation existed prior to the judgment sought to be assigned, and that the provisions of the section were confined to cases of joint liability arising out of contract, and had no application to a case of tort, where the defendants, jointly liable, were, as against each other, under no liability to contribute.

Merryweather v. *Nixan*, 8 T. R. 146, examined.—*Englishman, The, and The Australia*, P.D. & AD.D. 670.

See also COUNTY COURT, 2-6; SHIP.

ADULTERATION:—

1. *Ginger—Ground ginger—Written warranty—Invoice and label—Sale of Food Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25.—A grocer had purchased "ground ginger" in canisters labelled "Warranted genuine pure ground ginger," and had received from his vendor an invoice, in which it was described as "ground ginger." The grocer retailed it, having no reason to believe it otherwise than genuine. It was in fact adulterated with 90 per cent. of exhaused or spent sugar.

Held, that neither invoice or label, together or separately, constituted a warranty within section 25 of the Sale of Food Act, 1875, so as to be available as a defence by the grocer to a prosecution under the Act.

To constitute a warranty within section 25 there must be some express representation in writing by the original vendor to the retailer constituting part of the contract to sell.—*Jiorns* v. *Van Tromp*, Q.B.D.

2. *Justices—Analyst's certificate—Evidence—Jurisdiction—Sale of Food Act*, 1875, *s.* 6.—Although strictly justices, on hearing a complaint under section 6 of the Sale of Food Act, 1875, should hear evidence in contradiction of the analyst's certificate, yet they are not bound to discard and may rely on, their own special knowledge of the article alleged to be adulterated.

Fraud is no element of an offence under section 6; but the justices in determining whether they should act under section 16 of the Summary Jurisdiction Act, 1879, can take into consideration the absence of fraud.—*Reg.* v. *Field, White, Ex parte*, Q.B.D.

3. *Margarine—Penalties—Application of in metropolis—Title of receiver of metropolitan police district—Metropolitan Police Courts Act*, 1839 (2 & 3 *Vict. c.* 71), *s.* 47—*Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 26—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 11, 12.—Section 26 of the Sale of Food and Drugs Act, 1875, which deals with the application of penalties recovered under the Act, is incorporated by section 12 of the Margarine Act, 1887, and the provisions, therefore, of section 26 of the former Act are applicable to the appropriation of penalties recovered under the Margarine Act.

Such penalties, in the case of official prosecutions in the metropolis before a metropolitan police magistrate, must be paid to the official who prosecutes, to be by him paid over to the authority for whom he acts, and not to the receiver of the metropolitan police district, under section 47 of the Metropolitan Police Courts Act, 1839.—*Reg.* v. *Titterton*, Q.B.D. 603.

4. *Margarine—Sale without proper label or wrapper—Prosecution—Analysis of the substance sold—Condition precedent—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 12-28—*Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 12.—It is a condition precedent to a prosecution under section 6 of the Margarine Act, 1887, for selling margarine without a sufficient label or wrapper that the procedure under the Sale of Food and Drugs Act, 1875, should be followed. Therefore, where an inspector purchased a sample of a substance which the shop assistant who sold it to him admitted to be margarine, and, relying on that admission, did not divide the article into three parts or submit any part of it for analysis, according to the provisions of the Sale of Food and Drugs Act, 1875,

Held, that the vendor of the article could not be convicted.—*Smart* v. *Watts*, Q.B.D. 379.

ADVERTISEMENT.—See LIBEL, 7.

ADVOWSON.—See ECCLESIASTICAL LAW, 1; SOLICITOR, 4.

AGENT.—See COMPANY, 6; FRAUDS, STATUTE OF, 2; MASTER AND SERVANT, 3, 4; MORTGAGE, 10; PRINCIPAL AND AGENT.

AGISTMENT.—See CONTRACT, 5.

AGRICULTURAL HOLDINGS ACT, 1883.—See ARBITRATION, 3; COUNTY COURT, 7; LANDLORD AND TENANT, 1.

AIR.—See EASEMENT, 1.

ANNUITY.—See INLAND REVENUE, 4, 10, 14; WILL, 4.

APPORTIONMENT ACT, 1870.—See BANKRUPTCY, 26.

APPROPRIATION of PAYMENT.—See BANKER, 1, 2.

ARBITRATION:—

1. *Agreement to refer to a named person—Probability of bias—Staying proceedings in an action—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49) *s.* 4.—The rule that a judge, magistrate, or other person holding a judicial office, must not be judge in his own cause, and must not act if there is any reason to suspect him of bias, does not apply in the case of a person who has been chosen by the parties as arbitrator.

When the parties to a contract have agreed that all disputes which may arise under the contract shall be referred to the servant of one party, the court will not refuse to stay an action in respect of such disputes upon the ground that such servant may be suspected of bias in favour of his employer, or may have to decide questions as to his own competency, skill, or care.—*Eckersley* v. *Mersey Docks Board*, C.A.

2. *Consent to refer—Two arbitrators chosen and named by both parties—Refusal of one arbitrator to act—No jurisdiction in court to appoint another.*—Parties to an action consented to refer all matters in dispute to the arbitration of A. and B., with power to call in an umpire. B. declined to act.

Held, that the court had no power under the Common Law Procedure (Ireland) Acts, ss. 15 and 16, to appoint an arbitrator in place of B.—*Yates* v. *Caruth*, C.A. (Ir.).

3. *Award—Agricultural holding—Claim for unexhausted improvement—Costs of award—No jurisdiction in umpire to award costs on solicitor and client scale of costs—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 20.—Section 20 of the Agricultural Holdings Act, 1883, does not authorize the umpire to order that the costs of the award should be paid on the scale of solicitor and client costs.—*Griffiths and Morris, Re*, Q.B.D. 652.

4. *Local government — Difference between local authorities—Arbitration of Local Government Board—Obligation to state case for opinion of the High Court—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11 (3)—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 19, 24.—Where, under the Local Government Act, 1888, the Local Government Board are required to determine a difference by arbitration, they must proceed under section 63 of that Act, and are not entitled to proceed by means of a local inquiry under section 87, which section only applies in cases where a difference is to be determined by the board otherwise than by arbitration.

In an arbitration held by the Local Government Board under section 63 of the Local Government Act, 1888, the board can be required to state a case for the opinion of the court under section 19 of the Arbitration Act, 1889.—*Kent County Council and Sandgate Board Arbitration, Re*, Q.B.D. 601.

5. *Partnership—Agreement—Action—Staying proceedings—Motion—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.—A. and B. in August, 1894, agreed by their articles of partnership to refer all disputes arising during or in the winding up of the partnership to two arbitrators or their umpire. The business, a small pottery business, turned out a failure, and, disputes having arisen, A., in January, 1895, brought an action to wind up the partnership.

On motion by the defendant B.:

Held, that the partners, having agreed that a dispute such as the present should be referred to arbitration, the court would not interfere; these-

fore there must be an order staying further proceedings in the action, and referring the matter to arbitration.—*Denton* v. *Legge*, CH.D. KEKEWICH, J.

6. *Stay of proceedings—Submission to arbitration—Summons for extension of time to deliver defence—"Step in the proceedings"—Arbitration Act*, 1889 (52 & 53 *Vict.* c. 49), *s.* 4.—The defendants in an action on a contract, which contained a general submission to arbitration of all disputes arising therefrom, took out a summons and obtained an order for an extension of time to deliver a defence. Before delivering a defence they applied to stay the proceedings in the action under section 4 of the Arbitration Act, 1889.

Held, that the defendant, by taking out a summons and obtaining an order for an extension of time, had taken a "step in the proceedings" within the meaning of section 4, and the court had no jurisdiction to make the order—*Bartlett* v. *Ford's Hotel Co.*, C.A. 453.

See also BUILDING SOCIETY, 1; CANADA, LAW OF, LANDS CLAUSES ACTS, 2; PRACTICE, 42.

ASSIGNMENT OF DEBT—See ADMIRALTY, 10; PRACTICE, 11.

ATTACHMENT.—See CONTEMPT, 1; HABEAS CORPUS; PRACTICE, 12-14, 41; SOLICITOR, 2.

ATTORNMENT.—See MORTGAGE, 1; SALE OF GOODS, 3.

BANKER:—

1. *Appropriation of payments—Following trust money—Marshalling—Lien.*—A stockbroker lodged to the credit of his own current account at his bank a sum of money which was afterwards identified as belonging to a client. The stockbroker died the day after the lodgment, and the bank thereupon appropriated the balance due to the deceased on his current account in part payment of a sum due by him to the bank upon a loan account. The bank also sold so much of certain shares of the deceased (which they held as security for any balance due to them on the loan account) as were sufficient to pay off the entire amount remaining due to them, and transferred into court the remainder of the shares.

Held, that the client of the deceased stockbroker was entitled as against the bank to follow the money identified as his own, and to stand in the place of the bank and have the benefit of the bank's lien on the securities lodged in court.—*McMahon* v. *Fetherstonhaugh*, V.C. (Ir.)

2. *Appropriation of payments—Trustee—Solicitor—Rule in Clayton's case.*—A solicitor paid money belonging to a client into his own banking account. From that time up to the solicitor's death the balance to the credit of the solicitor always exceed the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients' money which the solicitor had also subsequently paid in to his own account and had not withdrawn.

Held, that the rule in *Clayton's case*, 1 Mer. 572, applied and that the money of the first client must be taken to have been drawn out by the solicitor, and, therefore, did not form part of the balance standing to the credit of his account at the time of his death, and consequently that the first client was not entitled to claim payment out of that specific balance.

Hancock v. *Smith*, 37 W. R. 459, 41 Ch. D. 456, distinguished.—*Stenning, Re, Wood* v *Stenning*, CH.D., NORTH, J.

3. *Letter of credit—Bill of exchange—Negotiation of bills with bank—Knowledge of terms of letter of credit.*—A letter of credit was addressed by the defendants to K. & Co., merchants in Batavia, in which the defendants undertook to open in favour of K. & Co. a credit for £5,000, "to be availed of by drafts on us . . . against produce bought and paid for by you, but not immediately ready for shipment." Acting under the letter of credit, K. & Co. drew bills on the defendants, without having bought and paid for produce, and negotiated them with the plaintiffs, a firm of bankers. The plaintiffs were aware of the terms of the letter of credit. The defendants declined to accept the bills. In an action against the defendants for the amount of the bills,

Held, that the letter of credit must be construed according to its ordinary meaning, and that, no goods having been "bought and paid for" by K. & Co., the defendants were not liable.

Union Bank of Canada v. *Cole*, 47 L. J. C. P. 100, 26 W. R. Dig. 31, followed.—*Chartered Bank of India* v. *Macfadyen*, Q.B.D. 397.

See also BILL OF EXCHANGE, 3; PRACTICE, 29; PRINCIPAL AND SURETY, 1.

BANKRUPTCY:—

1. *Act of bankruptcy—Bill of lading—Indorsement to third party—Title of trustee in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *ss.* 43, 48 (1).—Plaintiff consigned to E. F. certain goods under a bill of lading. E. F. on receiving the bill of lading, and before he had taken physical possession of the goods, indorsed it to G. his clerk, and directed him to sell the goods and account for the proceeds to the plaintiff; he then executed a deed of assignment to G. for the benefit of his creditors, and was subsequently adjudged bankrupt.

Plaintiff and the trustee in bankruptcy, the defendant in the action, both claimed the proceeds of the sale, and an interpleader issue was directed. At the trial the jury found that the property in the goods had passed to F. J., and that he had acted as he had done because he believed the goods were the plaintiff's, and not because he wished to prefer the latter.

Held, that the transaction was not fraudulent and void within section 48 (1) of the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), because the jury negatived a fraudulent preference, but that the indorsement of the bill of lading to G. did not pass the property to G. as agent for the plaintiff or otherwise, and that the goods were still part of F. J.'s estate at the moment of executing the deed of assignment, and that, therefore, under section 43 the trustee in bankruptcy was entitled to recover the proceeds of the sale.—*Lauretzen* v. *Carr*, Q.B.D.

2. *Act of Bankruptcy—Computation of time—Part of a day—Possession by sheriff of debtor's goods for twenty-one days—Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 1.—In calculating the time by which, under section 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy, if execution against him has been levied by seizure of his goods under process in an action in any court and the goods have been either sold or held by the sheriff for twenty-one days—the day upon which seizure takes place is to be excluded.—*North, Re, Hasluck* v. *Foster, Ex parte*, C.A.

3. *Act of bankruptcy—Debtor "absenting himself"—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4 (1) (*d*).—In order to shew that a debtor has committed an act of bankruptcy within meaning of section 4 (*d*) of the Bankruptcy Act, 1883, it is not

necessary to show actual physical absence from a particular place.—*Alderson, Re, Jackson, Ex parte,* BKCY.

4. *Act of bankruptcy—Execution levied—Goods held by sheriff for twenty-one days—Computation of time—Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 1.—By section 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy "if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

Held, that in computing the period of twenty-one days, the day upon which the seizure is made is not to be included.—*North, Re, Parkinson, Ex parte,* C.A.

5. *Act of bankruptcy—Goods taken in execution—Possession by sheriff for twenty-one days and subsequent sale—Notice—Title of trustee in bankruptcy—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11 (2).—By section 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold, or held by the sheriff for twenty-one days.

Held, that where the sheriff has been in possession of the debtor's goods for more than twenty-one days, an available act of bankruptcy has been committed to the knowledge of the execution creditor, of which the sheriff has notice; so that, under section 45 of the Bankruptcy Act, 1883, the execution creditor is not entitled to retain the benefit of the execution as against the trustee in bankruptcy.

Figg v. *Moore Brothers,* [1894] 2 Q. B. 690, approved.

Ex parte Villars, In re Rogers, 22 W. R. 397, L. R. 9 Ch. App. 432, distinguished.—*Burns-Burns (Trustee of)* v. *Brown,* C.A. 195.

6. *Act of bankruptcy—Notice of intention to suspend payment—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*h*).—Circular by trader to his creditors held to be a notice of his intention to suspend payment within section 4 (*h*) of the Bankruptcy Act, 1883.

In re Lamb, Ex parte Gibson & Bolland, 4 Morr. 25, and *Crook* v. *Morley,* [1891] A. C. 316, 40 W. R. Dig. 15, followed.—*Waite, Re, Bentley Breweries, Ex parte,* BKCY. 208.

7. *Act of bankruptcy—Privity of petitioning creditor to deed of assignment by debtor for benefit of creditors.*—The debtor had executed a deed of composition providing for the payment of a composition by instalments, and that if he made default in payment he would, within ten days after demand by the trustee, execute a deed of assignment of all his property for the equal benefit of his creditors. The petitioning creditors assented to this deed. The debtor made default, and executed a deed of assignment not in accordance with the provisions of the deed of composition, from which the petitioning creditors dissented.

Held, that, although the deed of assignment was not in accordance with the deed of composition, and did not bind the petitioning creditors, yet that they were not entitled to rely upon it as an act of bankruptcy, because its execution had been demanded by the trustee of the composition deed as their agent, and they were therefore privy to it.—*Adamson, Re, Viney, Ex parte,* BKCY 192.

8. *Adjudication—Adjournment—Discretion—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 20, *sub-section* 1; *s.* 105, *sub-section* 2.—On an application under section 20 (1) of the Bankruptcy Act, 1883, to adjucate a debtor bankrupt, the registrar has a discretion, for sufficient reason, to adjourn the application under section 105.

Semble, the fact that an immediate adjudication would result in injustice to the creditors is a "sufficient reason" for adjournment.—*Thurlow, Re, Official Receiver, Ex parte,* C.A. 403.

9. *Administration of deceased's estate—Business of deceased carried on by executor—Consent of creditors—Indemnity of executor.*—The sole executrix of a testator, who was also his sole legatee, carried on his business for about six months after the testator's death. No authority to carry on the business was contained in the will, but the creditors of the testator assented to its being carried on by the executrix. An order was afterwards made by the court that the deceased's estate should be administered in bankruptcy.

Held, that the executrix was not entitled to an indemnity, on the ground that the business was carried on by her, not for the purpose of winding-up the estate, but for her own maintenance and benefit, and that there was no evidence of such a consent by the creditors of the testator as would make her their agent in carrying on the business.—*Millard, Re, Yates, Ex parte,* C.A.

10. *Administration of estate of deceased debtor—Presentation of petition before grant of letters of administration—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 125.—A petition for the administration in bankruptcy of the estate of a deceased debtor may be presented, under section 125 of the Bankruptcy Act, 1883, before there is a duly constituted legal personal representative of the deceased debtor.—*Sleet, Re, Sleet, Ex parte,* C.A.

11. *Amendment—Adding creditors after expiration of three months from date of act of bankruptcy alleged in petition—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-section* 1 (a), (c), *ss.* 105 (3), *s.* 107.—A petition cannot be amended by the addition of creditors after the expiration of three months from the act of bankruptcy alleged therein.—*Maund, Re, Maund, Ex parte,* BKCY. 207.

12. *Annulment of adjudication—Debtor's petition—Abuse of process of court—Bankruptcy Act,* 1849 (12 & 13 *Vict. c.* 106), *s.* 93—*Bankruptcy Act,* 1861 (24 & 25 *Vict. c.* 134), *s.* 86—*Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71)—*Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 5, 8 (1), 35 (1)—*Police Act,* 1890 (53 & 54 *Vict. c.* 45), *s.* 7 (1).—The presentation of a petition by a debtor for his own benefit is not an abuse of the process of the court, and he ought to be adjudicated bankrupt thereon.—*Painter, Re, Painter, Ex parte,* BKCY. 144.

13. *Annulment by consent of creditors—Purchase of debts by creditors—Secret agreement with one creditor—Validity.*—A bankrupt desiring to obtain annulment, induced some of his creditors to sell their debts to two trustees who would consent to the annulment. A creditor who had proved for £25,000 assigned this debt to the trustees in consideration of £2,000; this assignment was made in pursuance of an agreement between the bankrupt and the creditor, whereby the bankrupt agreed to pay the creditor a further sum of £6,000 at a future time. This agreement was disclosed to the two trustees but not to the other creditors, nor to the court when applying for the annulment.

Held, that there was no duty to disclose the

agreement to the court, inasmuch as the functions of the court was merely to ascertain whether the proper parties consented; nor to the other creditors, inasmuch as there was no common basis of consent, and that the agreement was a valid one.

Decision of North, J. (42 W. R. 474), reversed.—*Levita, Ex parte, McDermott* v. *Boyd*, C.A.

14. *Bankruptcy notice—"Final judgment"—Order of Bankruptcy Court setting aside deed—Order for payment of costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g).—A "final judgment," so as to support a bankruptcy notice within section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, means a final judgment in an action.

Therefore, an order made by the Court of Bankruptcy upon motion under section 102 of the Bankruptcy Act, 1883, setting aside a deed of assignment of certain of the bankrupt's property and directing the assignee to pay the costs of the motion, is not a "final judgment" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, so as to support a bankruptcy notice against the assignee by reason of his non-payment of the costs.—*Official Receiver, Ex parte*, C.A. 305.

15. *Bankruptcy notice—Final judgment—Order for the payment of costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (*g*).—Although a bankruptcy notice cannot be issued upon an interlocutory order for the payment of costs, yet if an action is brought and judgment obtained for the taxed amount of the costs, a bankruptcy notice can issue upon such judgment, it being a "final judgment" within the meaning of section 4, sub-section 1 (g) of the Bankruptcy Act, 1883.

Re Shirley, 58 L. T. N. S. 237, discussed.—*Boyd, Re, McDermott, Ex parte*, C.A.

16. *Bankruptcy notice issued against a widow upon a judgment obtained against her separate property during coverture—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*g*)—*Bankruptcy Rules*, 1886, *r.* 136—*Appendix, Form No.* 6.—When a judgment has been obtained against the separate property of a married women in the form prescribed in *Scott* v *Morley*, 36 W. R. 67, 20 Q. B. D. 120, no bankruptcy notice can be issued against her personally upon such judgment after she has become a widow and her separate property has ceased to exist as such.—*Hewitt, Re, Levene, Ex parte*, Q.B.D. 237.

17. *Bankruptcy notice—Irregularity—No substantial injustice—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*g*).—In an action in which the petitioning creditor had been plaintiff and the debtor and five other persons defendants, judgment was recovered against the debtor and three of the five other defendants. In a bankruptcy notice founded upon the judgment, the judgment was stated to have been recovered against all the defendants, their names being given.

Held, that the irregularity caused no substantial injustice to the debtor, and that the bankruptcy notice was not invalidated thereby.—*Low, Re, Gibson, Ex parte*, C.A., 405.

18. *Charging order on fund in court—Protected transaction—"Dealing or transaction" with bankrupt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 49 (d).—A charging order on a fund belonging to a person against whom a bankruptcy petition had previously been presented, on which an adjudication was made subsequently to the charging order, is not a protected execution within the meaning of section 45 of the Bankruptcy Act, 1883; nor is it a "contract dealing or transaction" with the bankrupt within the protection of section 49 of the same Act.—*O'Shea, Re, Courage* v. *O'Shea*, C.A. 232.

19. *Costs—Official receiver—Liability of, for costs—Costs of proceedings under third-party notice—Duties of official receiver as* interim *receiver—Bankruptcy Rules*, 1886, *r.* 339—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 70.—Proceedings taken against an official receiver by third-party notice are "proceedings taken either by action, motion, or in any other manner" within the meaning of rule 339 of the Bankruptcy Rules, 1886, and if such proceedings are taken "in respect of anything done or default made by him when acting, or in the *bonâ fide* and reasonable belief that he is acting, in pursuance of the Act or in execution of the powers given to official receivers by the Act," the official receiver is entitled, provided he have otherwise complied with the rule, to be paid out of the estate of the debtor the costs to which he may be put under such proceedings.

An official receiver when acting as *interim* receiver ought not to realize or deal with or encumber the estate, except for the purpose of protecting it or disposing of perishable goods, and if extraordinary measures out of the ordinary practice have to be adopted he should first consult the Board of Trade, and if necessary apply to the court.

An official receiver, acting as *interim* receiver, instructed certain auctioneers to pay off a bill of sale given by the debtor, and to take an assignment of it to themselves. The trustee chosen by the creditors sued the auctioneers in order to test the validity of the bill of sale, and the auctioneers brought in the official receiver as third party. The action was dismissed with costs.

Held, that, under the implied indemnity given by the official receiver, the auctioneers were entitled to receive from him the difference between the costs incurred by them as between solicitor and client, and the costs as between party and party which they received from the trustee, and that the official receiver was entitled to be paid out of the estate his own costs and the amount he had paid under his indemnity to the auctioneers.—*Wells and Croft, Re, Official Receiver, Ex parte*, BKCY.

20. *Deed of arrangement—Registration—Affidavit—Secured creditors—Omission of names from schedule to debtor's affidavit—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 6, 19.—By section 6, sub-section 1, of the Deeds of Arrangement Act, 1887, on the registration of a deed of arrangement there shall be filed an affidavit of the debtor stating (*inter alia*) the names and addresses of his creditors.

Held, that it was not necessary to set out in the schedule to the debtor's affidavit the names and addresses of those creditors whose debts were secured, and that an omission to do so did not render the registration bad.—*Chaplin* v. *Daly*, Q.B.D.

21. *Deed of assignment—Right of trustee of deed to remuneration—Discretion of official receiver.*—A trustee of a deed of assignment has no right to remuneration out of the estate of the assignor, upon the bankruptcy of the latter within three months of the date of the execution of the deed, for services rendered to the estate; but, if the official receiver is of opinion that valuable services have been rendered, he may, in his discretion, grant the trustee some remuneration, and the court will rarely override his discretion.—*Foster, Re, Official Receiver, Ex parte*, BKCY. 428.

22. *Discharge—"Misdemeanour or felony connected with the bankruptcy"—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8 (2).—It is provided by section 8 (2) of the Bankruptcy Act, 1890, "that the court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the principal Act, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines."

Held, that a "misdemeanour or felony connected with the bankruptcy" means an offence *ejusdem generis* with the offences included in the Debtors Act, 1869, and the Bankruptcy Act, 1883, and would be—first, one wherein there was a conviction on facts which brought about the bankruptcy; secondly, one wherein the facts upon which the conviction was based were misconduct as a bankrupt, or in view of impending bankruptcy.—*Hedley, Re, Board of Trade, Ex parte*, BKCY. 465.

23. *Disclaimer—Vesting order—Terms—Past liabilities—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.—Where a lease has been disclaimed and application is made for a vesting order, the court will, as a general rule, make such vesting order upon the terms that the person in whose favour it is made shall take upon himself the burden of the unperformed obligations, both past and future, to which the bankrupt was liable when the petition was filed.

The court may, however, under special circumstances, modify such terms so as to make the person in whose favour the vesting order is made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the petition was filed.—*Walker, Re, Mills, Ex parte*, BKCY.

24. *Fraudulent preference—Conveyance with intent to defeat and delay creditors—Conversion of bankrupt's business into a limited company—Respective rights of creditors of the bankrupt and of the limited company.*—The bankrupt, when insolvent, had converted his business into a "one-man" company, limited.

Held, that the trustee in the bankruptcy was entitled to a declaration that the conveyance of the bankrupt's business to the company was void against him, and that he was entitled to take the assets of the company; but that he must pay the new creditors of the company in full, in priority to the creditors of the bankrupt, upon the principle that the bankrupt had used the company as his agent, and was bound to indemnify it.—*Carey, Re, Jeffries, Ex parte*, BKCY. 605.

25. *Judgment debt—Power of court to inquire into consideration for debt—Application for receiving order—Compromise, reasonableness of—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.—The doctrine laid down in *Ex parte Lennox, In re Lennox*, 34 W. R. 51, 16 Q. B. D. 315, that the Court of Bankruptcy has power to go behind a judgment and inquire into the consideration for the judgment debt, even though the judgment was the result of a compromise, is not confined to cases in which the judgment was obtained by fraud on the part of the judgment creditor. Apart from fraud, if the court is of opinion that the compromise was not a fair and reasonable compromise between the parties, the court will refuse to make a receiving order on a bankruptcy petition founded upon the judgment.

So held by Lord Esher, M.R., and Lopes, L.J. (Rigby, L.J., dissenting).—*Hawkins, Re, Troup, Ex parte*, C.A. 306.

26. *Landlord and tenant—Distress for rent—Apportionment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9 (1), 42 (1); *Schedule II., r.* 19—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 28—*Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 4.—The bankrupt had paid his rent up to the June quarter day, and a receiving order was made against him on the 1st of September.

Held, that at the expiry of the Michaelmas quarter the landlord was entitled to distrain on the goods of the bankrupt for the whole quarter's rent.—*Howell, Re, Mandleberg, Ex parte*, BKCY. 447.

27. *Married woman carrying on a trade separately from her husband—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1 (5).—A married woman can be made a bankrupt in respect of a business carried on by her, but entirely managed by her husband, provided that he has no control over the money in, or assets of, the business.

In re Helsby, Ex parte Helsby, 1 Manson, 12, explained.—*Edwards, Re, Edwards, Ex parte*, BKCY. 509.

28. *Partnership — Infant partner — Judgment against firm—Receiving order against firm—Amendment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 5, 6, 105—*Bankruptcy Rules*, 1886, *rr.* 260, 262, 264—*R. S. C., ord.* 48a, *rr.* 5, 8.—An infant partner is not a debtor for goods supplied to his firm; judgment should, therefore, be entered either against the firm excepting the infant, or against the adult members alone. A judgment entered, and a receiving order made, against the firm simply, may be amended by the addition of words excluding the infant partner.

There is nothing to prevent an infant's trading or becoming partner with a trader, and until his contract of partnership be disaffirmed he is a member of the trading firm. Though the infant cannot contract debts by such trading, the adult partner is is entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that, until these are provided for, no part of them shall be received by the infant partner; and, if the proper steps are taken, this right of the adult partner can be made available for the benefit of the creditors.

Judgment of the Court of Appeal (42 W. R. 110, [1894] 1 Q. B. 1) varied.—*Lovell* v. *Beauchamp*, H. L. 129.

29. *Petition—Dwelling-house in England—Bankruptcy Act*, 1883 (46 & 47 *Vict c.* 52), *s.* 6 (1) (*d*).—A debtor who had resided in a house of his own in England, but who had abandoned the house as his residence and gone to reside abroad more than one year before the presention of a petition against him, and who had not again adopted the house as his residence, although he might at any time of the said year, had he chosen to do so, have gone to reside there, cannot be considered to have had a "dwelling-house" in England within the year before the presentation of the petition within the meaning of section 6, sub-section (1) (*d*) of the Bankruptcy Act, 1883.—*Nordenfelt, Re, Maxim-Nordenfelt Guns, &c., Co., Ex parte*, C.A.

30. *Petitioning creditor's debt—Merger of debt in judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (2) (3).—The old common law of bankruptcy, that a debt, though merged in a higher security, such as a judgment, will still support a

bankruptcy petition, remains unaltered by the Bankruptcy Act, 1883.—*King and Beesley, Ex parte,* BKCY 78.

31. *Practice—Costs—Small bankruptcy—Review of taxation—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 72, 73, 121—*Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 15—*Bankruptcy Rules,* 1886, *rr.* 112 (2), 124.—By rule 112 (2) of the Bankruptcy Rules, 1886, "where the estimated assets of the debtor do not exceed £300 a lower scale of solicitor's costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate—namely, three-fifths of the charges ordinarily allowed, disbursements being added."

Held, that the words "proceedings" in this rule includes litigious proceedings.—*Marsh, Re, Trustee, Ex parte,* BKCY. 208.

32. *Practice — Secured creditor — Valuation of security—Notice to trustee to elect to redeem—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *Schedule* 2, *rr.* 11, 12.—By rule 11 of schedule 2, "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date at which it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Held, that, when sending in a proof in accordance with this rule, a creditor need not state which particular securities he holds against which particular debts, nor need he separately assess the value of each security he holds, but may value his securities in a lump against the total amount of his debt.—*Smith and Logan, Re, Fletcher, Ex parte,* BKCY. 413.

33. *Proof—Calls on shares—Disclaimer of shares by trustee—Liquidator of company person injured thereby — Damages, measure of — Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 55 (7).—In cases of proof for injury sustained by the operation of a disclaimer, the measure of damages is the amount lost by the contract disclaimed, subject to deductions for any advantages which the party proving may have gained by the disclaimer.—*Hallett, Re, National Insurance Co., Ex parte,* BKCY.

34. *Proof—Interest—Bankruptcy Act,* 1890 (53 & 54 *Vict. c.* 71), *s.* 23.—Section 23 of the Bankruptcy Act, 1890, does not affect the principle that, when a debtor does not appropriate his payments either to interest or principal, the creditor has a right to appropriate the first payments to interest, the later ones to principal.—*Holland, Re, Parker* v. *Young, Ex parte,* BKCY. 16.

35. *Property of bankrupt—General lien of warehouseman—Custom of trade in Bristol.*—By a custom of trade in Bristol, warehouse keepers in that city are entitled to a general lien over all goods warehoused with them for all warehouse rent, labourage, and other charges incurred in connection with such goods or with any other goods warehoused by the same owner—either before or after.—*Catford, Re, Carr, Ex parte,* BKCY. 159.

36. *Receiving order — Refusal to make order—"Sufficient cause"—Attempt to extort money—Cesser of bankrupt's interest in the only asset—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (3).—The only property of the debtor was a life interest which ceased on bankruptcy. He proposed to insure his life and to set aside half the income of his life interest to keep up the insurance, and paying his creditors 10s. in the pound. The petitioning creditor refused to accept this proposal, and a receiving order was made on the petition.

Held, on appeal (1) that the fact that the effect of a receiving order would be to deprive the debtor of the only asset available for the payment of a composition to his creditors was a sufficient cause why no order should be made; and (2) that, as the petitioning creditor had tried to obtain £25 from the debtor as a condition for agreeing to an adjournment of the petition, no receiving order ought to have been made on it.—*Otway, Re, Otway, Ex parte* C.A.

37. *Scheme of arrangement—Rejection of proof on judgment debt—Release of debtor—"Debts provable in bankruptcy"—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-section* 8; *s.* 37, *sub-section* 3.—By section 18, sub-section 8, of the Bankruptcy Act, 1883, "A composition or scheme accepted and approved in pursuance of this section shall be binding on all creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy."

The trustee under a scheme rejected a proof for the amount due under a judgment against the debtor upon the ground that the consideration for the judgment was a gambling debt.

Held, that the judgment debt was a "debt provable in bankruptcy" within the meaning of section 18, sub-section 8, and that the scheme was binding upon the judgment creditor and released the debtor, and that the judgment creditor could not issue execution upon the judgment.—*Seaton* v. *Deerhurst,* C.A. 436.

38. *Settlement—Post-nuptial—Separate property of wife settled by husband—Property of husband settled by him in exoneration of debt due to wife—Purchaser in good faith and for valuable consideration—Bankruptcy Act,* 1883, *s.* 47—*Proviso for cesser of husband's interest on bankruptcy—Validity—Married Women's Property Act,* 1882, *s.* 3.—A husband and wife, immediately after their marriage in 1883, went out to India, where separate property of the wife was remitted to her from England. The husband borrowed from his wife to the extent of 51,000 rupees, 16,000 rupees of which he invested on his wife's account in his own name, speculating with the balance of 35,000 rupees and losing it. In exoneration of his debt to his wife, the husband executed in 1884 a post-nuptial settlement, in which the wife joined, whereby, with her consent therein expressed, he settled the securities representing the said sum of 16,000 rupees, and also certain property of his own, upon the usual trusts, subject, however, to a proviso that the husband's interest, in the trust funds should cease in the event of his bankruptcy. The husband was made a bankrupt in 1888 on the petition of the mortgagee under a mortgage entered into by the bankrupt previous to his marriage.

On an application by the husband's trustee in bankruptcy for a declaration that the said post-nuptial settlement was void as against him,

Held, that the wife was a purchaser in good faith and for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and that the settlement was therefore valid as against the plaintiff.

On an alternative claim, that the provision for the cesser of the husband's interest in the event of his bankruptcy was void as against the plaintiff as such trustee in bankruptcy.

Held, that the property brought into settlement by the husband was, to the extent of the unpaid

balance of 35,000 rupees due from him to his wife, in substance the property of the wife, and was, therefore, capable to that extent of being limited to the husband until his bankruptcy.

Held, further, on the authority of *Ex parte Tidwell*, 35 W. R. 669, that section 3 of the Married Women's Property Act of 1882 only applies where the wife's property has been lent to the husband for the purposes of his trade or business.—*Mackintosh* v. *Pogose*, CH.D. STIRLING, J., 247.

39. *Trustee—Appointment—Objection by Board of Trade—Difficult for trustee to act with impartiality—Decision of High Court as to validity of objection—Appeal by Board of Trade—Right of appeal—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 21, 104.—When the High Court has decided against the validity of an objection by the Board of Trade to the appointment of a trustee, under section 21 of the Bankruptcy Act, 1883, an appeal will lie to the Court of Appeal; and such appeal may be brought by the Board of Trade as "a person aggrieved" within the meaning of section 104 of the Act.

By section 21, sub-section 3, of the Bankruptcy Act, 1883, the Board of Trade may object to the appointment of a trustee upon the ground that "his connection with the bankrupt or his estate makes it difficult for him to act with impartiality"; and, by sub-section 3, the High Court may decide upon the validity of such objection.

The creditors of L., a bankrupt, appointed G. as trustee, he being already the trustee of E., a bankrupt. The only asset of E.'s estate was a large claim against L.'s estate. G. was a creditor of L. for about £400, and of E. for £3,000. The Board of Trade objected to the appointment, upon the ground that G.'s connection with the bankrupt and his estate would make it difficult for him to act with impartiality in the interests of the creditors generally.

Held, that the objection was a valid one.

Decision of Vaughan Williams, J. (42 W. R. 544), reversed.—*Lamb, Re, Board of Trade, Ex parte*, C.A.

40. *Trustee appointed by Board of Trade—Duties of—Right to give indemnity—Default of trustee—Liability to Board of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 74, 75—*Bankruptcy Rule* 295.—A trustee in bankruptcy appointed by the Board of Trade under section 21, sub-section 6, of the Bankruptcy Act, 1883, has no authority, without the sanction of the Board, to give a personal indemnity to his agent against the consequences of selling goods seized for rent due to the bankrupt's estate; and when such goods are sold it is the statutory duty of the trustee to require that the proceeds of the sale should be at once paid into the Bankruptcy Estates Account.

For any loss occasioned to the estate of the bankrupt by the default of the trustee herein, he and his guarantors are liable to the Board of Trade upon a bond given by them guaranteeing to make good any loss or damage to the bankrupt's estate occasioned by the default of the trustee in the performance of his statutory duties.—*Board of Trade* v. *Provident Clerks Association*, Q.B.D.

41. *Undischarged bankrupt—After-acquired property—Leaseholds—Transactions before intervention of trustee—Disclaimer—Vendor and purchaser—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 55, 168.—The general rule in *Cohen* v. *Mitchell*, 38 W. R. 551, 25 Q. B. D. 262, applies to leaseholds, so that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired leasehold property, whether with or without knowledge of the bankruptcy, are valid against the trustee.

In re New Land Development Association and Gray, 40 W. R. 295, 551, [1892] 2 Ch. 138, discussed.

Quære, whether the Bankruptcy Act, 1883, s. 55 (Disclaimer of Onerous Property), applies to the case of after-acquired leaseholds.—*Clayton and Barclay's Contract, Re*, CH.D. CHITTY, J., 549.

42. *On due preference—Conduct of bankrupt—Discharge—Suspension—Bankruptcy Act*, 1883, *s.* 8, *sub-section* (3) (i).—Where a bankrupt within three months before the receiving order, at a time when he was unable to pay his debts as they became due, paid some creditors in full, whereas it was not absolutely certain that in the bankruptcy, these creditors would have been paid in full before the other creditors, he has given an "undue preference" within the meaning of section 8, sub-section (3) (*i*), of the Bankruptcy Act, 1883.—*Bryant, Re, Bryant, Ex parte*, C.A.

43. *Voluntary settlement—Avoidance—Puisne incumbrancers—Priority—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—The avoidance of a voluntary settlement under section 47 of the Bankruptcy Act, 1883, does not give the settlor's trustee in bankruptcy any priority over puisne incumbrancers.

Ex parte Payne, In re Cross, 27 W. R. 808, 11 Ch. D. 539, and *Ex parte Blaiberg, In re Toomer*, 31 W. R. 906, 23 Ch. D. 254, followed.—*Sanguinetti* v. *Stuckey's Bank*, CH.D. CHITTY, J., 154.

See also ADMINISTRATION, 3, 8; COMPANY, 1, 33; COUNTY COURT, 7; DIVORCE, 12; FACTOR; MORTGAGE, 1; PRACTICE, 41; SALE OF GOODS, 5; SHERIFF, 2; WILL, 21.

BETTING.—See GAMING, 1-3.

BILL of EXCHANGE:—

1. *Alteration—Forgery—Acceptance of bill with blank spaces—Stamp—Negligence—Estopped—Liability of acceptor for amount of altered bill—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 64, *sub-section* 1.—The defendant was the acceptor of a bill of exchange for £500. In the bill as drawn a space was left before the words "five hundred pounds" in which there was sufficient room for the insertion of two words, and between the £ and the figures 500 sufficient space was also left for the insertion of another figure. The bill bore a stamp sufficient to cover £4,000. After the acceptance the drawer fraudulently inserted the words "three thousand" before the words "five hundred pounds," and the figure "3" between the £ and the 500, and in this form he indorsed and negotiated the bill. In an action by the plaintiff, who was a *bonâ fide* holder for value, to recover the full amount of the altered bill, Charles, J., held that there was no evidence of such negligence on the part of the defendant in accepting the bill in the form in which it was drawn as estopped him from setting up the subsequent alteration as a defence to the action; and that, therefore, the defendant was only liable to the extent of £500 under section 64, sub-section 1, of the Bills of Exchange Act, 1882.

Held, by Lord Esher, M.R., and Rigby, L.J., that the acceptor of a bill owes no duty to subsequent holders not to accept a bill drawn in such a form as to facilitate fraud, his only duty being to pay the bill which he has accepted at maturity; that, assuming that there is such a duty on the part of the acceptor, the above facts did not show any evidence of negligence on his part; that,

assuming that there was negligence on his part, the negligence was not the proximate cause of the loss, inasmuch as the forgery of the drawer intervened; and that, therefore, the defendant was not estopped from setting up the subsequent alteration of the bill, and was only liable to the extent of £500.

Held, by Lopes, L.J., that the acceptor of a bill owes a duty to subsequent holders not to be guilty of negligence with reference to the form of the bill which he accepts; that the defendant, in accepting the bill framed in such a way as to give obvious opportunities for its fraudulent alteration and bearing a stamp sufficient to cover a much larger amount, was guilty of such negligence as disentitled him to set up the fraudulent alteration; that the negligence was the proximate cause of the loss; and that, therefore, the defendant was liable for the full amount of the altered bill.

Young v. *Grote*, 4 Bing. 253, commented upon.—*Scholfield* v. *Londesborough* (*Lord*), C.A. 331.

2. *Cheque—"Fictitious or non-existing person"—Ignorance of Drawer—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 7 (3), 73.—A clerk of the plaintiffs, by fraudulently representing to the plaintiffs that work had been done on their account by B. induced the plaintiffs to draw cheques in favour of B. There was, in fact, no such person as B., nor had any such work as represented been done on the plaintiffs' behalf. The clerk forged B.'s endorsement to the cheques negotiated them with the defendant, who gave value for them in good faith.

The cheques were duly honoured by the plaintiffs' bankers. The plaintiffs having eventually discovered the fraud sought to recover from the defendant the amount of the cheques as money paid under a mistake of fact.

Held, that B. was not the less a "fictitious or non-existing person" within the meaning of section 7 (3) of the Bills of Exchange Act, 1882, because, at the time of drawing the cheques, the plaintiffs supposed him to be a real person, that consequently the cheques were to be treated as payable to bearer, and that the plaintiffs could not recover.—*Clutton* v. *Attenborough*, Q.B.D.

3. *Cheque—Post-dated cheque—Validity of—Holder for value—Banker and customer—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 38—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 13, 73.—A post-dated cheque, bearing a penny stamp, though taken by the holder before its date, is a valid cheque, and an action can be maintained upon it by the holder after its date.

Gatty v. *Fry*, 25 W. R. 305, 2 Ex. D. 265, followed.

Where a customer pays a cheque into his account at his bankers, with the intention that the bankers shall at once credit him with the amount in his account, and the bankers place the amount to his credit accordingly, the bankers become holders of the cheque for value, and can sue upon it.—*Royal Bank of Scotland* v. *Tottenham*, C.A. 22.

See also BANKER, 3.

BILL of SALE:—

1. *Address of grantor—Club address given in bill of sale—True address in affidavit—Form in schedule—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—In a bill of sale the grantor gave as his address a club where he did not reside, but of which he had been a member for many years, where he was well-known, where letters addressed to him would certainly reach him, and where information could be given about him at any time. In the affidavit filed on registering the bill of sale the true address and description of the grantor were given, and there was no intention to mislead, and no one was in fact misled by the omission of the grantor's correct address in the bill of sale. Upon an objection that the bill of sale was void as not containing the address of the grantor.

Held, that the bill of sale was not void by reason of the omission of the grantor's true address therein, but was in accordance with the form in the schedule to the Bills of Sale Act, 1882, and was valid.—*Dolcini* v. *Dolcini*, Q.B.D. 542.

2. *Assignment for the benefit of creditors—Registration—Time limit for assenting to deed—Notice—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.—A deed of assignment is not prevented from coming within the exception in section 4 of the Bills of Sale Act, 1878, by reason only that a time limit is imposed within which creditors must assent to it in order to gain the benefit of its provisions, so long as the deed provides for notice to the creditors of the existence of the deed.

A deed of assignment in favour of the creditors of a debtor provided that any creditor who should not signify his assent to the deed within three months from the date of its registration under the Deeds of Assignment Act, 1887, he having received actual notice thereof, should be excluded from acquiring any benefit under the deed. It further provided for the exclusion of creditors who, having received notice from the trustees, should not assent within seven days of such notice.

Held, the deed was valid, notwithstanding it had not been registered under the Bills of Sale Act, 1878.—*Hadley* v. *Beedom*, Q.B.D. 218.

3. *Attestation by agent of party thereto—Consideration—Term for maintenance of the security—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9, 10.—An agent of the grantee of a bill of sale may be an attesting witness of the execution thereof within the meaning of section 10 of the Bills of Sale Act, 1882, which requires the execution of a bill of sale to be attested by a credible witness, not being a party thereto.

A debtor, in order to pay an agreed composition to his creditors, obtained a loan of £150 from certain of those creditors, and in consideration thereof granted a bill of sale to such creditors to secure this advance of £150, and their own compositions. This advance was made by cheques payable to the joint order, and paid into the joint account, of the grantor and one L., the agent of one of the grantees, who was to see to the payment of the compositions to the other creditors, the joint account being opened for the purpose of enabling L. to make the payments. It was said that the consideration was not truly stated by reason of the £150 having been paid to the joint order and into the joint account of the grantor and L. instead of to the grantor himself.

Held, that the advance was really made to the grantor for the purposes correctly set forth in the bill of sale, and that the arrangement made as to the joint account did not alter the character of the consideration, which was, therefore, truly stated.

A stipulation in the bill of sale provided that "the grantor shall not during the course of this security obtain credit to the extent of ten pounds without the consent of one of the parties hereto . . . and shall bind himself to give the said firms the greater portion of his business, and shall keep proper books of account of his business,

and shall permit the parties hereto, or any authorized agent of them or any of them, to enter the premises of the grantor and inspect the said books at all reasonable times during the existence of the security."

Held, that this was not a term for the maintenance of the security, and that the bill of sale was, therefore, not in accordance with the form in the schedule and was void.—*Peace* v. *Brookes*, Q.B.D.

4. *Company — Non-registration — Description of chattels by reference to schedule—Falsa demonstratio.*—A hotel company incorporated under the Companies Act, 1862, executed in 1873 a bill of sale of all the furniture and effects "which now are or hereafter shall be in the hotel and which effects now on the premises are set forth in the schedule hereto." By mistake certain of the chattels then on the premises were omitted from the schedule. The bill of sale was not registered.

Held (1) that the bill of sale being a security given by a limited company was not within the Bills of Sale Acts; (2) That it passed all furniture in the hotel and not merely that described in the schedule.—*Royal Marine Hotel Co., Re*, CH.D. M.R. (Ir.)

5. *Consideration truly stated—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10 (3)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.—Six persons joined together to advance the sum of £600 to S. They contributed the loan in different amounts and at different times. When the whole £600 had been advanced, S. gave a bill of sale to T., one of the six, to secure the loan of £600. The consideration was therein stated as "£600 now paid by T."

Held, that this was a true statement of the consideration, and that T. was not a trustee, but merely a collector for the six lenders.—*Smith, Re, Tarbuck, Ex parte*, BKCY. 206.

6. *Statutory form—Assignment of chattel and hire-purchase agreement in one instrument—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.—The bankrupt had executed a deed by which he assigned a piano and a hire agreement whereby the piano was let. The assignment was not registered under the Bills of Sale Acts, 1878 and 1882.

Held, that the assignment of the piano was separable from the assignment of the hire agreement, and that the assignment of the hire agreement was not void.

Cochrane v. *Entwistle*, 38 W. R. 587, 25 Q. B. D. 116, and *In re Burdett, Ex parte Byrne*, 36 W. R. 345, 20 Q. B. D. 310, followed.

Decision of the Divisional Court (*ante*, p. 128) affirmed.—*Isaacson, Re, Mason, Ex parte*, C.A. 278.

7. *Statutory form—Covenant to produce last receipts not in writing—No power to seize on failure to do so—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9, *and Schedule.*—A bill of sale contained a covenant that the grantor would produce his last receipt for rent, taxes, rates, and outgoings, without specifying that there should be any previous demand by the grantee; and the bill of sale also contained a proviso that the goods conveyed should not be liable to seizure except for the causes specified in section 7 of the Act of 1882.

Held, that the deviation from the form of the Schedule to the Act was not a material one, and did not render the bill of sale void under section 9 of the Act.

Barr v. *Kingsford*, 56 L. T. N. S. 861, 35 W. R. Dig. 26, considered and distinguished.—*Cartwright* v. *Regan*, Q.B.D. 650.

See also MORTGAGE, 7.

BUILDING SOCIETY:—

1. *Arbitration — Withdrawing member — Dispute with society—Appointment of arbitrators after issue of writ—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 16 (9), 34.—By one of the rules of a benefit building society it was provided that disputes should be settled by reference to arbitration; that five arbitrators should be elected by the board of directors, and that in each case of dispute three of such arbitrators, chosen by lot, should decide the matters in difference; and that vacancies in the office of arbitrators should be filled up by the board of directors.

A dispute having arisen between a member who had given notice of withdrawal and the society, the member brought an action against the society for the amount which she alleged to be due to her. The writ was issued on the 18th of September, 1894. On the 24th of October, 1894, the society took out a summons to stay all proceedings in the action, and to refer the matters in dispute to arbitration. At the date of the issue of the writ there were only three arbitrators, but on the 29th of November, 1894, the directors appointed two additional arbitrators, making the number up to five, as required by the rules.

Held, that all proceedings in the action should be stayed, and that the matters in dispute should be referred to arbitration pursuant to the rules of the society.

Christie v. *Northern Counties Permanent Benefit Building Society*, 38 W. R. 280, 43 Ch. D. 62, disapproved.—*Norton* v. *Counties Conservative Building Society*, C.A. 178.

2. *Instrument of dissolution—Priority of members—Liability of advanced members—Power to vary—Building Societies Act*, 1874, (37 & 38 *Vict. c.* 42), *s.* 32—*Building Societies Act*, 1894 (57 & 58 *Vict. c.* 47), *s.* 10.—A building society was dissolved by an instrument of dissolution executed in accordance with section 32 (3) of the Building Societies Act, 1874. The instrument provided that withdrawing members should have no preference or priority over members who had not given notice of withdrawal.

Held, by Kekewich, J., that all withdrawing members were bound by the instrument of dissolution.

Some members of the society having received advances from the society repayable by instalments.

Held, by the Court of Appeal (reversing the decision of Kekewich, J.), that such members could not be compelled by the instrument of dissolution to pay up forthwith the balances due from them in respect of their advances.

Brownlie v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28, explained.

Section 10 of the Building Societies Act, 1894, applies to societies not completely dissolved at the time of the passing of the Act.—*Kemp* v. *Wright*, C.A. 213

3. *Power to lend on a first mortgage, and to release part of a mortgaged property—Postponement of security on part payment of mortgage moneys by third person—Ultrà vires.*—A building society which had power under its rules to lend to its members on first mortgage, and also to release any portion of a mortgaged estate if satisfied that the remainder would be sufficient security, lent to H., one of its members, £17,000 on a first mortgage. Having exhausted its borrowing powers, the society applied to the I. Co. for a loan, and an arrangement

was made whereby the I. Co. lent £6,000 to H. on the security of the property comprised in the building society's mortgage, the building society joining in the deed to postpone its own mortgage. H. handed the £6,000, when received by him, to the building society, and was credited with that amount in reduction of the £17,000 loan.

Held, by the Court of Appeal (affirming Romer, J., *ante*, p. 586), that the transaction between the society, the I. Co., and H. was *ultrà vires* the society; that the society's security for £11,000 had priority over the I. Co.'s security for £6,000; and that as between the I. Co. and the society, the former were not entitled to any security as against the latter in respect of so much of the £6,000 as had been applied in payment of the debts and liabilities of the society.

Persons dealing with a building society are affected with notice of the limitation of its directors' authority as established by its rules.—*Portsea Island Building Society* v. *Barclay*, CH.D. ROMER, J., 586; C.A.

4. *Unadvanced shareholders — Withdrawals — Priority of payment.*—The rules of a building society, incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), provided that: "Upon giving one month's notice in writing to the secretary of his intention so to do, any member may withdraw his investments at any monthly meeting of the society, the amount to be repaid out of the moneys received from members in repayment of advances on the night for withdrawal, but should the repayments not be sufficient, the balance shall be paid from the same fund on the next or following monthly night. If several members shall give notice to withdraw within any one month, they shall be paid *pro ratâ*; but the directors shall have power, after a resolution to the board, to use the monthly subscriptions upon investments to assist in repaying withdrawals. The directors shall also have power in their discretion to make prior payments to any member leaving not more than £50 standing to his credit in the books of the society upon such terms as may be arranged between the member and the directors, should the directors deem the same beneficial to the society. Provided always that the widow and children of lunatic or deceased members shall have the precedence."

Held, that members who gave notice of withdrawal in one month took in priority over those who gave notice in subsequent months.—*Botten* v. *City and Suburban Building Society*, C.A.

5. *Withdrawing members—Repayment of advances —Dissolution, instrument of—Priorities—Building Societies Act*, 1874 (37 & 38 *Vict.* c. 42), *ss.* 18, 32.—The priorities under the rules of a building society of withdrawing members over those who have given no notice of withdrawal cannot be varied by an instrument of dissolution executed under the Building Societies Act, 1874, unless such variation has been previously sanctioned by a special meeting of the society summoned and held in accordance with the rules of the society and the terms of section 18 of the Act.—*Botton* v. *City and Suburban Building Society* (No. 2), CH.D. STIRLING, J.

See also COMPANY, 2.

BURIAL:—

1. *Ecclesiastical law—Church rate—Rate authorized by local Act—"Contract for good or valuable consideration"—Church Rate Abolition Act*, 1868 (31 & 32 *Vict.* c. 109), *s.* 5—*Burial fees—Burial Act*, 1852 (15 & 16 *Vict.* c. 85), *s.* 36.—Section 5 of the Compulsory Church Rate Abolition Act, 1868, provides that "this Act shall not affect any enactment in any private or local Act under the authority of which church rates may be made or levied, upon any contract made, or for good or valuable consideration given."

Held, that the contract made or the consideration given, must be found in or be gathered from the Act authorizing the levying of the church rate.

Under the provisions of a local Act certain fees payable in respect of burials in the burial-ground of a metropolitan parish were applicable to the purpose (*inter alia*) of the repair of the parish church.

Held, that the repair of the parish church was a parochial purpose within the meaning of section 36 of the Burial Act, 1852, and that the fees received by the burial board under section 34 of the same Act were applicable to the purpose of this repair.—*Reg.* v. *St. Marylebone Vestry*, C.A.

2. *Church—Site—Sale—Vendor and Purchaser—Union of Benefices Act*, 1860 (23 & 24 *Vict.* c. 142)—*Union of Benefices Amendment Act*, 1871 (34 & 35 *Vict.* c. 90)—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict.* c. 34)—*Disused Burial Grounds Act*, 1884 (47 & 48 *Vict.* c. 72)—*Open Spaces Act*, 1887 (50 & 51 *Vict.* c. 32).—The site of a church (in which interments have taken place) which vests in the Ecclesiastical Commissioners under a scheme made under the Union of Benefices Act, 1860, may be sold by them for building purposes, and such power to build is not affected by the Amendment Act of 1871.

The Disused Burial Grounds Act, 1884, s. 5, is not confined only to sales made before the passing of that Act.—*Ecclesiastical Commissioners and New City of London Brewery Co., Re*, CH.D. NORTH, J., 457.

BUSINESS.—See EXECUTOR; WILL, 18.

CANADA, LAW of:—

1. *Manitoba—Provincial legislation — Appeal to Governor-General in council—Manitoba Public Schools Act*, 1890—*Dominion Statute*, 33 *Vict.* c. 3, *s.* 22 (2) (3).—Where the Roman Catholic minority of Manitoba appealed to the Governor-General in council against the Manitoba Education Acts of 1890, on the ground that their rights and privileges in relation to education had been affected thereby.

Held (reversing the judgment of the Supreme Court) (1) that such appeal lay under section 22 (2) of the Manitoba Act, 1870, which applies to rights and privileges acquired by legislation in the province after the date thereof; (2) that the Roman Catholics having acquired by such legislation the right to control and manage their denominational schools, to have them maintained out of the general taxation of the province, and to determine the character of the religious teaching therein, were affected as regards those rights by the Acts of 1890 under which State aid was withdrawn from their schools while they themselves remained liable to local assessment in support of non-sectarian schools to which they conscientiously objected; (3) that the Governor-General in council has power to make remedial orders in the premises, within the scope of sub-section (3) of section 22—*e.g.*, by supplemental, rather than repealing legislation.—*Brophy* v. *Manitoba Attorney-General*, P.C.

2. *Quebec — Arbitration — Award — Review — Canadian Railway Act*, 1888, *s.* 161, *sub-section* (2). —Where an award of compensation made in an

arbitration under the Canadian Railway Act, 1888, was appealed under section 161, sub-section (2),

Held, that the court rightly exercised its jurisdiction by reviewing the award as if it had been the judgment of a subordinate court; that is, by deciding whether a reasonable estimate of the evidence had been made. It was not, however, authorized by the sections to disregard the award and deal with the evidence *de novo* as if had been a court of first instance.—*Atlantic and North-West Railway Co.* v. *Wood*, P.C.

3. *Quebec—Banking Company—Trust—Transfer of Shares—Registration—Notice of trust—Bank Act (Canada)*, 18 *Vict. c.* 202, *s.* 36.—Where the respondent bank, incorporated by 18 Vict. c. 202, registered an absolute transfer of its shares which had been executed by trustees and executors of a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatees lawful issue at his death, and the transferee disposed of the shares so as to defeat the rights of the issue,

Held, that such registration, unless with actual knowledge of a breach of trust, was not wrongful having regard to section 36 of the Act which enacts that the bank is not bound to see to the execution of any trusts, express, implied, or constructive, to which any of its shares may be subject.

Notice that the shares were held by the trustees and executors in trust; possession by the bank of a copy of the will; the facts that transfers of other of its shares by the same trustees to other residuary legatees contained notice of substitution; that the president of the bank was one of the executors; and the law agent of the bank was also law agent of the executors;

Held, not to be sufficient to effect the bank with knowledge of the particular trusts sought to be enforced.—*Simpson* v. *Molson's Bank*, P.C.

4. *Quebec—Ecclesiastical Law—Parish—Canonical and civil jurisdiction—Quebec Statutes, ss.* 3373, 3380.—Under the Quebec Statutes Title, IX., c. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is a sufficient foundation for proceedings with a view to obtain civil recognition of that parish. Proceedings before the commissioners of the diocese with a view to such civil recognition are not subject to the review or control of a court of justice. An objection to the formation of a new parish on the ground that one of the old parishes dismembered for that purpose was in debt, is a valid objection under section 3380; but where the debt relied on was contracted by the Fabrique, it must be proved that the Fabrique was unable to pay for it, and that a levy upon the Roman Catholic freeholders of the parish has been duly authorized.—*Alexandre* v. *Brassard*, P.C.

5. *Quebec—Procedure—Non-judicial day—Expiration of time—Code of Civil Procedure, art.* 3—49 & 50 *Vict. c.* 95 (*Quebec*), *s.* 20—42 & 43 *Vict. c.* 53 (*Quebec*), *s.* 12.—By the Canadian Code of Civil Procedure, art. 3, it is provided that "if the day on which anything is to be done in pursuance of the law is a non-judicial day, such thing may be done with like effect on the following day."

By the Declaratory Act, 49 & 50 Vict. c. 95 (Quebec), s. 20, "If the day fixed for any proceedings, or for the doing of anything, expires on a non-judicial day, such delay is prolonged till the next following juridical day.

Held, that these provisions relate to matters of procedure only, and to things which the law directs to be done by either of the parties in the course of a suit, and not to the title or want of title in the plaintiff to institute and maintain it; and therefore where a statute (42 & 43 Vict. c. 53 (Quebec) s. 12) provided that proceedings of the respondent corporation might be questioned on the ground of illegality by a petition presented to the superior court within three months, and the last day of the three months was a non-judicial day, the time for presenting such petition was not extended to the following day.

Judgment of the court below affirmed.

Semble, that, though an incompetent resolution must be illegal, it does not follow that an illegal resolution is necessarily incompetent.—*Déchêne* v. *City of Montreal*, P.C.

6. *Quebec—Railway — Information—Code of Civil Procedure Act, Article* 997—*Power of Attorney-General to discontinue—General Railway Act*, 1888, *c.* 109, *s.* 12.—Article 997 of the Civil Procedure Code relates, on its true construction, not to every illegal act done by an association therein mentioned, but only to such acts as are professedly or manifestly done in the assertion of some special power, franchise, or privilege not conferred upon it by law.

Where an information under Article 997 alleged that the respondent company had closed a public lane under pretext that they had acquired private interests therein which entitled them so to do.

Held, that this did not amount to an allegation that they closed it in exercise of any power, franchise, or privilege within the meaning of the article.

Held also, that the court has jurisdiction under Article 998 to prohibit the issue of a writ of information under Article 997; but that, after issue, the Attorney-General is *dominus litus*, and can discontinue proceedings or control their conduct independently of any private relator.

Held further, that assuming the lane in question to have been a public one, the respondent company were entitled to close and use it, with the assent of the city council, which could be given under Railway Act, 1888, c. 189, s. 12.—*Casgrain* v. *Atlantic and North-West Railway Co.*, P.C.

CAPE of GOOD HOPE, LAW of:—

1. *Company—Memorandum of association—Business to be carried on in the colony—Licence—Duty—Act No.* 3 *of* 1864, *schedule* 17.—By schedule 17 to the Colonial Act, No. 3, of 1864, every joint-stock company, "any of the dealings of which shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony," shall take out an annual licence and pay a stamp duty at a certain rate. The memorandum of association of a limited company having its principal office in England declared that one of the objects of the company was "to carry on in any part of the world the business," &c. The company carried on business through an agent in the Cape Colony.

Held, that the company was not liable to stamp duty under the schedule, which was intended to apply only to companies in whose constitution there was something specially pointing to the colony as a place of business.—*Marshall* v. *Orpen*, P.C.

2. *Lease — Improvements — Permanent buildings erected by lessee—Right of removal.*—A lessee of lands in Cape Colony, who was entitled by the terms of his lease to remove all such improvements as should be capable of removal without injury to the land itself, pulled down a brick building he had

erected on the land, and removed the materials except those composing the stone foundations beneath the soil.

Held, that this was authorized by the lease, and was in accordance with the lessee's common law right under Roman-Dutch law.—*London and South African Exploration Co.* v. *De Beers Mines*, P.C.

CARRIER:—

Wharfinger — Accidental fire — Loss of goods — Liability.—Wharfingers who described themselves as wharfingers, lightermen, and carmen, carried goods from their wharf to their own wharf customers, but not for strangers unless at arranged prices, and not then unless they considered the business good.

Held, that they were wharfingers and not carriers; and even if carriers, were not common carriers; and consequently that they were not liable for the loss of goods occasioned by an accidental fire at their wharf.—*Chattock* v. *Bellamy*, Q.B.D.

CHARITY:—

1. *Administration—Scholarship—Action to obtain possession and enjoyment—Consent of Charity Commissioners—Stay of proceedings—Charitable Trusts Act*, 1852 (16 & 17 *Vict. c.* 137), *s.* 17.—The foundation deed of a scholarship provided for the awarding of the scholarship to the duly qualified candidate who should pass the best examination in certain subjects. The above action was against the trustees of the deed for a declaration of the plaintiff's title to the scholarship, and an order directing the plaintiff to be put in possession thereof. The plaintiff alleged that he obtained the highest number of marks at an examination of candidates, but no award of the scholarship was made. On a motion to stay all proceedings, on the ground that the certificate of the Charity Commissioners had not been obtained pursuant to the Charitable Trusts Act, 1853, s. 17.

Held, that the plaintiff, by submitting himself for examination, did not do anything which resulted in a contract between the plaintiff and the trustees, and that the case made by him related to and involved the partial execution or administration of the trusts of the deed, and, therefore, that the action could not be allowed to proceed without the certificate of the Charity Commissioners.

Rendall v. *Blair*, 38 W. R. 689, 45 Ch. D. 139, considered and distinguished.—*Rooke* v. *Dawson*, CH.D. CHITTY, J., 313.

2. *Charity Commissioners—Jurisdiction—Endowment—College—Exhibition—Public school—Endowed School — Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *ss.* 4, 5, 6, 8, 24 — *Endowed Schools Act*, 1873 (36 & 37 *Vict. c.* 87), *s.* 9 —*Endowed Schools Act*, 1874 (37 & 38 *Vict. c.* 87), *s.* 6.—Where under a charitable trust a fund was applicable to the maintenance of exhibitions tenable at the University of Oxford which were open to the competition of schools, some of which were included in the Endowed Schools Act, and one of which, being a public school, was excluded from their operation.

Held, that such exhibitions were educational endowments within the meaning of the Endowed Schools Act; and that the Charity Commissioners had exclusive jurisdiction to deal with the whole fund, including that part of it available for exhibitions applicable to the public school.—*Attorney-General* v. *Christ Church, Oxford (Dean of)*, CH.D. NORTH, J. 198.

3. *Charitable purposes — Intention to benefit the community — Anti-vivisection societies.*—Institutions whose objects are lawful and intended to benefit the community may be charities although the achievement of their objects might not in fact benefit, or tend to benefit, the community.

The "Victoria-street joined with the International Society for the Total Suppression of Vivisection" and "The London Anti-Vivisection Society, Sackville-street," are charities.—*Foveaux's Estate, Re, Cross* v. *London Anti-Vivisection Society*, CH.D. CHITTY, J., 661.

4. *Charitable purposes — Will — Perpetuity.* — A testator, who declared that his object was to encourage the sport of yacht racing, gave a sum of money to trustees upon trust out of the annual income to purchase annually a cup to be given to the most successful yacht of the season.

Held, that the gift, being remotely and not directly beneficial to the community, was not charitable, and was, therefore, void for perpetuity. —*Nottage, Re, Jones* v. *Palmer*, CH.D. KEKEWICH, J.

5. *Endowment—Charity Commissioners—Accounts —Charitable Trusts Act*, 1853 *and* 1855 (16 & 17 *Vict. c.* 137 *and* 18 & 19 *Vict. c.* 124.—Where a testator bequeathed funds to trustees upon trust to apply and appropriate the same as they in their uncontrolled discretion should think proper for the advancement of education and learning,

Held, that the charity was subject to the general jurisdiction of the Charity Commissioners, and that the trustees must furnish accounts to the commissioners.—*Gilchrist's Trusts, Re*, CH.D. KEKEWICH, J., 234.

6. *Endowment—Voluntary subscriptions and donations—Investment in land—Charity Commissioners—Jurisdiction—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66.—Whether the property of a charity is applicable to the general purposes of the charity, or only to some specific purpose in connection with the charity, is not the true test of whether the property is an endowment within the meaning of the Charitable Trusts Act, 1853, although this circumstance is material in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in section 62.

The reasoning of Romilly, M.R., in *Governors of Charity for Relief of Poor Widows, &c., of Clergymen* v. *Sutton*, 8 W. R. 167, 27 Beav. 651, on this point, dissented from.

Held, on the true construction of sections 62 and 66 of the Charitable Trusts Act, 1853, (1) that income of any endowment *primâ facie* means income derived from any invested funds; (2) but that, in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the jurisdiction of the Charity Commissioners; and (3) that such bequests and donations, and the income thereof, are not brought within the jurisdiction of the Charity Commissioners by the fact of their being invested by the governors of the charity.—*Clergy Orphan Corporation, Re*, C.A. 150.

7. *Mortmain—Corporation stock—Borough fund—Charge on—Charge on revenues of landed property—Pure personalty.*—A charge on the "revenues" derived from the "landed property" of a corporation can only be enforced by the appointment of a receiver; although such receiver can arrest the revenues before they go into the borough fund, still he can

only collect them after they have become arrears. Such arrears are pure personalty. A debenture bond which, in addition to charging the borough fund, charged the said revenues, could, therefore—even prior to the Mortmain Act, 1891—be bequeathed for charitable purposes.

Decision of North, J. (42 W. R. 375) affirmed.—*Pickard, Re, Elmsley* v. *Mitchell*, C.A.

8. *Mortmain—Testator domiciled in colony—Bequest to erect buildings in England—Mortmain Act*, 1888 (51 & 52 *Vict. c.* 42).—A domiciled Victorian who died in June, 1891, bequeathed £10,000 to the mayor and corporation of an English city for the purpose of buying a suitable piece of land and erecting thereon a free library. Under the law of Victoria the corporation were able to lawfully expend the money as directed by the testator.

Held, that the English Mortmain Act, 1888, only applied in so far as that the assurance of the land purchased must be in accordance with the provisions of the Act, and that the bequest was valid.

Attorney-General v. *Mill*, 2 Dow. & Clark, 393, explained.—*Canterbury (Mayor)* v. *Wyburn*, P.C., 430.

9. *Will—General charitable purpose—Particular charity—Failure of object—Lapse*—Cy-près.—Where a legacy is bequeathed, upon the true construction of the will, to a particular charitable institution existing at the date of the will, and the institution has ceased to exist before the testator's death, the doctrine of *cy-près* does not apply, and the legacy lapses.

A., by his will, dated in 1883, bequeated £5,000 "to the rector for the time being of St. T. Seminary, for the Education of Priests in the Diocese of W., for the purposes of such seminary." At the date of the will there was such an institution known as St. T. Seminary; but before the death of the testator it had ceased to exist.

Held, (affirming the decision of Chitty, J., 42 W. R. 581), that the legacy was a gift to the particular institution, and must be taken on the above principle, to have lapsed.—*Rymer, Re, Rymer* v. *Stanfield*, C.A., 87.

10. *Will—Gift of residuary real and personal estate to charity subject to life interests—Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *s.* 4 (1) (2) (3) (6)—*Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *s.* 5.—A gift by will of land to a charity is valid, notwithstanding that the interest so given is reversionary, dispositions by will under section 5 of the Mortmain and Charitable Uses Act, 1891, not being subject to the restrictions imposed by section 4, of the Mortmain and Charitable Uses Act, 1888.

Decision of Stirling, J. (p. 188), affirmed.

Section 4 of the Act of 1888 has not been repealed by section 5 of the Act of 1891, but the restrictions thereby imposed are still applicable to a gift by deed of land to a charity.—*Hume, Re, Forbes* v. *Hume*, C.A., 291.

11. *Will—Gift to volunteer corps—Gift payable on contingency—Perpetuity—Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *s.* 13.—A testator by will gave an annuity of £100 to be provided to a volunteer corps "on the appointment of the next lieutenant-colonel." The officer who was lieutenant-colonel at the date of the will was still lieutenant-colonel at the date of the testator's death.

Held (1) that a gift to a volunteer corps was a charitable bequest within the Charitable Uses Act, 1888; and (2) that as the gift in this will was contingent on an event which might never happen, it was void on the ground of perpetuity.—*Alt* v. *Stratheden*, CH.D. ROMER, J.

12. *Will—Legacy to charity in satisfaction of promise to subscribe—Alteration in scheme*—Cy-près.—A testatrix by codicil bequeathed a legacy to a committee for establishing a bishopric in satisfaction of a promise to subscribe a like sum. After her death the particular scheme of establishment was given up, but the committee still existed, and the intention of establishing a bishopric had not been abandoned.

Held, that this was a good charitable legacy for a purpose which had not yet failed, and the money must be paid over to approved members of the committee with an undertaking to apply it to the proper purposes, and, in case the purposes failed, to return it for application *cy-près*.—*Villers-Wilks, Re, Bower* v. *Goodman*, CH.D. STIRLING, J.

See also FRIENDLY SOCIETY; WILL, 1.

CHEQUE.—See BILL OF EXCHANGE, 2, 3.

CHURCH.—See BURIAL, 1, 2.

COAL MINE:—

1. *Examination of machinery—Report of result of examination—Record of report—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 49, *r.* 5.—Section 49, r. 5 of the Coal Mines Regulation Act, 1887, on its true construction requires a report to be recorded as well of the examination by that section directed to be made every twenty-four hours, as of that directed to be made once every week.—*Scott* v. *Bould*, Q.B.D.

2. *Support—Props and sprags where "required"—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 49, *r.* 22.—Section 49, rule 22, of the Coal Mines Regulation Act, 1887, provides for the use of sprags or holding props in mines to support the top coal while the lower coal is being worked.

Held, upon the true construction of that rule, the words "where they are required" mean where they are "necessary," and not where the workmen think they are necessary. The necessity is a question of fact to be decided by the justices in each case.—*Gibbon* v. *Phillips*, Q.B.D.

COMPANY:—

1. *Bankruptcy—Liquidator, petition by—Bankruptcy notice containing two judgments—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*g*)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Companies (Winding-up) Act*, 1893 (56 & 57 *Vict. c.* 58), *s.* 1.—The liquidator of a limited company cannot present a bankruptcy petition on behalf of the company in his own name, but must present it in the name of the company, though he may issue a bankruptcy notice in his own name on a judgment making a sum payable to him.

A bankruptcy notice is bad which calls upon a debtor to pay a sum due under a final judgment, and also the costs of an unsuccessful appeal against such judgment.—*Bassett, Re, Lewis, Ex parte*, BRCY. 427.

2. *Building society—Unregistered building society—Company of less than seven members—Winding-up order—Jurisdiction—Sale by liquidator—Companies Act*, 1872 (25 & 26 *Vict. c.* 89), *s.* 199.—The court has no jurisdiction under section 199 of the Companies Act, 1862, to make an order for the winding up of an unregistered building society whose members are not more than seven in number. Such an order, if made, might be binding on the society.

but would not be binding on an outsider who challenged it.

Held, therefore, that the liquidator appointed in pursuance of such an order cannot make a good title to property of the society so as to force his title on a purchaser.

Decision of Stirling, J., p. 216, affirmed.

In re Padstow Total Loss, &c., Corporation, 30 W. R. 326, 20 Ch. D. 137, explained.—*Bowling and Welby's Contract, Re*, C.A. 417.

3. *Capital—Dividend — Depreciation of capital—Liability of company to make good same out of profits on year's working.*—The articles of a company provided that the profits made during the financial year should be applicable to the payment of dividends on the shares of the company, and that no dividend should be payable except out of profits arising out of the business of the company.

At the end of a financial year the value of the assets of the company, including the goodwill, were less than the nominal capital of the company, but the profit and loss account showed a balance of profit after all proper and usual allowances had been made. No allowance was made for depreciation in the value of the goodwill.

On a motion to restrain the company from applying the said balance of profit in payment of dividends so long as the value of the company's assets was less than the nominal amount of its capital.

Held, that the word "profits" in the articles was intended to mean the excess of receipts over the expenditure properly attributable to the year; that the depreciation in the value of the goodwill was loss of fixed capital; that the company was not bound to make any allowance in respect of such depreciation, and was acting within its powers in applying the said balance of profit in payment of a dividend on its shares.—*Wilmer* v. *McNamara*, CH.D. STIRLING, J. 519.

4. *Capital—Reduction—Memorandum— Alteration —Evidence—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26)—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62).—Where a petition is presented for the confirmation of resolutions for reducing the company's capital, or altering its memorandum of association, a copy of the memorandum and articles, and the original minute-book of the proceedings of general meetings, should be made exhibits to the affidavit in support of the petition.

Where a reduction of capital is to be effected by cancelling paid-up capital which has not been paid up in cash, it must be proved that the shares were issued pursuant to a contract filed under section 25 of the Companies Act, 1867.—*Omnium Investment Co., Re*, CH.D. VAUGHAN WILLIAMS, J.

5. *Capital—Reduction—Surrender of part of investments to improve value of others*—Ultrà vires—*Companies Acts*, 1867 (30 & 31 *Vict. c.* 131), *s.* 9—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26).—Where a limited company incorporated for the purposes of investing its capital in su h a way as might seem expedient, and of carrying on financial operations of every kind, held shares in a railway company which had become valueless in consequence of inability to complete the line, and proposed as part of a scheme for raising further capital, to surrender some of their shares with a view to promote the completion of the line, and thus increase the value of their remaining shares in the railway company.

Held, that this was a "reduction of capital" requiring the sanction of the court under the Companies Acts, 1867 and 1877.—*Thomson* v. *Trustees, &c., Securities Insurance Corporation*, CH.D. KEKEWICH, J.

6. *Company incorporated for benefit of one man—Indemnity to company in respect of debts of company —Principal and agent—Debentures.*—The Companies Acts were intended to allow seven or more persons *bonâ fide* associated for the purposes of trade to limit their liability under certain conditions on becoming a corporation. But where a company has been formed for the purpose of enabling a trader to carry on his own business with limited liability in the name of the joint-stock company, such company is entitled to treat the trader as its principal or *cestui que trust*, and to be indemnified by him against the debts of the company.—*Broderip* v. *Salomon*, C.A. 612, 641.

7. *Company limited by guarantee—Articles, alteration of—Resolution declaring members' interests in shares—Resolution not* ultrà vires—*Companies Act*, 1862, *ss.* 8, 9, 14.—A company limited by guarantee, by special resolutions divided the undertaking into "shares or interests," and adopted new articles, which, provided for the transmission of shares, their division into classes, and the election of new members. The plaintiff moved to set aside these resolutions as being *ultrà vires*.

Held, that the new articles did not in any way alter the constitution of the company and were not *ultrà vires*.—*Malleson* v. *General Minerals Patents Syndicate*, CH.D. NORTH, J., 41.

8. *Costs—Promoting and obtaining Act—Solicitor —Agreement for payment of costs on condition of "the capital" being raised—Issue of part of the company's capital.*—A company was being promoted for the building of a railway, and for the purchase, in connection therewith, of a certain canal. The promoters and a firm of solicitors came to an agreement, afterwards adopted by the company, by which the solicitors consented to give their services gratis "in the event of the application to Parliament failing, or the capital not being raised," but in the event of these two conditions being fulfilled, they were to be paid the customary professional charges for work done. An Act of Parliament was obtained incorporating the company, and providing for the transfer to it of the canal, and authorizing the construction of the railway. The capital was not to exceed eight million pounds, and the company was authorized to resolve that the canal undertaking and capital necessary for it should be a separate undertaking, with a separate capital. This course was adopted by the company, and the canal capital fixed at one and a quarter millions. This amount was raised, but the rest of the capital of the company was not raised. In an action by the solicitors to recover the customary professional charges for work done by them:

Held, that the raising of the canal capital was not a raising of "the capital," and that the conditions of the contract made between the promoters and the solicitors not having been fulfilled, the solicitors were not entitled to succeed in the action.—*Nichols* v. *North Metropolitan Railway Co.*, C.A.

9. *Debenture—Affixing seal to—Articles of association—Irregularities in issue of debentures—Valuable consideration—Notice.*—B. was a director of and vendor to a company which had agreed to pay him a certain sum of money, with interest at six per cent. B. owed D. a smaller sum, and it was arranged that this latter sum should be secured by the company issuing a debenture to B. for the

amount owing, with interest at five per cent., and that B. should transfer the debenture to D. The debenture was sealed by the company in the presence of B. as a director and countersigned by M., the secretary of the company. No meeting of directors was called to sanction the issue of the debenture, but it appeared that at a meeting held about that time B. and M. were present, and a resolution was passed authorizing the issuing and sealing of the debenture. The material provisions of the articles were the following:—Money borrowed might be secured by debentures. The common seal of the company was not to be affixed to any document except in the presence of two directors or of one director and the secretary, and in pursuance of a resolution of the directors. No director was to vote in respect of any contract in which he was personally interested, and if he should vote his vote was not to be counted. Any debenture bearing the common seal and issued for valuable consideration was to bind the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same.

Held, that, the debenture being given for valuable consideration, the irregularities attending its issue were cured by the last-stated clause in the articles.—*Davies* v. *Bolton & Co.*, CH.D. VAUGHAN WILLIAMS, J. 171.

10. *Debenture—Blank left for name — Equitable charge—Frauds, Statute of—Contract.*—If a registered debenture is issued with the name of the person to whom the security is issued in blank, the document will be void as a deed, but may be a contract to issue a debenture which will be as valid in equity as if the debenture had been actually issued.

The signature of the chairman to a resolution authorizing the issue of debentures, followed by the issue of debentures in blank, amounts to a good contract within the Statute of Frauds.—*Queensland Land Co, Re, Davis* v. *Martin*, CH.D. NORTH, J.

11. *Debenture — Execution creditor — Sheriff.* — Held, by Kekewich, J., that, where debenture-holders intervene after sale by a sheriff, but before the sale moneys are handed over to the execution creditor, the equity of the debenture-holders is not displaced, and the proceeds of sale belong to them.

Held, by the Court of Appeal, that, upon the facts of the case, there had been no sale by the sheriff, and the decision of Kekewich, J., affirmed on that ground.—*Taunton* v. *Warwickshire* (*Sheriff of*), C.A. 579.

12. *Debenture — Floating security—Charge—Garnishee order.*—A debenture which creates merely a floating security on the assets of a company, and even though it contain a provision that the company shall not be at liberty to create any mortgage or charge upon its property in priority to the debenture, does not, before a winding up or a receiver has been appointed, constitute a charge on specific assets such as a debt due to the company, and a creditor who has obtained a garnishee order absolute is entitled to priority over the debenture security. A garnishee order absolute does not come within the term "charge" in such a proviso as that in the debenture in question. A garnishee order absolute is a form of execution, not a charge. —*Robson* v. *Smith*, CH.D. ROMER, J., 632.

13. *Debenture-holders' action—Beneficial occupation —Licence in nature of lease—Costs of realization—Costs of preservation—Receiver authorised to "raise" money—Advances to receiver by debenture-holders—Priority.*—A ferry company, who were in occupation of works in the bed of the Thames, under a licence from the conservators, which reserved an annual payment, were unable to meet their liabilities. An action was commenced against them by their debenture-holders to enforce their security, which comprised all the assets of the company, and a receiver and manager was appointed. The receiver, who continued to maintain and use the works with a view to the realization of the assets, under an order of the court giving him leave to "raise" money to carry on the company's business, borrowed £1,000 from a corporation, who were debenture-holders of the company, giving them therefor a charge on the assets in priority to the existing debentures. Certain other debenture-holders also advanced £196 to the receiver for the same purpose. Under an order of the court the receiver sold the assets and paid the proceeds into court. Claims being made by summons against the fund:

Held (1) that the company having continued in beneficial occupation, the conservators, although only licensors, and having no power of distress, were entitled in priority to the sums due under their licence as costs of realization. (2) that the receiver was next entitled to his costs of realization, but that such costs only included costs of actual sale, and not the costs of preserving the property. (3) that the corporation, although debenture-holders, having advanced their £1,000 under an entirely separate contract, were entitled next in priority to the existing debentures. (4) that those who advanced the £196, having done so in their character of debenture-holders, could only come in with the other debenture-holders after payment of the expenses of the litigation.—*Lathom* v. *Greenwich Ferry Co.*, CH.D. KEKEWICH, J.

14. *Debenture-holder's action—Money authorized to be raised in priority to debentures—Right of receivers and managers to be paid costs, charges, and expenses.*—The receivers and managers appointed in a debenture-holders' action were authorized by orders of the court to raise £5,000 in order to carry on the business of the company, such sum to have priority over all the debentures of the company.

By a subsequent order it was provided that second debentures should be issued to the unsecured creditors of the company, and that the unsecured creditors or some of them should advance part of the £5,000, and the plaintiff in the debenture-holders' action the rest. Two of the unsecured creditors were subsequently added as defendants to the debenture-holders' action.

The greater part of the £5,000 was raised, but the receivers and managers, in carrying on the business of the company, incurred further costs, charges, and expenses, the payment of which they claimed in priority to the lenders of the £5,000 and to all other claimants.

Held (reversing the decision of Vaughan Williams, J.), that the persons who advanced the £5,000 could not be regarded as being in the position of strangers advancing money, and that the receivers and managers were entitled to the priority they claimed.—*Strapp* v. *Bull & Co.* C.A. 641.

15. *Director—Agreement made* bonâ fide *but* ultra vires—*Measure of damages—Market price of shares.* —Where the directors of a company made an agreement for the sale of shares, which was in fact partially *ultrà vires* was made *bonâ fide*, in the honest and reasonable belief that it was for the interest of the company, they cannot be charged

with *dolus malus* or fraud merely because the effect of the transaction was to cause a rise in the shares of the company, which enabled them to sell shares of their own at prices which gave them large profits; and the proper measure of damages in an action brought by shareholders against the directors in respect of the transaction is the value of the shares to the company if the agreement had not been made. A subsequent market price, due to the influence upon a market, fluctuating from day to day, of the impugned transaction itself, is not the proper measure of what might have been realized from the shares if no such transaction had taken place.

McKay's case (2 Ch. D. 1) and *Weston's case* (10 Ch. D. 589) distinguished.—*Hirsche* v. *Sims*, P.C.

16. *Director— Contributory—Agreement to become member—Qualification of director—Winding up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.—Where the articles of association of a company provide and require that the directors shall hold a certain qualification in shares, the mere acceptance of the office of director, coupled with acting as such, is not sufficient to enable the court to infer a contract of membership within section 23 of the Companies Act, 1862. The proper contract to be inferred in such a case is a contract to qualify as a director—*i.e.*, to take the required number of shares —within a reasonable time, either from the company or from outside persons. Such a contract is not a contract of membership, nor does a contract of membership arise from the mere lapse of a reasonable time.—*Issue Co., Re, Hutchinson's case*, CH.D. VAUGHAN WILLIAMS, J., 267.

17. *Director—Misfeasance—Winding up—Presents made to director out of borrowed money—Consent of shareholders — "Private" company — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10. —Directors cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting.

N., the chairman of the company, purchased on behalf of the company the right to a building agreement for £16,000. In consequence of an objection to the acceptance of the company as tenants, N. was substituted as tenant, and he then sold the agreement to the company for £26,000, an advance of £10,000. Of this £10,000 it appeared from the evidence that £7,000 was part of the cost of acquiring the contract, and £3,000 was profit actually made by N. A sum of £3,500 was spent by N. out of moneys borrowed by the company for the purpose of its business in decorating his private house. Nearly all the shares in the company were held by N. and his family, and these transactions were entered into with the knowledge and approval of all the shareholders. The company being wound up, a summons under section 10 of the Companies (Winding-up) Act, 1890, was taken out by the liquidator.

Held (affirming the decision of Vaughan Williams, J.), that N. was not liable for the £7,000; but

Held (reversing the decision of Vaughan Williams, J.), that he was liable for the £3,000 and the £3,500.—*Newman & Co., Re*, C.A. 483.

18. *Director—Qualification—Resignation during period allowed for qualification—Winding up—Contributory.*—By the Articles of Association of a company, the signatories thereto were to be the directors until such time as six of them should nominate another director in their place; and the qualification of a director was to be the holding £100 in shares, but he might act without acquiring his qualification, and a director was to acquire his qualification within three months from his appointment, and unless he should do so he was to be deemed to have agreed to take the shares from the company,

Held (Lindley, L.J., dissenting), that the directors who resigned within the three months were under no obligation to take the qualification shares from the company.—*Salisbury-Jones, Ex parte, Bolton & Co., Re*, C.A.

19. *Friendly Society—Winding up of registered Company—Friendly Societies Acts* (18 & 19 *Vict. c.* 63, 38 & 39 *Vict. c.* 60)—*Industrial Societies Acts* (15 & 16 *Vict. c.* 31, 56 & 57 *Vict. c.* 39.—The court has jurisdiction under section 199 of the Companies Act, 1862, to wind up compulsorily as an unregistered company a friendly society registered under the Friendly Societies Acts, but are not registered under the Companies Acts.

Members of a Friendly Society who have given notice of withdrawal of deposits are not in same position as outside creditors and are not entitled *ex debito justitiæ* to a winding-up order, but where the circumstances make it just and equitable to do so, the court will order a winding up.—*Independent Protestant Loan Fund Society, Re*, CH.D., V.C. (Ir.).

20. *General meeting—Chairman—Dissolution of meeting—Power of chairman.*—It is not within the power of the chairman at a general meeting of a company to dissolve the meeting at his own pleasure. The function of the chairman is to preserve order and to see that the proceedings are properly conducted, and to see that the sense of the meeting is properly ascertained in regard to any question before it.—*National Dwellings Society* v. *Sykes*, CH.D. CHITTY, J.

21. *Mortgage of uncalled capital—Power to mortgage—Winding up—Priority—Companies Act*, 1862. —A company limited by shares was authorized by its memorandum of association "to receive money on loan or deposit or otherwise, and upon any security of the company, or upon the security of any property of the company, or without giving security."

Held, that these words authorized a charge upon uncalled capital.

The articles of association of the company, as altered by special resolution, contemplated and provided for the issue of debentures, which were to be a charge upon uncalled capital. Debentures were accordingly issued and expressly charged all uncalled capital.

In the winding up the debenture-holders claimed to have a first charge on the capital of the company which remained uncalled at the commencement of the liquidation.

Held, that they were entitled to be paid out of such calls in priority to the unsecured creditors of the company.

In re Pyle Works (Limited), 38 W. R. 674, 44 Ch. D. 534, approved.—*Newton* v. *Anglo-Australian Investment Co.*, P.C. 401.

22. *Practice—Debenture-holder's action—Declaration of charge.*—It is the practice of the judges of the Chancery Division to allow a declaration of charge to be inserted in the judgment in a debenture-holder's action; but, after a winding-up order, the declaration will not be made without the assent of the official receiver and liquidator.—

Marwick v. *Thurlow* (*Lord*), CH.D. VAUGHAN WILLIAMS, J. 493.

23. *Practice—Debenture-holder's action—Form of order.*—A debenture-holder suing on his own behalf to enforce his security is not entitled as a matter of course to a declaration similar to that in *Perry* v. *Clutton Coal Co.*, Seton, 5th ed., p. 1685; but, where all persons interested are parties, such a declaration is a convenient preface to the judgment of the court, and should be inserted according to the usual practice of the Chancery Division.—*Purkinson* v. *Wainwright*, CH.D. NORTH, J. 420.

24. *Shares—Allotment—Application for shares—Withdrawal of application—Authority of clerk in registered office—Contributory—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 39.—In the absence of evidence to the contrary, the court will draw the inference that a clerk in the registered office of a company is, in the absence of the secretary, so far the clerk in charge that it must be imputed to the company that, in office hours, he had authority to receive communications so as to bind the company which were made in the absence of other persons who, if present, would have authority to receive such communications.—*Brewery Assets Corporation, Re, Truman's case*, CH.D. WRIGHT, J., 73.

25. *Shares—Contributory—Signature of memorandum by member of firm—Application for shares by firm—Director—Qualification shares—Contract—Intention—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.—D., a member of a firm, signed the memorandum of association of a company in his own name for 100 shares. In the name of the firm he subsequently applied for 100 shares, which were allotted to the firm.

Held, upon the evidence, that there was only one agreement to take 100 shares—viz., an agreement entered into by D. on behalf of the firm, and created by his signature to the memorandum; that the application for, and allotment of, the shares to the firm was merely made in pursuance of, and to carry out, that agreement; and, consequently, that D.'s name ought not to have been placed on the list of contributories for 100 shares in addition to the 100 shares held by the firm.

A director's qualification shares may be held jointly with another person.

Decision of Vaughan Williams, J., reversed.—*Glory Paper Mills Co., Re, Dunster's case*, C.A. 164.

26. *Shares—Issue of paid-up shares—Registered contract—Payment not in cash—Illusory consideration—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25. In deciding whether section 25 of the Companies Act, 1867, has been complied with, the court is not bound to go into the question whether the price given was fair or reasonable, or whether the things given for the shares had a cash value in the market equal to the nominal value of the shares.—*Theatrical Trust, Re, Chapman's case*, CH.D. VAUGHAN WILLIAMS, J., 553.

27. *Shares—Reduction of capital—Confirmation by court—First preference, second preference, and ordinary shares—Preferential rights as to capital as well as dividend—Total extinction of second preference and ordinary shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.—The court has jurisdiction to sanction a reduction of capital involving the entire cancellation of groups of deferred shares against the will of some of the holders if such shares are deferred as to capital as well as dividend.

The capital of a company consisted of first preference, second preference, and ordinary shares, with contingent non-cumulative preferential rights as to dividend and absolute preferential rights as to capital. A large amount of capital being lost or unrepresented by available assets, an extraordinary meeting of more than three-fourths of each class of preference shareholders and a few ordinary shareholders unanimously passed a special resolution for reduction, throwing the loss as far as possible on the second preference and ordinary shares, so as to entirely cancel them, and leaving the balance only to be borne by the first preference shares. A second preference shareholder, who was not at the meeting, attended at the hearing of the petition for confirmation and opposed the reduction. The evidence showed that it was highly improbable that the company would ever earn more than enough to pay the first preference dividends.

Held, having regard to the evidence and to the large majority in favour of the proposed reduction, that it ought to be allowed.—*Floating Dock Co. of St. Thomas, Re*, CH.D. CHITTY, J., 344.

28. *Shares—Transfer—Blank transfer—Broker—Authority of—Priorities—Right to registration.*—The plaintiff, the registered owner of shares in a company, instructed a broker to sell same, and for that purpose delivered to him the share certificate and a blank transfer signed by plaintiff. The articles of the company did not require transfers to be by deed. The broker improperly deposited the blank transfer and certificate with the defendant as security for his own debt. Defendant afterwards filled up the blank transfer with the date, consideration, and name of transferee, and sent it for registration to the office of the company, where it lay for sixteen days without being registered. The company had then no notice of any invalidity in the transfer, and had no power under their articles to refuse to register the transfer. The plaintiff (whilst the transfer was lying unregistered at the office of the company) discovered the facts, and brought an action to restrain registration and establish his title to the shares.

Held, that the defendant, the broker, had acquired no title to the shares as against the plaintiff; that the defendant had, therefore, no inchoate title capable of being completed by registration, and that the plaintiff was entitled to the injunction and declaration claimed.

France v. *Clarke* (26 Ch. D. 257) followed.—*Fox* v. *Martin*, CH.D. KEKEWICH, J.

29. *Winding up—Compulsory order—Debt under agreement with voluntary liquidator—Petitioner—Locus standi of—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 95, 133, 145, 161.—The A. Banking Co., being unable to realize its assets and pay its debts, passed resolutions for voluntary winding up, and appointed liquidators, who were authorized to enter into an agreement with the U. Banking Co. for the transfer of its assets and liabilities to the U. Co. One of the terms of such agreement was that, in the event of the assets not being sufficient to pay the debts, the liquidators were, so far as they legally could, to make such calls as should be necessary to raise the deficiency.

Held (affirming the decision of Vaughan Williams, J., p. 299), that there was power under sections 95 and 133 of the Companies Act, 1862, to sell on the terms of the agreement, and that the debt, whether existing at the date of the commencement of the winding up or not, was sufficient to support a petition for compulsory winding up by the court.—*Bank of South Australia, Re*, C.A. 339.

30. *Winding up—Costs—Successful litigant—Priority—Immediate payment—Companies (Winding-*

up) Rules, 1890, *r.* 31.—A. obtained an order that his name should be removed from the list of contributories of a company which was being wound up, and that the liquidator should, "out of the assets of the company," pay the applicant his taxed costs of the application. The liquidator having refused to pay, except in due course of administration in the winding up, A. took out a summons asking that the liquidator might be ordered to make immediate payment. The liquidator had a sum of money in hand, but the costs of realization in the winding up had not been paid, and a similar order to the applicant's, and prior in date, had been obtained by another person. There were also some claims put forward by the liquidator, in respect of which he had to give security for costs.

Held, that the matter ought to be referred back to chambers, with liberty to the liquidator to bring to the attention of the registrar any present claims or rights to immediate payment, and that, if there was a sufficient sum to warrant payment to the applicant of his costs, he was to have them; if there was not such a sum, there could be no order for immediate payment; but, even in the latter case, the right of payment ought not to be postponed indefinitely.

In re Home Investment Society, 28 W. R. 576, 14 Ch. D. 167, and *In re Dominion of Canada Plumbago Co.*, 32 W. R. 425, 27 Ch. D. 33, followed.

Ex parte Percival, L. R. 6 Eq. 519, 17 W. R. Ch. Dig. 76; and *In re Dronfield Silkstone Coal Co.*, 31 W. R. 671, 23 Ch. D. 511, not followed.—*London Metallurgical Co., Re*, CH.D. VAUGHAN WILLIAMS, J. 476.

31. *Winding-up — Costs — Taxation—Official receiver's report—Misfeasance summons—Adjournment into court—Oral evidence—Instructions for brief—Three counsel — Consultations — Refreshers —Companies (Winding-up) Rules* 1890, *r.* 78—*R. S. C.* 1883, *Ord.* 65, *r.* 27, *sub-rules* 30, 39, 40, 48; *App. N., no.* 81.—The official receiver's special report under rule 78 of the Companies (Winding-up) Rules 1890, is neither a pleading nor equivalent to a pleading, nor an affidavit, nor within Ord. 65, r. 27; but a statement of facts for which the only charges which can be made are for drawing at 8d. a folio, and copying at 4d. a folio.

The hearing of an adjourned misfeasance summons under section 10 of the Companies (Winding-up) Act, 1890, is not "the hearing or trial of action upon notice of trial, or notice for judgment given" (R. S. C., 1883; App. N., no. 81), and therefore charges for instructions for brief cannot be allowed, but only for drawing and copying all the necessary proofs and statements of the witnesses and observations at the rate of 1s. for drawing and 4d. for each copy for counsel.

On the hearing of such a summons upon affidavit and oral evidence the fees and costs of three counsel may be allowed where it is essential to justice, having regard to the issues raised and the probable and actual length of the hearing, that the services of three counsel should be retained.

Fees to counsel for consultation (after the first one) during the hearing disallowed.

The registrar has power to allow refreshers on such an adjourned summons where oral evidence is adduced, such a case being a matter within ord. 65, r. 27, sub-rule 48, and section 100 of the Judicature Act, 1873.—*Anglo-Austrian Printing Union Re*, CH.D. VAUGHAN WILLIAMS, J.

32. *Winding-up — Dividend — Net profits—Estimate—Payment of dividend out of the estimated profits—Stale demand—Resolution for dividend—Directors' remuneration—Interest*—3 & 4 *Will.* 4, *c.* 42, *s.* 28.—The articles of a limited company provided that, after certain sums had been paid, ten per cent. of the residue of the net profits should be paid as remuneration to the directors, and that the ultimate residue of net profits should be applied in paying such dividend on the ordinary shares, or in such manner as, subject to the regulations, a general meeting might determine. At a general meeting held in April, 1883, it was resolved that a sum treated as the balance of net profits should be dealt with in accordance with the last-mentioned provisions of the articles. It was objected that some of the items which were then treated as valuable had no substantial value, and that the directors could not, acting reasonably, take the view that they were valuable. The directors acted on the report of their auditor and after consultation with him. The company was wound up voluntarily in 1883, and all the creditors were paid in full, and certain directors claimed to be paid their shares of the ten per cent. of the residue of the net profits—a claim which was opposed by the liquidator, on the ground that the assets were over-estimated at the time the resolution was passed, and that the proposed distribution of the residue was in effect a payment of dividends out of capital.

Held, that the directors were entitled to the ten per cent. claimed, but without interest.

Orton v. *Cleveland Fire Brick and Pottery Co.*, 13 W. R. 869, 3 H. & C. 868, not followed.—*Peruvian Guano Co., Re, Kemp's case*, CH.D. WRIGHT, J., 170.

33. *Winding up — Lease — Bankruptcy—Proof—Claim by lessee—Future and contingent liability under lease—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—A limited company were lessees under a lease for a term of fourteen years at a quarterly rent determinable at the end of seven years, they paying the rent and performing and observing the covenants in the lease down to the date of the determination of the term. The company went into liquidation before the end of the seven years and was insolvent.

Held, that the lease was a subsisting lease; that *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, had no application, and that the principle of *In re Haytor Granite Co.*, 14 W. R. 186, L. R. 1 Ch. App. 77, and *Horsey's Claim*, 16 W. R. 577, L. R. 5 Eq. 561, applied.—*New Oriental Bank Corporation*, CH.D. VAUGHAN WILLIAMS, J. 523.

34. *Winding up—Officers of company—Auditor—Payment of dividends out of capital—Misfeasance—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10—*Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7, *sub-section* 1.—The articles of a joint-stock banking company provided that the auditor should be elected by the company in general meeting. They also expressly declared that the auditor should be an officer of the company.

The Companies Act, 1879, *s.* 7, provides (1) for the examination of the accounts of every banking company once at least in every year by an auditor or auditors elected annually by the company in general meeting; and (2) that a director or officer of the company shall not be capable of being elected auditor of such company.

Held, that a person duly appointed auditor in pursuance of the articles and the Companies Act, 1879, is an officer of the company within the meaning of section 10 of the Companies (Winding-up) Act, 1890, and, as such, is liable for any misfeasance or breach of duty on his part.—*London and General Bank, Re*, C.A. 481.

35. *Winding up—Officer of Company—Solicitor—Misfeasance—Companies (Winding-up) Act* 1890 (53 & 54 *Vict. c.* 63), *s.* 10.—W., a solicitor, was appointed and acted as sole solicitor to the Liberator Society, which was incorporated under the Building Societies Act 1874, at an annual salary out of which he was to pay officers, clerks, &c., and undertook to pay over to the society all fees and costs paid to him by clients of the society. An order was subsequently made for the compulsory winding-up of the society, and pursuant to rule 78 of the Companies (Winding-up) Act 1890, application was made by the official receiver to bring to the notice of the court certain acts of misfeasance committed by W., and for an order that he should contribute to the assets of the society sums received by him as officer thereof.

Held that, although *primâ facie* a solicitor is not any more an officer of a society than is a banker, yet inasmuch as W. had agreed to do all the work that the society had for him to do in consideration of a fixed salary, and to forego as far as the members of the society were concerned all the ordinary rules with regard to payment, and as he had acted practically as the society's financial manager, he was an officer of the society within section 10 of Companies (Winding-up) Act 1890, and that as such, his estate was liable to contribute to the assets of the society all sums that he had received as "officer" of the society.—*Liberator Building Society, Re,* Q.B.D.

36. *Winding-up—Practice—Deceased shareholder—Scotch sequestration—Title to shares—Surplus assets—R. S. C.,* 1883, *ord.* 16, *r.* 46.—A domiciled Scotchman was, at the date of his death, the registered holder of shares (of which he was a trustee) in an English company which was in voluntary liquidation. After his death sequestration was issued in Scotland against his estates, and a trustee was appointed in the sequestation proceedings. By Scotch law the legal interest in the shares was vested in the sequestrator, and he was able to give a title to a purchaser of the shares from himself without the assistance of the Scotch legal personal representative. No legal personal representative had been constituted in England.

Held, that the title to the shares vested in the sequestrator, and that it was unnecessary to make any order under R. S. C., 1883, ord. 16, r. 46.—*Tuticorin Cotton Press Co., Re,* CH.D. VAUGHAN WILLIAMS, J.

37. *Winding up—Practice—Official receiver—Misfeasance—Board of Trade—Jurisdiction of court—Companies Winding-up Act,* 1890, *s.* 10.—Whether or not proceedings under section 10 of the Companies (Winding-up) Act, 1890, for misfeasance ought to be instituted by the official receiver against the directors or officers of a company, is a matter for the determination of the court, and not of the Board of Trade.—*New Zealand Loan Agency Co., Re,* CH.D. VAUGHAN WILLIAMS, J.

38. *Winding up—Profits—Undivided profits—Profits earned before liquidation—Preference shareholders—Capital—Costs of liquidation—Priority.*—Where, on a limited company going into liquidation, there is standing to the credit of its revenue account a sum representing undivided net earnings.

Held, that, notwithstanding the liquidation, such sum was, by the terms of the memorandum and articles of association, applicable as "profits," in payment of arrears of dividend due to the preference shareholders in priority to the payment of a deficit on the capital accounts, to the costs of liquidation, or to the return of capital to the shareholders.—*Bishop* v. *Smyrna and Cassaba Railway Co.,* CH.D. KEKEWICH, J., 647.

39. *Winding up—Public examination—Official receiver—Further report of—Grounds for discharge of order for public examination—Evidence explaining or contradicting report—Application to remove from file—Facts showing fraud—Companies (Winding-up) Act,* 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sections* (2) (3).—The further report made by the official receiver under section 8, sub-section (2), of the Companies (Winding-up) Act, 1890, after making various allegations as to the promotion and formation of the company and its affairs generally, concluded as follows:—"The official receiver is of opinion that the facts hereinbefore set out show a *primâ facie* case of fraud on the part of some persons, being directors or officers of the company, in relation to its affairs since its formation, and that it is desirable that a public examination should be held of the persons named in the schedule hereto." An order having been made thereupon for the examination of certain persons, officers of the company, under sub-section (3) of the same section, these persons moved that the further report might be ordered to be amended or taken off the file, on the ground that it was not in accordance with the said Act and materially misstated or misrepresented the effect of the evidence on which it purported to be founded, and that the order for public examination might also be discharged. There was no suggestion that the official receiver had acted in bad faith. On the hearing of the motion the applicants asked to be allowed to adduce further evidence as to matters referred to in the further report.

Held, that such further evidence ought not to be allowed, and that the application should be dismissed.—*New Travellers Club, Re,* CH.D. ROMER, J., 282.

40. *Winding up—Public examination—Report of official receiver—Fraud—Companies (Winding-up) Act,* 1890, *s.* 8.—The court has no power under the Companies (Winding-up) Act, 1890, s. 8, sub-section 3, to order a public examination upon a report which does not show on the face of it that some fraud has, in the opinion of the official receiver, been committed. That opinion, however, need not be stated in express terms.

In re Laxon & Co. (*No.* 3), 41 W. R. 62, [1893] 1 Ch. 210, and *In re Birkdale Steam Laundry Co.,* 42 W. R. 144, [1893] 2 Q. B. 386, discussed.

Decision of Vaughan Williams, J. (42 W. R. 602), affirmed.—*General Phosphate Corporation, Re,* C.A., 34.

41. *Winding up—Rates—Liability for—Beneficial occupation of premises—Caretaker's possession—Companies Act,* 1862 (26 & 27 *Vict. c.* 89), *ss.* 85, 87, 138, 163.—A liquidator of a company who deliberately chooses to occupy premises belonging to the company because he thinks he may get a better price by waiting before selling, and a loss to the company would be avoided by his so waiting, must pay the rates in respect of his occupation in full.

A company which has ceased to carry on business went into voluntary liquidation. The company possessed certain leasehold premises and plant. The liquidator put a caretaker in possession of the premises and plant until the same should be sold. No profits were made by reason of the occupation of the liquidator, but, on the contrary, expense was incurred. After the commencement of the winding up the vestry made a rate and threatened

to distrain on the company's premises for the amount assessed thereon.

Held, that the liquidator ought to pay the rates in respect of his continued occupation of the premises.

The true test to be applied in such a case is the test approved by Bowen, L.J., in *National Arms and Ammunition Co.*, 33 W. R. 585, 28 Ch. D. 474, doubting the test applied by Bacon, V.C., in *In re West Hartlepool Iron Co.*, 34 L. T. N. S. 568, 24 W. R. Dig. 68.

After *National Arms and Ammunition Co.*, the case of *Watson, Kipling, & Co.*, 31 W. R. 574, 23 Ch. D. 500, cannot stand as an authority so far as it distinguishes rent from rates. — *Blazer Fire Lighter, Re*, CH.D. VAUGHAN WILLIAMS, J., 364

42. *Winding up—Scheme of arrangement—Reservation to official receiver of rights against directors of old company—Opposition to proceedings by new company—Sanction of court—Companies (Winding-up) Act*, 1890, *s.* 10.—Where a scheme sanctioned by the court under the Joint Stock Companies Arrangement Act, 1870, contains a reservation to the official receiver of his right to proceed against the directors of the old company under section 10 of the Companies (Winding-up) Act, 1890, for misfeasance, the court will refuse to sanction such proceedings even where a *primâ facie* case of misfeasance has been shown, if it is satisfied that the directors of the new company have come to a *bonâ fide* conclusion that such proceedings will be detrimental to the interests of their company.—*New Zealand Loan Agency Co., Re*, CH.D. VAUGHAN WILLIAMS, J.

43. *Winding up—Scheme of arrangement—Transfer to new company—Creditor—Contingent liability—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 158—*Joint-Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.—The lessee of a colliery assigned his lease to a limited company, who covenanted with him to pay the rent and royalties reserved by the lease, and to perform the lessee's covenants and to indemnify the lessee therefrom. A resolution to wind up the company voluntarily was passed, and subsequently an order was made to continue the winding up under the supervision of the court.

By a scheme of arrangement sanctioned by the court it was provided that a new company was to be formed to take over the assets and liabilities of the old company, and to pay or satisfy, within three months of the approval of the scheme by the court, the debentures and unsecured creditors of the company and the costs of winding up; that the new company should allot to each shareholder of the old company one share in the new company, credited with £4 paid, for each share held by him in the old company; and that, upon payment or satisfaction of the debentures, debts, and expenses the old company should be wound up and dissolved.

A new company was formed as proposed, and under an agreement made between the liquidators of the old company and the new company the assets of the old company were taken over by the new company. The lessee knew of the proposed scheme, but did not oppose its approval by the court or take any steps to prevent its being carried out. He subsequently, however, applied by summons that a claim by him might be admitted against the old company based on the covenant by the company to indemnify him from the rent, royalties, and covenants of the lease.

Held (1), that the applicant was a "creditor" within the meaning of section 2 of the Joint-Stock Companies Arrangement Act, 1870, and was, therefore, bound by the scheme of arrangement; (2) that, even if that were not so, the applicant was too late in making his application.

Quære, as to the effect of the decision in *Hardy* v. *Fothergill*, 37 W. R. 177, 13 App. Cas. 351, upon the right of a lessor to have the assets of a limited company which is being wound up impounded.—*Midland Coal & Iron Co., Re, Craig's case*, C.A. 244.

44. *Winding up—Shares issued at a discount—Distribution of assets—Adjustment of rights of contributories* inter se—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38)—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.—A limited company, having under its articles power to issue shares at a discount, increased its capital by the creation of additional shares and issued some of the additional shares at a discount to W., an original shareholder. The company having been ordered to be wound up, and all the creditors and the costs of the winding up having been paid before the whole of the share capital had been called up, the liquidator took out a summons to make W. liable, as the holder of discount shares, to pay up the whole amount of those shares under section 25 of the Companies Act, 1867.

Held, that the issue of shares at a discount was void altogether, even though the company purported by its articles to have power to do so; and, therefore, that the discount shares were liable to be called up in full for the purpose of adjusting the rights of the various shareholders in the company *inter se*.

In re Almada and Tirito Co., 36 W. R. 593, 38 Ch. D. 415, and *In re Weymouth and Channel Islands Steam Packet Co.*, 39 W. R. 5, 49, [1891] 1 Ch. 66, followed.—*Railway Time Tables Publishing Co., Re, Welton, Ex parte*, C.A., 117.

45. *Winding up—Voluntary winding up—Distress for rent—Rent payable in advance—Proof—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 138, 163.—A company, formed under the Companies Acts, was tenant under an agreement which provided that, on payment being required, two quarters' rent should become payable in advance, the rent being payable on the usual quarter days. The company went into voluntary liquidation on the 20th of December, 1894, and a liquidator was appointed. On the 27th of December a demand was made for the rent due for the December quarter, and payment was required of two quarters in advance. This demand not being satisfied, the defendants levied a distress for the whole amount.

Held, that the liquidator was only liable for an apportioned part of the rent.

In re Lancashire Cotton Spinning Co., Ex parte Carnelley, 36 W. R. 305, 35 Ch. D. 656, followed and applied.—*Shackell* v. *Chorlton*, CH.D. KEKEWICH, J. 394.

See also BANKRUPTCY, 24; BILL OF SALE, 4; CONTRACT, 2; ESTOPPEL; INFANT, 1; LIBEL, 2; MORTGAGE, 2; RECEIVER; TRADE NAME, 1; TRAMWAY, 1; WILL, 33.

COMPENSATION.—See LANDLORD AND TENANT, 1; LANDS CLAUSES ACTS, 1, 3; MINES; RAILWAY, 4, 5; TRAMWAY, 3.

COMPROMISE.—See BANKRUPTCY, 25; PRACTICE, 51; PROBATE, 4; SPECIFIC PERFORMANCE.

CONDITION:—

Restraint of marriage—Gift over in event of daughter marrying "below her social position"—Condition not invalid for uncertainty.—A testator,

by will, devised freehold lands to his daughter for life; and by a codicil he provided that if his daughter should "marry a man below her in social position" he thereby revoked the devise to his daughter in the will, and gave the property over to others.

The daughter married an office apprentice in a mill.

Held, that the condition as to the marriage of the daughter was neither illegal nor invalid for uncertainty; and evidence having been taken as to the respective social positions of the daughter and her husband at the time of the marriage, it was held that the gift over took effect.—*Greene* v. *Kirkwood*, C.A. (Ir.).

See also ADULTERATION, 4; INSURANCE, 3; LOCAL GOVERNMENT, 11; RAILWAY, 2; VENDOR AND PURCHASER, 1-5.

CONSENT:—

Mistake of fact—Setting aside fixtures—Mortgagee and debenture-holders.—An order made by consent in an action can be set aside upon the like grounds as those upon which the agreement embodied in such order might have been set aside.

A consent order having been made, and it having been afterwards discovered that the parties had consented to it under a common mistake as to a material fact.

Held, that the order ought to be set aside.—*Huddersfield Banking Co.* v. *Lister*, C.A. 567.

See also ESTOPPEL.

CONTEMPT:—

1. *Attachment, writ of—Order for the payment of money—Part payment—Giving time—Waiver of writ of attachment.*—A writ of attachment issued for disobedience to an order to pay money can be enforced although the person at whose instance it was obtained has received payment of part of the money and given time (which had since expired) for the payment of the rest.

Harvey v. *Hall*, 21 W. R. 733, L. R. 19 Eq. 324, distinguished.—*Fereday, Re*, CH.D. NORTH, J.

2. *Hearing* in camera—*Publication of proceedings.*—It is a contempt of court to give the public information of what the judge has decided ought not to be disclosed by determining to hear the case in private; and the contempt is the same whether the report is accurate or not.—*Martindale, Re*, CH.D. NORTH, J., 53.

See also HABEAS CORPUS.

CONTRACT:—

1. *Construction—Building contract—Non-completion by specified date—Penalties—Transfer of contract—Liability.*—By a contract between a waterworks company and a building contractor for the building of a reservoir, it was agreed that the contractor should be liable to certain penalty, as and for liquidated damages, for each day elapsing between the day which should be fixed for the completion of the works, and the day on which the completed works should be delivered to the company. There was also a clause providing that in certain events the company might terminate the contract so far as respected its performance by the contractor, but without thereby affecting in any other respects his liabilities, and might enter into possession of the works.

In pursuance of this last-mentioned clause the company terminated the contract, and entered into possession of the works.

The defendant, who had been surety for the contractor, then entered into an agreement with the company to complete the works in accordance with the original contract, upon the express condition that nothing in the agreement should be construed to rescind or vary any term or condition in the original contract, but that everything should stand upon the same footing, both during completion of the works and in finally settling the accounts, as if the latter agreement had not been made.

Through no delay on the part of the defendant, but owing solely to the delay of the original contractor, the works were not completed and delivered until some time after the day fixed for completion. The company claimed from the defendant penalties at the rate agreed upon in the original contract.

Held that, upon the true construction of the two contracts, the defendant was liable to the penalties at the rate agreed upon in the original contract.—*Yeadon Waterworks Co.* v. *Wright*, C.A.

2. *Construction—Company—"£1,000 worth" of shares—Covenant to pay £1,000 or to transfer £1,000 worth of shares in company to be formed by covenantor—Company formed with preference and ordinary shares—Transfer of ordinary shares of no market value—Right to enforce payment of £1,000.*—The defendant by deed covenanted within twelve months to pay the sum of £1,000 to or to transfer into the names of the plaintiffs "£1,000 worth of fully paid-up shares" in a company to be formed by him. The company was formed and registered with capital divided into preference and ordinary shares of £10 each. The defendant transferred to the plaintiffs 100 ordinary shares expressed to be fully paid up, but no contract in respect of them was registered till after the expiration of twelve months from the date of the deed. Neither class of shares had any value in the market.

The plaintiffs refused to accept the shares, and brought an action for payment of £1,000.

Held, by Stirling, J., that the defendant, by forming the company with preference and ordinary shares, had put it out of his power to perform his covenant to transfer shares, and that, therefore, the plaintiffs were entitled to £1,000 in cash.

Studholme v. *Mandell*, 1 Ld. Raym. 279, followed.

Held, by the Court of Appeal, that the decision of Stirling, J., should be affirmed, on the ground that the covenant to transfer "£1,000 worth" of shares was a covenant to transfer shares to the value of £1,000.—*McIlquham* v. *Taylor*, C.A. 297.

3. *Engagement as musical director—Stipulation that name should appear in advertisements as such—Measure of damages—Implied term in contract.*—By an agreement of the 18th of August, 1892, the defendant company engaged the plaintiff as musical director of their theatre until the 1st of October, 1895, upon certain terms as to salary, with a provision that the plaintiff's name should be announced in certain daily newspapers, and on bills and programmes. It appeared that the most important duty of a musical director is to conduct the orchestra. The plaintiff had conducted three pieces at the defendants' theatre with perfect success, when a piece was brought out which was conducted by the composer. Since that time the plaintiff had not been called on to conduct or perform the duties of his office, but his salary had been paid under the agreement, and it was common ground that he was still musical director of the theatre.

Held, that the stipulation that the plaintiff's name should appear as musical director meant, having regard to the observations of Lord Esher,

M.R., in *Hamlyn & Co.* v. *Wood & Co.*, 1891, 2 Q. B. at p. 491, that such a state of things should exist that the defendants should be in a position truly to make such an announcement; or, in other words, that they should employ him in that capacity, and the plaintiff, though it had not been shown that his non-employment had interfered with his obtaining another post, was entitled to more than nominal damages.—*Bunning* v. *Lyric Theatre*, CH.D. STIRLING, J.

4. *Joint contract—Joint guarantee—Cheque given by one joint guarantor—Unsatisfied judgment on cheque—Action against other guarantor on guarantee—Res judicata.*—An unsatisfied judgment on a cheque given by one joint contractor in respect of the joint debt is no bar to an action against the other joint contractor on the original debt.

Two persons jointly guaranteed the payment by a tenant of his rent to the plaintiff. The tenant having made default in payment of the rent, one of the joint guarantors gave the plaintiff his cheque for the amount. The cheque being dishonoured, the plaintiff sued upon it and recovered judgment which was not satisfied. The plaintiff then sued the other joint guarantor upon the guarantee.

Held, that, as the causes of action were different, the judgment on the cheque was no bar to the action on the guarantee.

Drake v. *Mitchell*, 3 East, 251, followed.

Cambefort v. *Chapman*, 35 W. R. 838, 19 Q. B. D. 229, overruled.

Judgment of Wills, J., 42 W. R. 639, [1894] 2 Q. B. 101, affirmed.—*Wegg-Prosser* v. *Evans*, C.A. 66.

5. *Negligence—Agisment—Accident arising from negligence of agister's servant—Damage too remote or not—Liability of agister if accident is a "natural consequence" of such negligence.*—Under a contract of agistment the defendant put the plaintiff's mare to graze with three horses of his own in a field, part of which, divided off by a wire fence, was let to a cricket club. Through the negligence of the defendant's servant the gate in the fence dividing the two parts of the field was left open, and the four horses strayed through it on to the cricket ground. Some cricketers attempted to drive the horses back, and three of them passed quietly through the gate, but the plaintiff's mare, becoming frightened, ran against the wire fence and was seriously injured.

Held, that the damage to the mare was not too remote, but was the natural and probable consequence of the servant's negligence in leaving the gate open, and that the defendant was liable for damages under the contract.—*Halestrap* v. *Gregory*, Q.B.D. 507.

6. *Service—Implied obligation—Master and servant—Improper use of information obtained during service—Damages.*—The defendant being employed by the plaintiff as manager of his business secretly copied from his master's order-book a list of the names and addresses of the customers with the intention of using it for the purpose of soliciting orders from them after he had left the plaintiff's service and set up a similar business on his own account.

Held, that it was an implied term of the contract of service that the defendant would not use to the detriment of the plaintiff information to which he had access during the course of the service; and that the defendant was liable with damages for the loss caused to the plaintiff by reason of the breach of that term.—*Robb* v. *Green*, C.A.

7. *Service—Negative stipulation really affirmative—Breach—Injunction.*—An injunction ought not to be granted on the breach of a stipulation in a contract of service which, though negative in form, is affirmative in substance.—*Davis* v. *Forman*, CH.D. KEKEWICH, J., 168.

8. *Specific performance—Statute of Frauds—"Lease to be approved in the customary way by my solicitor."*—By a letter which contained all essential terms of a contract, the defendant offered to take a lease of a number of houses from the plaintiff, but there was this provision at the end: "Such lease to be approved in the customary way by my solicitor." The offer contained in this letter was accepted by the plaintiff. The defendant's solicitor subsequently refused to approve the lease, or to complete.

Held, that there was a binding, and not a conditional, contract, which must be specifically enforced. The meaning of the provision was, that the defendant's solicitor was to see that nothing irregular or unusual was inserted in the formal lease which was to carry out the agreement.

The observations of Cairns, L.C., in *Hussey* v. *Horne-Payne* (4 App. Cas. 311) applied.—*Chipperfield* v. *Carter*, CH.D. WRIGHT, J.

See also ADMINISTRATION, 4; COMPANY, 10, 16, 25, 26; COUNTY COURT, 9, 15; FRAUDS, STATUTE OF, 1, 2; INFANT, 1; MARRIED WOMAN, 1; SALE OF GOODS, 1, 2; STOCK EXCHANGE, 1, 2.

CONVERSION.—See ADMINISTRATION, 4; WILL, 17, 18,

CONVEYANCING ACTS.—See INFANT, 2; VENDOR AND PURCHASER, 8.

COPYHOLD:—

1. *Manor—Village green—Manor map—Tithe map—Evidence—Encroachments.*—A manor map produced by the lord of the manor, and made in 1817 by a surveyor, since deceased, but who was proved by the evidence of a living witness to have been conversant with the district, which map was used by the parish authorities for rating purposes:

Held, to be admissible in evidence upon a question of general right to the waste of the manor, in which the inhabitants of a township and tenants of the manor have a common interest.

Acts of ownership by persons who have successfully encroached upon small portions of a common do not give rise to the inference that such persons can make a title to the waste surrounding their encroachments.—*Smith* v. *Lister*, Q.B.D.

2. *Title—Admittance of tenant—Right of lord to seize quousque—Possession of tenant—Admission of title—Statutes of Limitations* (3 & 4 *Will.* 4, *c.* 27; 37 & 38 *Vict. c.* 57).—The Statutes of Limitations do not run as against a lord of a manor so as to deprive him of his quit-rents or to make the copyhold hereditaments freehold until after the usual three proclamations or such a neglect of the copyhold tenant to come in after an express notice as amounts, in fact, to a refusal.—*Beighton* v. *Beighton*, CH.D. ROMER, J., 685.

COPYRIGHT:—

1. *Book—"Map, chart, or plan"—Pattern sleeve—Literary merit—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 1, 2.—The plaintiff claimed copyright in a cardboard pattern sleeve, containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions.

Held, that it was not capable of copyright as a "map, chart, or plan," within section 2 of the Copyright Act, 1842.

Semble, that it might be the subject of a patent, as an instrument or tool.—*Hollinrake* v. *Truswell*, C.A.

2. *International copyright — Breach out of the jurisdiction of copyright in a foreign country — Jurisdiction — Dramatico-musical work — Copyright Act*, 1833 (3 & 4 *Will.* 4, *c.* 15)—*Berne Convention, articles* 2, 9—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33).—The English courts have no jurisdiction to restrain a British subject, resident in England, by injunction from infringing the international copyright granted by the Berne Convention in one of the other countries of the Copyright Union. — "*Morocco Bound*" *Syndicate* v. *Harris*, CH.D. KEKEWICH, J., 393.

3. *International copyright—Registration—Foreign picture—Country where "first produced"—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *ss.* 2 (3). 11.—It is not necessary, in order to maintain an action brought under the International Copyright Act, 1886, for infringement of the copyright in a foreign picture, that the plaintiff should register his copyright in this country.

The country in which a picture is "first produced" within the meaning of section 2, sub-section 3, of the International Copyright Act, 1886, is that in which it is first published.

Hanfstaengl Art Publishing Co. v. *Holloway*, [1893] 2 Q. B. 1, 41 W. R. Dig. 56, approved.—*Hanfstaengl* v. *American Tobacco Co.*, C.A. 261.

4. *Newspaper—Sporting paper—Selections of winners.*—The plaintiff was the registered proprietor of a sporting paper published on Monday in each week, in which appeared, under the heading "One-Horse Selections," the days on which races were to be run during the week, and opposite each day the name of the horse which, in the plaintiff's opinion, was likely to win the race on that day for which it was entered. The defendant published on each day upon which races were run a paper in which appeared, under the heading "The 'Special' One-Horse Finals," the plaintiff's name and the horse selected by him. In an action for infringement of the plaintiff's copyright,

Held, that the matter alleged to be infringed was not a proper subject-matter for copyright, and that, even if it were, there had been no infringement.

Decision of Kekewich, J., p. 136, affirmed.—*Chilton* v. *Progress Printing and Publishing Co.*, C.A. 456.

5. *Periodical—Coloured supplement not physically connected therewith — Registration under Literary Copyright Act of* 1842, *but not under Fine Arts Copyright Act of* 1862—*Infringement — Injunction.* — Where a coloured supplement is issued, but not physically connected, with a periodical, registration of the periodical under the Literary Copyright Act of 1842 will protect such supplement, although not registered under the Fine Arts Copyright Act of 1862, from infringement, if there is clear evidence to show that the supplement is a part of the periodical; and the court will restrain such infringement by injunction.—*Comyns* v. *Hyde*, CH.D. STIRLING, J. 266.

6. *Periodical—Series of separate stories under one general heading—Author, when entitled to sue—Publication in periodical only, not separately—Registration, when sufficient—"Book"—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18, 19.—A. published in a periodical a series of short stories under one general heading, under an arrangement with the proprietors that he should be entitled to separately publish the stories when the series in the periodical was completed. A. registered the general heading only, and the date of first publication as the date when the first story appeared. B. published a copy of one of the stories, which appeared more than two months after such date.

Held (1) that the copyright of the whole series was in A.; (2) that A. could sue B. for infringement without having published his stories, apart from the periodical; (3) that the registration of the general heading with the date, as above stated, entitled A. to sue in respect of any subsequent story of the series, under section 19 of the Copyright Act, 1842.—*Johnson* v. *Newnes*, CH.D. ROMER, J. 572.

7. *Pictures—Sketches from living pictures—Newspaper—Publication—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 2, 6.—Observations upon the meaning of the terms "copy," "reproduction," and "colourable imitation" of an original picture, "or of the design thereof," used in the Fine Arts Copyright Act, 1862, ss. 1, 6.

Decision of the Court of Appeal, [1894] 2 Ch. 1, affirmed.—*Hanfstaengl* v. *Baines & Co.*, H.L.

8. *Sale of printing blocks—Licence—No assignment of copyright — Injunction — Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 18.—The plaintiffs were the registered owners of the copyright in certain illustrations of carriages. Their business was to print illustrations for carriage makers. Occasionally they sold the electro-blocks for printing the illustrations to carriage builders who printed them themselves. The plaintiffs sold to L. some of these blocks, and he permitted the defendants to print from these blocks.

Held, that the sale of the blocks to L. did not operate as an assignment of copyright, and that L. could not authorize the defendants to print illustrations from the blocks, and that an injunction should issue to prevent them doing so.—*Cooper* v. *Stephens*, CH.D. ROMER, J., 444.

9. Tableaux vivants—*Sketches in newspaper—Foreign picture—Foreign Law—Copyright (Fine Arts) Act*, 1862 (25 & 26 *Vict. c.* 68), 1, 2, 4, 6—*International Copyright Act*, 1886, (49 & 50 *Vict. c.* 33) s. 2 (3).—Plaintiff was the owner of copyright in pictures first produced in Germany. These pictures had been represented at an English theatre in the form of *tableaux vivants*, but such representations had been held not to be infringements of the plaintiff's copyright. The defendants published in an illustrated newspaper sketches of the *tableaux vivants* with explanatory letterpress.

Held, that the defendant's sketches were not copies or reproductions of the plaintiff's pictures within section 1 of the Copyright (Fine Arts) Act, 1862, and that whether the case was to be governed by English or German law, the plaintiff was not entitled to an injunction.

Dicks v. *Brooks* followed.—*Hanfstaengl* v. *Newnes*. C.A.

CORPORATION :—

Penalty — Want of qualification — Procedure — Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 224, 226—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61).—An action under section 224 of the Municipal Corporations Act, 1882, to recover a fine from any person for acting in a corporate office without being qualified, is not a "proceeding" to which the Public Authorities Protection Act, 1893, applies, and therefore section 224 is not repealed by the Act of 1893.—*Humphries* v. *Worwood*, Q.B.D.

See also CHARITY, 7; ELECTION LAW, 1, 2, 4, 5, 6, 12; LIBEL, 5; LOCAL GOVERNMENT, 4, 14.

COSTS.—See ADMINISTRATION, 3, 7, 8; ADMIRALTY, 2; ARBITRATION, 3; BANKRUPTCY, 14, 19, 21; COMPANY, 8, 13, 30, 31, 38; COUNTY COURT, 8-10, 13; DIVORCE, 4, 11, 14. ELECTION LAW, 3; EXECUTOR; JUSTICES, 2, 6; LANDS CLAUSES ACTS, 2; LUNACY, 3; MARRIED WOMAN, 9, 10, 12, 13: METROPOLIS MANAGEMENT. 6; PARTNERSHIP, 1; PATENT, 1, 2; POOR LAW, 2, 4; PRACTICE, 4, 8. 20-25, 41, 43, 56; PROBATE, 4, 9; SETTLED LAND, 1, 3; SHIP, 27; SOLICITOR, 3-14; TRUSTEE, 3, 4, 8.

COUNTY COURT:—

1. *Administration—Further proceedings in aid of—Order as to carriage of such proceedings—County Court judge, discretion.*—Where, in the course of an administration suit in a county court, outside proceedings have to be taken, the county court judge has power to direct by whom such proceedings are to be taken; where there is a personal representative (whose conduct is not impeached) of the testator whose estate is being administered, he is *primâ facie* the proper person to have carriage of such proceedings.—*McKinlay* v. *Mackey*, CH.D. (Ir.).

2. *Admiralty—Appeal—Collision—Amendment of claim—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 87, 120.—There is a right of appeal from a county court in an interlocutory matter by permission of the county court judge, although the amount is under £50.

A county court judge has power, under section 87 of the County Courts Act, 1888, to amend a claim in an Admiralty action of collision after the question of liability has been decided, and before the reference.—*Alert, The*, P.D. & AD.D.

3. *Admiralty—Function of assessors—Judgment against opinion of judge—Appeal from county court—Power of Divisional Court to alter judgment.*—In a collision action brought in the county court the judge formed an opinion on the evidence in favour of the plaintiffs, but the nautical assessors took the view that the plaintiffs' vessel was to blame for a wrong manœuvre. The judge felt himself bound to give judgment in accordance with the view of the assessors, expressing at the same time his dissent therefrom. The plaintiffs appealed.

Held, that, on these facts, the court had no power to alter the decision of the learned judge.—*Fred, The*, P.D. & AD.D.

4. *Admiralty—Jurisdiction—Appeal—Damage—Practice—Hearing by judge assisted by nautical assessors—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 10—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 101.—Notwithstanding the provisions of the 101st section of the County Courts Act, 1888, enabling a plaintiff to require a jury to be summoned "in any action" where the claim exceeds £5, and the action is not one of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice, causes of collision, salvage, or towage appointed to be heard in a county court having Admiralty jurisdiction, must, on the request of either party to the cause, be heard, not by a judge and jury, but by the judge of the court assisted by nautical assessors.—*Tynwald, The*, P.D. & AD.D. 509.

5. *Admiralty—Practice—Appeal—Jurisdiction—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.—Sections 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868, are impliedly repealed by section 120 of the County Courts Act, 1888, so far as relates to appeals on questions of law.

An appeal, therefore, lies on a question of law from a judgment of a county court in an Admiralty action, though the amount of the judgment is less than £50, and though no security for costs has been given.—*Delano, The, Neptune Steam Navigation Co.* v. *Sclater*, C.A. 65.

6. *Admiralty—Practice—Salvage—Affidavits of value—County Court Rules*, 1892, *ord.* 39b, *rr.* 30, 31, 32.—The defendant in a salvage suit instituted in a county court having admiralty jurisdiction, is required in the ordinary course of practice, to prove by his affidavit of value the value of the property proceeded against, and this practice is not to be departed from unless under a special order of the judge made in his discretion, having regard to the special circumstances of any particular case before him.—*Argo, The*, P.D. & AD.D. 415.

7. *Bankruptcy—Appeal—Incidental order of judge of High Court—Appeal from such order—Bankruptcy Appeals (County Courts) Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules*, 1886 and 1890, *Rule* 134 (*a*).—Where an order incidental to the order of a county court judge in a bankruptcy matter has been made by a judge of the High Court, the appeal from such order ought to be brought before a divisional court constituted to hear appeals from orders of county courts in bankruptcy matters.—*Dunhill, Re, Wilson, Ex parte*, Q.B.D

8. *Costs—Admitted set-off—Credit given to defendant on writ—Credit not assented to by defendant before action—Reduction of claim by amount of credit—Jurisdiction of county court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 57.—When, in an action of contract brought in the High Court, the plaintiff gives credit on his writ for a sum paid to him by the defendant, such credit, although not assented to by the defendant before action, is an admitted set-off within the meaning of section 57 of the County Courts Act, 1888, and if, in such a case, the plaintiff finally recovers by judgment a sum of £50, then £50 is the amount recovered in the action; so that the action is one which might have been brought in the county court, and the plaintiff is entitled only to county court costs.—*Lovejoy* v. *Cole*, Q.B.D. 48.

9. *Costs—Contract or tort—Action in High Court—Misfeasance—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—An action which can be maintained for misfeasance, contract or no contract, is "founded on tort" within the meaning of section 116 of the County Courts Act, 1888, and a verdict for £20 will, therefore, carry costs on the High Court scale.—*Taylor* v. *Manchester, &c., Railway Co.*, C.A. 120.

10. *Costs—Practice—Interpleader issue—"Subject-matter"—County Court Rules*, 1889, *ord.* 50a, *r.* 12—*Higher scale of costs, Column C.*—The "subject-matter" of an interpleader issue in a county court is not the amount paid into court, but is the value of the goods seized, as found by the judge, together with the damages, if any. Therefore, where the claimant in an interpleader issue paid £36 into court, and the judge found the value of the goods to be £51, and awarded £10 damages,

Held, that the claimant was entitled to costs on the higher scale, Column C, which applies to cases

"where the subject-matter or sum recovered exceeds £50."—*Studham* v. *Stanbridge*, Q.B.D. 543.

11. *Jurisdiction—Registrar—Claim for unexhausted improvements—Appointment of referee—County Court Rules*, 1889, *ord.* 40, *r.* 7—*Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 9, 11, 20, 24.—The court will set aside an award made under the Agricultural Holdings Act, 1883, if it appears on the face of the award that one of the referees was appointed by the county court registrar, unless the award states that such appointment was made with the consent of the party on which behalf the referee was to act.

Held, by Wills, J., that ord. 40, r. 7, of the County Court Rules, 1889, which purported to give larger jurisdiction to the county court registrar in this matter than is conferred by section 9, sub-section 6, and section 11 of the Agricultural Holdings Act, 1883, was *ultrà vires.** [* Ord. 40, r. 7, of County Court Rules, 1889, is since repealed; and r. 7 (*a*), substituted.]—*Griffiths and Morris, Re*, Q.B.D. 652.

12. *Jurisdiction—Stay of execution—Judgments for over £20—County Courts Act*, 1888, (51 & 52 *Vict. c.* 43), *ss.* 105, 153.—A county court judge has no power to grant a stay of execution beyond fourteen days after the date of the judgment in cases of judgments for over £20, on the ground of mere inability to pay the amount of the debt.—*Attenborough* v. *Henschel*, Q.B.D. 283.

13. *Practice—Costs—Action founded on contract or tort—Personal injury to passenger on railway—Negligence of railway company—Less than £50 recovered—County Courts Act*, 1889 (51 & 52 *Vict. c.* 43), *s.* 116.—An action by a passenger lawfully travelling in a train belonging to a railway company for personal injuries caused by the negligence of the company is an action "founded on tort" within the meaning of section 116 of the County Courts Acts, 1888, whether the statement of claim be framed in contract or in tort; and a plaintiff who recovers £20 or upwards is entitled to costs on the High Court scale.

Taylor v. *Manchester, Sheffield, and Lincolnshire Railway Co.*, *ante*, p. 120, [1895] 1 Q. B. 134, discussed.—*Kelly* v. *Metropolitan Railway Co.*, C.A. 497.

14. *Practice — Interpleader — Auctioneer's commission—Independent claims by different parties in respect of same property—County Court Rules*, 1889, *Ord.* 27, *r.* 13.—The plaintiffs, a firm of auctioneers, sued the defendant in a county court for commission in respect of the sale of a house. Another firm of auctioneers claimed from the defendant a different sum for commission in respect of the same sale of the same house.

Held, that the two claims were not opposing or competing and could not be made the subject of an interpleader order.—*Greatorex* v. *Shackle*, Q.B.D.

15. *Remittal — Counter-claim for unliquidated damages—Practice—Jurisdiction—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.—Under section 65 of the County Courts Act, 1888, there is power to remit to the county court an action of contract for less than £100, although the defendant has set up a counter-claim for unliquidated damages.

Decision of the Divisional Court (p. 45) affirmed.—*Guilford* v. *Lambeth*, C.A. 97.

See also SHERIFF, 2.

COVENANT:—

Separation deed between man and women not married—Covenant to pay during life or until molestation—Resumption of cohabitation—Validity of deed.—A. and R., having lived together as man and wife, mutually agreed to separate, and executed a deed by which A. covenanted to pay to R. during her life, or so long as she should not molest him, an annuity. After some time the parties again cohabited, and lived together until A.'s death.

Held (affirming North, J.) in an action by R. for the administration of the testator's estate, that the covenant to pay during life was absolute and indefeasible, and that R. must be admitted as a creditor on the estate for the amount of her annuity. There is no analogy between such a deed and a separation deed between husband and wife.—*Abdy, Re, Rabbeth* v. *Donaldson*, C.A. 323.

See also LANDLORD AND TENANT, 2, 12, 15; MORTGAGE, 11; SETTLED LAND, 4; SETTLEMENT, 1, 5.

CRIMINAL LAW:—

1. *Brothel—Meaning of—House occupied by one woman who receives men for purposes of prostitution—House not frequented by other women—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 13, *sub-section* 1.—A house occupied by a woman who receives men there by day and night for the purpose of having illicit intercourse with her for payment, where no other woman resides in the house or visits or uses the same for immoral purposes, is not a brothel, and such woman does not "keep a brothel" within the meaning of sub-section 1 of section 13 of the Criminal Law Amendment Act, 1885.—*Singleton* v. *Ellison*, Q.B.D. 426.

2. *Demand of money with menaces—Threat of accusation of immoral conduct not amounting to crime—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 44.—A person may be convicted under section 44 of the Larceny Act, 1861, of the offence of sending a letter demanding money with menaces, although the threats contained in the letter are of misconduct not amounting to a crime, and are not threats of injury to person or property.—*Reg.* v. *Tomlinson*, C.C.R. 544.

3. *False pretences—Indictment—Receiving goods knowing them to have been obtained by a false pretence—Setting out false pretence in the indictment—24 & 25 Vict. c.* 96, *s.* 95.—In an indictment for receiving goods knowing them to have been obtained by false pretences, it is not necessary to set out the false pretence.—*Reg.* v. *Taylor*, Q.B.D. 24.

4. *False pretences—Sufficiency of indictment—Allegation of false pretences made "to her Majesty's subjects"—Evidence—Handwriting—Witness not a professional expert.*—A prisoner was convicted for obtaining a cheque by false pretences upon a count in an indictment which alleged that he inserted an advertisement in a newspaper and thereby "did falsely pretend to the subjects of her Majesty the Queen," &c., and by means of such false pretence did unlawfully obtain from A. B. (the prosecutrix) &c.

Held, that the count sufficiently stated the offence, and that the prisoner was rightly convicted.

Reg. v. *Sowerby*, 42 W. R. 608, [1894] 2 Q. B. 17[illegible] distinguished.

Per Mathew, J.—If the averment that the false pretence was made to the prosecutrix was imperfect, the imperfection was cured by verdict.

A solicitor who had made a study of handwriting, but was not by profession an expert in handwriting, gave evidence that, in his opinion, certain documents were written by the prisoner.

Held, that the evidence was admissible.—*Reg.* v. *Silverlock*, C.C.R. 14.

5. *First offence—Trial as for a first offence—Previous conviction—Justices—Summary Jurisdiction Act*, 1879, *s.* 17—*Criminal Law Amendment Act*, 1885, *s.* 13.—A defendant was charged before a court of summary jurisdiction with keeping a brothel under section 13 of the Criminal Law Amendment Act, 1885, for which offence she was convicted, and become thereby liable to imprisonment not exceeding three months. Before sentence a constable reported to the justices a previous conviction for the like offence. Upon a second conviction she would have been liable to imprisonment for a period not exceeding four months. Under the Summary Jurisdiction Act, 1879, a person charged with any offence for which imprisonment exceeding three months may be imposed, is entitled to the option of being tried by a jury. The justices sentenced the defendant to two months' imprisonment.

Held, that the defendant had never been charged with any offence for which imprisonment exceeding three months could have been imposed; that the justices had in fact treated the charge as a first offence; and that the defendant was, therefore, not entitled to claim a trial by jury.—*Reg.* v. *Fowler*, Q.B.D.

6. *Intimidation—"Following"—Conspiracy and Protection of Property Act*, 1875, *s.* 7—*Commitment—Justices.*—A commitment under section 7 of the Conspiracy and Protection of Property Act, 1875, for "following in a disorderly manner with a view to compel one A. B. to abstain from working as a shoe-finisher in the employment of one C. D., a shoe manufacturer carrying on business in the parish of E, is a good one, inasmuch as it contains a sufficient description of a specified act from which the complainant was compelled to abstain.—*Wilkins, Ex parte*, Q.B.D.

7. *Libel—Form of indictment—Absence of averment of malice—Libel Act*, 1843 (6 & 7 *Vict. c.* 96), *s.* 5.—Section 5 of the Libel Act, 1843, which enacts that "if any person shall maliciously publish any defamatory libel," he shall upon conviction be liable to fine or imprisonment, does not create or define the offence, and an indictment for libel which does not contain an averment of malice is not bad by reason of the omission of such an averment.

Semble (*per* Lord Russell of Killowen, C.J., and Charles, J.), even if the averment of malice be necessary, the omission of it is a defect which may be cured by verdict.—*Reg.* v. *Munslow*, C.C.R. 495.

8. *Maintenance.*—A criminal prosecution cannot be tainted with the illegality of maintenance.—*Grant* v. *Thompson*, Q.B.D., 446.

9. *Perjury — Materiality of evidence.* — False evidence wilfully and corruptly given as to matters affecting the credit of the witness is material, and he may be convicted of perjury in respect thereof.

At the trial of a person upon a charge of selling beer without a licence he falsely swore that a plea of guilty put in upon the occasion of a previous charge for a similar offence being made against him, had been put in without his knowledge or consent.

Held, that such evidence affected his credit as a witness, and was material, and that he was rightly convicted for perjury in respect of such false evidence.—*Reg.* v. *Baker*, C.C.R., 654.

See also GAMING, 3.

CROWN :—

Prerogative—Crown colony—Colonial servants—Right of dismissal—Office held during pleasure.—Except in special cases where it is otherwise provided, servants of the Crown hold their office during the pleasure of the Crown, for such are the well-understood terms of their engagement. This rule applies in a Crown colony.

Semble, a Colonial Government stands, in this respect, on the same footing with the Home Government.

The Colonial Office Regulations are merely directions given by the Crown to the Governments of Crown Colonies, and do not constitute a contract between the Crown and its servants.—*Shenton* v. *Smith*, P.C., 637.

See also LANDLORD AND TENANT, 6.

DAMAGES.—See CONTRACT, 1, 3, 5, 6; COUNTY COURT, 15; HIGHWAY, 7; INJUNCTION, 1; LANDLORD AND TENANT, 9, 15; LOCAL GOVERNMENT, 8; MASTER AND SERVANT, 1, 2; SALE OF GOODS, 3; SHIP, 5, 14.

DEED :—

1. *Construction—General words—"Other goods, chattels, and effects"—Doctrine of* ejusdem generis.—A husband executed by deed a post-nuptial settlement by which he demised to trustees certain leasehold premises "with the messuage, tenement or dwelling-house, back-building, offices, coach-houses, stable buildings, and all other erections." By the same deed the husband assigned to the trustees the household furniture, plate, linen, china, glass, &c., "and other goods, chattels and effects, in, or upon, or belonging to" the said messuage and premises. After the death of the husband, the wife, as *cestui que trust* under the settlement, claimed the horses, carriages, harness, and stable furniture in the coach-houses and stable buildings at the time of the husband's death.

Held, that the general words "other goods, chattels, and effects" were to be given their natural, and not a restricted, sense; and that the wife was entitled to the horses, carriages, harness, and stable furniture.

The doctrine of *ejusdem generis*, as explained in *Parker* v. *Marchant*, 1 Y. & C. C. C., followed and approved.—*Anderson* v. *Anderson*, C.A. 322.

2. *No words of limitation—Legal or equitable estate—Money passing as land—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69.—Under a deed executed by father and son, the son, in consideration of the release by his father of a sum of £1,000, part of an alleged debt, purported to assign to his father absolutely all his "estate and interest whatsoever of and in the property, estate, and effects devised and bequeathed," by a certain will. The property subject to the will consisted partly of realty and partly of money in court, paid in as the result of compulsory sales. To all of this property the son was absolutely entitled, subject to the life interest therein of his father. On the death of the father the effect of the assignment was disputed.

Held, that, in the absence of the proper words of limitation, or of any words of reference which might supply the defect, the deed failed to pass both the fee simple in the realty (whether the estate was legal or equitable), and also the money in court, which must be treated and conveyed as land.—*Dearberg* v. *Letchford*, CH.D. WRIGHT, J.

See also COVENANT.

DEEDS OF ARRANGEMENT ACT, 1887.—See BANKRUPTCY, 20; LIBEL, 4.

DEFAMATION.—See LIBEL.

DIVORCE:—

1. *Alimony—Income of husband—Profits of partnership business—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Divorce Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 1.—Upon an application by the wife after a decree for dissolution of marriage for an order under section 32 of the Divorce Act, 1857, that the husband should secure to the wife an annual sum of money, it appeared that the husband was a partner in a brewery and entitled to £200 per month in respect of his share of the profits, but could not draw anything more without consent of his partners. His share of the profits for several years past had come to £3,300 a year, but he had in fact only received the monthly allowance amounting to £2,400 a year, the rest being carried to his credit in the partnership books.

Held (reversing the decision of the Court of Appeal) that an application under section 1 of the Divorce Act, 1866, would have been the proper course of proceeding; and an order was made under that section that the husband should pay £600 a year in monthly instalments during the joint of himself and the wife.—*Hanbury* v. *Hanbury*, H.L.

2. *Collusion—Agreement to initiate and conduct suit—Abstention from defence—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 30—*Matrimonial Causes Act*, 1860 (23 & 24 *Vict.* 144), *s.* 7.—If the initiation of a suit for dissolution of marriage be procured and its conduct (especially if abstention from defence to a term) provided for by agreement. that constitutes collusion, although no one can put his finger on any fact falsely dealt with or withheld.—*Churchward* v. *Churchward*, P. D. & AD.D. 380.

3. *Conjugal rights — Restitution suit — Delay.*—Delay is no bar to a suit for restitution of conjugal rights.—*Beauclerk* v. *Beauclerk*, P.D. & AD.D.

4. *Costs—Suit for judicial separation—"Usual order" for wife's costs refused.*—In a suit by a wife for judicial separation on the ground of cruelty, where no summons for discovery of documents had been applied for by the wife's solicitor, it transpired, and was conclusively proved at the hearing, that numbers of affectionate letters had passed between the parties during a period of more than a year after the husband had gone to China to resume his official duties, and, after the acts specified in the petition as cruelty and deposed to by the petitioner, were alleged to have been committed. At the close of the petitioner's case the petition was dismissed, and

The court refused to make the "usual order" for the wife's costs.—*Hough* v. *Hough*, P.D. & AD.D.

5. *Cruelty—Degrading treatment—Isolated acts of physical violence condoned years before—Deed of separation not a bar.*—Upon a petition by the wife for dissolution of her marriage on the grounds of cruelty and adultery, where the only acts of physical violence had long since been condoned.

Held, that wilfully depriving the wife of her proper position in the household, neglecting her, degrading her to the level of a servant, and compelling her to do the menial work of the house and to take her meals and to sleep apart from the rest of the household, was, in itself, cruelty which would entitle the wife to relief; and, although the wife had lived apart from her husband under a deed of separation, when coupled with adultery on the part of the husband, entitled the wife to have her marriage dissolved.—*Aubourg* v. *Aubourg*, P.D. & AD.D.

6. *Custody of child* pendente lite — *Child over sixteen—Application by father—Order for child to remain in custody of mother.*—Upon a summons by a father that the mother should be deprived of the custody of their eldest child, a girl over sixteen years of age, the judge (in chambers) refused the father's application, and directed that the mother should retain the custody of the child pending suit. —*B*—— v. *B*——, P.D. & AD.D.

7. *Husband and wife — Voluntary separation—Offers to resume cohabitation by wife—Alleged desertion—Lapse of years between "desertion" and application for maintenance.*—In 1880 the appellant, a labourer, married the respondent. In the following year a child was born, and the wife went, with her husband's full consent, to her mother's house for her confinement. During her absence the appellant broke up their home and took a room in his father's cottage, where the wife refused to live with him, on the ground that the accommodation there was insufficient. Subsequently the husband refused her requests to take her back to live with him as his wife. The husband was in 1894 convicted on a summons for desertion of his wife.

Held, that the husband's wish that the wife should live with him at his parents' house was not unreasonable, and that there was no evidence of desertion within the meaning of section 1 of the Married Women Act, 1886, to warrant the justices in making an order against him after the lapse of so many years from the time they ceased to live together.—*Jones* v. *Jones*, Q.B.D. 424.

8. *Justices — Husband convicted of aggravated assault—Order for separation, maintenance, and custody of children—Evidence — Procedure appeal—Power to remit—Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 4.—Where a husband has been summarily convicted of an aggravated assault within the meaning of 24 & 25 Vict. c. 100, s. 43, upon his wife, he is entitled to give evidence if the wife asks under section 4 of the Matrimonial Causes Act, 1878, for an order for separation, maintenance, and custody of children.

Where such evidence had not been given before justices, this court, on appeal, remitted the case to them for rehearing.

Powell v. *Powell*, 14 P. D. 177, 38 W. R. Dig. 98, overruled.—*Jones* v. *Jones* (*No.* 2), P.D. & A.D. 656.

9. *Nullity of marriage—Duress—Decree.*—A man, after paying to a girl of sixteen attentions which she rejected, threatened to blow her brains out if she would not consent to marry him, and produced from his pocket a pistol, which he held at her head. She then promised to marry him on condition that he put away the pistol, which he did. A few days later she went home, and shortly afterwards he intercepted her while on a railway journey, and took her to the office of a registrar of marriages, stating that they were going to see his mother. During the marriage ceremony she fainted, and, as soon as it was over, she went away. The marriage was never consummated, and the man never insisted upon his marital rights.

The court pronounced the marriage to be null and void.—*Bartlett* v. *Rice*, P.D. & A.D.

10. *Nullity of marriage—Impotence of husband—Delay—Sincerity.*—Seven years after her marriage a wife took proceedings for divorce upon the ground

(as the fact was) that the marriage had never been consummated owing to the husband's impotence. This fact had caused unhappiness between the parties and had led to a separation, but since the filing of the petition the wife had offered to return to the husband.

Held, that the conduct of the wife did not, in fact, prove want of sincerity on her part, and that the wife was entitled to a decree of nullity.

G—— v. *M*——, 10 App. Cas. 171, distinguished.—*L*—— v. *B*——, P.D. & AD.D.

11. *Practice—Costs—Pauper husband suing in formâ pauperis—Divorce Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 51.—Although the Divorce Division has, under section 51 of the Divorce Act, 1857, absolute discretion in the matter, yet the practice in that court has been to allow a husband suing in *formâ pauperis* for divorce, only his own or his solicitor's costs out of pocket (including therein the costs due to counsel and solicitor for obtaining the necessary certificate), with a reasonable sum for office expenses, as against the co-respondent.

Carson v. *Pickersgill*, 14 Q. B. D. 859, and *Johnson* v. *Lindsay*, [1892] A. C. 110, followed.

Semble, this practice does not exclude a successful respondent or co-respondent in such a suit obtaining an order for her or his full costs, for what it is worth.—*Richardson* v. *Richardson*, P.D. & AD.D.

12. *Separation deed—Adultery and cruelty—Unreasonable delay—Order for restitution of conjugal rights—Disobedience—Adultery—Petition for dissolution—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85). *s.* 31—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.—A husband and wife were married in 1858, and voluntarily separated in 1870. In 1890 the court, on the ground of unreasonable delay, dismissed the wife's undefended petition for dissolution of the marriage, on the ground of her husband's adultery and cruelty. In 1894 the wife obtained a decree for restitution of conjugal rights on a petition, to which the husband did not appear. The husband failed to comply with this decree, and the wife petitioned for a dissolution, on the ground of desertion and cruelty.

The court granted a decree, holding that there had not been unreasonable delay in presenting the petition for restitution of conjugal rights, as, on the evidence, until that suit was instituted there was nothing to show when the husband first became unable or unwilling to use the deed as an answer to the wife's claim.

Semble, that delay is no answer to a petition for restitution of conjugal rights, but *quære* whether it is not an answer to a petition for dissolution founded on adultery and desertion by refusal to comply with a decree for restitution of conjugal rights where there has been unreasonable delay in applying for such decree.—*Beauclerk* v. *Beauclerk* (No. 2), P.D. & AD.D. 655.

13. *Variation of settlement—Contingent interests—Absence of possible beneficiary and of one trustee—Order—Trustees' costs.*—Where there were five beneficiaries who might become entitled in a remote contingency to share in the settled fund, four of them consented to an order upon the trustees to repay the corpus of the fund to the petitioner, but the fifth was somewhere in the interior of Africa, and could not be communicated with:

The Court made the order, extinguishing the interests of all five; and, as it further appeared that one of the trustees of the settlements had left this country, and his whereabouts could not be ascertained, the costs of the two trustees who had appeared upon these proceedings were allowed out of the settled fund, in his absence, as if he had joined with them.—*Storer* v. *Storer*, P.D. & AD.D.

14. *Variation of settlement—Extinguishment of rights of children of subsequent marriage—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.—Where the only remaining interests under a marriage settlement of freehold property brought in by the husband, who had obtained a decree for dissolution of the marriage on the ground of his wife's adultery, other than those of the husband and wife, were trusts in favour of the children of the husband's second marriage, the court, in the exercise of the powers given to it by section 5 of the Matrimonial Causes Act, 1859, ordered the trustees of the settlement to reconvey the property to the husband for his own use.—*Meredyth* v. *Meredyth*, P.D. & AD.D. 304.

DOMICILE:—

Will—Land situate in Sardinia—Trusts invalid by Italian law—Proceeds of sale.—The proceeds of sale of land in a foreign country can be settled by an English testator in a manner valid by English law, even if such a settlement of the land itself is invalid by the foreign law.

Until a sale has actually taken place, a trust invalid by the *lex loci* cannot be enforced in this country.—*Piercy, Re, Whitwham* v. *Piercy*, CH.D. NORTH, J., 134.

See also ADMINISTRATION, 5; INSURANCE, 2; PROBATE, 11.

DONATIO MORTIS CAUSA:—

Unindorsed deposit receipt—Evidence.—A deposit receipt unindorsed is a good subject-matter of a *donatio mortis causa.*

Duffield v. *Elwes*, 1 Bli. N. S. 497, applied.—*Porter* v. *Walsh*, CH.D. V.C. (Ir.).

EASEMENT:—

1. *Air—Right to undefined passage of air—Implied grant—Prescription—Injunction.*—The plaintiff alleged that the defendant, by increasing the height of his buildings, had obstructed the current of air passing over plaintiff's premises, and had thereby prevented their proper ventilation; and he claimed an injunction in respect of the alleged nuisance.

Held, that though a right might be acquired to have air pass through some definite channel, the plaintiff's claim to have a current of air passing over the whole of his property was too vague, and could not be maintained.—*Chastey* v. *Ackland* C.A., 627.

2. *Light—Enjoyment for twenty years—Date of commencement of period of prescription—2 & 3 Will.* 4, *c.* 71, *ss.* 3, 4.—A house was built on a piece of land adjoining the defendant's premises. Its external walls with the window openings and the roof were completed on the 13th of December, 1873. Early in 1874 the house was finished, and the plaintiff (the owner) entered into occupation. In May, 1893, the defendant erected on his land a hoarding which obstructed the windows, and on the 16th of January, 1894, an action was begun by the plaintiff to restrain this interference with the access of light and air to the windows.

Held, that the period of twenty years prescribed by 2 & 3 Will. 4, c. 71, as giving an indefeasible right to the access of light began to run from the 13th of December, 1873, when the external walls, window openings, and the roof were completed, and that there had not been during that period any interruption within section 4 of the Act.

Courtauld v. *Legh*, 17 W. R. 466, L. R. 4 Ex.

126, followed.—*Collis* v. *Laugher*, CH.D. ROMER, J., 202.

See also HIGHWAY, 8; POOR LAW, 11; RAILWAY, 8; RENT CHARGE.

ECCLESIASTICAL COMMISSIONERS:—

Glebe—Opening mine on glebe—Right to work mine on glebe—Waste—Right to sue in respect to waste on glebe—Consent necessary to working mine—5 & 6 *Vict. c*, 108, *s.* 20; 21 & 22 *Vict. c.* 57, *ss.* 1, 2, 10; 13 *Eliz. c.* 10; 13 *Eliz. c.* 20; 14 *Eliz. c.* 11; 14 *Eliz. c.* 20.—No mine can be opened on glebe land without the consent of the Ecclesiastical Commissioners, under 5 & 6 Vict. c. 108, s. 20, and the working of any mine on glebe land that must not be presumed to have been open before the passing of the statutes 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, and 14 Eliz. c. 20 is waste, in respect of which the Ecclesiastical Commissioners can maintain an action. — *Ecclesiastical Commissioners* v. *Wodehouse*, CH.D. ROMER, J., 395.

ECCLESIASTICAL LAW:—

1. *Advowson—Co-owners—Right of presentation—Turns — Cyclical order — Usurpation — Exchange of livings.*—The cyclical order of turns of presentation to a church is not altered by usurpation of a turn, whether by a stranger or by a person privy in title to the person usurped upon. The person usurped upon must wait till his own turn comes round again, and cannot take the usurper's turn by way of retaliation.

A presentation on an exchange of livings counts as a turn.—*Keen* v. *Denny*, CH.D. CHITTY, J., 39.

2. *Faculty — Churchyard — Burial — Consecrated ground—Conversion to secular use—Jurisdiction—Burial Act*, 1852 (15 & 16 *Vict. c.* 85), *s.* 44.—The ordinary has no jurisdiction to decree a faculty authorizing a strip of consecrated ground added to a parish churchyard under the Burial Act, 1852, but in which burials were prohibited by the Secretary of State's order, being taken therefrom and made part of an adjoining public highway.—*Plumstead Burial Ground, Re*, ROCHESTER CONSISTORY COURT.

3. *Faculty—Reredos—Triptych with painted panels surmounted with figures of our Lord, and Moses, and Elias.*—A faculty may be issued for the erection in a parish church of an oaken reredos 8 feet high in the form of triptych with painted panels, of which the two wings, being hung to the centre panels by hinges, could be closed over it when Divine service was not being performed; the centre panel having painted thereon a representation of the "Last Supper"; and upon one wing a painting of the "Agony in the Garden," and upon the other "Christ risen from the tomb with the Marys standing"; the reverse sides of the wings to be plain; the whole triptych to be surmounted by a figure of our Lord carved in oak, 18 inches high, between figures of Moses and Elias beneath pillared canopies connected by an arch of tracery-work over the central figure; but such faculty was to contain a proviso that the triptych was always to remain open during Divine service.—*St. John, Pendebury (Vicar)* v. *Parishioners of Same*, MANCHESTER CONSISTORY COURT.

4. *Faculty—Rood loft—Wooden figures—Chancel Screen.*—A faculty refused, for the retention in a parish church of a loft over the chancel screen, supported upon a beam upon which was cut a figure (in life size) of Our Lord upon the cross and figures of the Virgin Mary and of St. John.

Clifton v. *Ridsdale* 1 P. D. 316 followed.—*St. John Baptist, Timberhill (Vicar of)* v. *Rector of same*, NORWICH CONSISTORY COURT.

See also BURIAL, 1.

EJUSDEM GENERIS.—See DEED, 2.

ELECTION LAW:—

1. *Corporation—Election of Aldermen—Validity of method of voting—Delivery of voting papers—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 60, *sub-section* 4.—At a meeting of a town council for the purpose of electing aldermen for a municipal borough, the chairman requested the town clerk to collect some of the voting papers, and hand them to him. Some of the voting papers were handed direct to the chairman.

Held, that a proper delivery of all the voting papers had been made.—*Baxter* v. *Spencer*, Q.B.D.

2. *Corporation—Election of councillor—Misspelling of surname of candidate—Burgess-roll—Nomination paper—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50).—The petitioner, whose surname was Miller, was a candidate for election of councillor for one of the wards of a municipal borough. Upon the burgess-roll and upon each of the nomination papers his name appeared as "Millar." Objection being taken to the same he was prevented going to the poll, and respondent was elected.

Held, that the name as spelt did not invalidate the nomination papers, and that the election as made was void.—*Miller* v. *Everton*, Q.B.D.

3. *Election, validity of—Name on ballot-paper of person not a candidate—Sufficient votes given to influence result—Negligence of returning officer—Liability to costs—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 13.—The name of a person who had been duly nominated as a candidate at an election of urban district councillors, but who had withdrawn his candidature, was put on the ballot-papers by the mistake of the returning officer's clerk, and such person had received a number of votes sufficient, if given to the other candidates, to have influenced the result.

Held, that the election was void, as not being in accordance with the provisions of the Ballot Act, 1872. In such a case there is no general rule exempting a returning officer from liability to pay costs for the consequences of his negligence.—*Wilson* v. *Ingham*, Q.B.D., 621.

4. *Parliament — Franchise — Borough—Duplicate entries—Voter's notice of selection—Form of notice—Validity—Appeal from decision of revising barrister—Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *ss.* 17, 18, 39, 42—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-section* 14—*Registration Act*, 1885 (48 & 49 *Vict. c.* 15), *s.* 5—*Registration Order*, 1889, *Schedule* 3, *Form* (*P*)—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 44.—There is no appeal from the decision of a revising barrister upon the validity of a notice given by a voter under the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-section 14, selecting which of two duplicate entries of his name upon the lists of voters for the borough he will retain for voting, at a parliamentary election.—*Reg.* v. *Liverpool Revising Barrister*, Q.B.D. 220.

5. *Parliament—Franchise—Occupation—Change in character of occupation—Transfer of whole of qualifying premises and new tenancy of part—Municipal Corporation Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 9.—The appellant, who was the occupier of certain premises, transferred them to a company, and on the same

day took from the company a demise of part of the premises, which he continued to occupy.

Held, that there had been no break in the appellant's occupation of that part of the premises sufficient to disentitle him to be enrolled as a burgess under section 9 of the Municipal Corporation Act, 1882.—*Timmis* v. *Albiston*, Q.B.D.

6. *Parliament—Franchise—Registration—Borough vote—Occupancy by virtue of service—Part of a house—Separate dwelling—Cubicle—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-section* 2—*Representation of the People Act*, 1884 (48 *Vict. c.* 3), *s.* 3—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5.—A police constable occupied exclusively, by virtue of his employment, a cubicle, which consisted of a portion of a large room, separated off by a partition seven feet high but not reaching to the ceiling. The room contained eleven other similar cubicle, with a common passage. The cubicle was used for the purpose of a bedroom. It was not stated whether there were other rooms used in common for the purpose of meals, recreation, &c., nor whether the cubicles were separately warmed and lighted at night. It did not appear that the house was occupied by any superior officer of the constable.

Held, that the cubicle was not separately occupied by the police constable as a dwelling within section 5 of the Parliamentary and Municipal Registration Act, 1878.

Stribling v. *Halse*, 16 Q. B. D. 246, 34 W. R. Dig. 68, commented on.—*Barnett* v. *Hickmott*, Q.B.D. 284.

7. *Parliament — Franchise — Registration — Inhabitant occupier—Compulsory absence during part of qualifying period—Imprisonment on remand pending trial.*—During the qualifying period the defendant, an inhabitant occupier, was arrested on a criminal charge and remanded to gaol for a week without bail, to petty sessions. At the petty sessions he was returned for trial (bail being accepted) to the quarter sessions. His trial had not taken place at the time the revision sessions were held.

Held, that the defendant's innocence was to be presumed until his guilt was proved, and that he was not to be deprived of the franchise by his compulsory absence until his guilt was proved.—*Charlton* v. *Morris*, Q.B.D. (IR.).

8. *Parliament—Franchise—Registration—Notice of objection—Omission of name of polling district—Date of signing of notice*—Onus *of proof.*—In a borough which had been divided into polling districts a notice of objection served on a voter omitted to state the particular polling district to which the voter objected to belonged.

Held that the notice of objection was bad. The objector could not swear that he signed several notices of objection on the days they purported to bear date, but they were duly served within the limits of time allowed for objections.

Held that the *primâ facie* presumption that all documents are made on the day they bear date applied, in the absence of evidence that the objections were not in fact so signed, and that the notices of objection were good.—*Kenny* v. *Kenealy*, Q.B.D. (Ir.).

9. *Parliament — Franchise — Registration — Old lodgers' list—Claim—Omission in claim of name of borough—Mistake—Amendment—Parliamentary Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 28, *sub-section* (2).—A claim to be entered on the old lodgers' list was in the statutory form in all respects except that the name of the borough was omitted. The overseers published the claim in the list of old lodger claimants, and no notice of objection thereto was given either by the overseers or any other person. The claim was objected to at the revision court on the ground of the omission in it of the name of the borough. The claimant contended that notice of objection should have been given, and that in any case the claim ought to be amended by inserting the name of the borough.

Held (1) that the claim as it stood was bad even though no notice of objection had been given to it; and that it was a necessary constituent of the qualification of a lodger to claim; but (2) that the omission of the name of the borough was a mistake which ought to have been amended by the barrister under section 28, sub-section (2) of the Parliamentary Registration Act, 1878.—*Treadgold* v. *Grantham* (*Town Clerk*), Q.B.D.

10. *Parliament—Registration—Lists and notices of voters—Parish church—Parishes united for ecclesiastical purposes only—Church of one of parishes so united pulled down—Lists not to be affixed to the other parish church—Registration Act*, 1843, *ss.* 23, 24, *and* 25.—Where, in the City of London the church of parish A. had been pulled down, and the benefice united, for ecclesiastical purposes only, with that of B. parish, the overseer of parish A. is not entitled under section 23 of the Registration Act, 1843, to affix the voters' lists and notices relating exclusively to parish A. to the door of the parish church of B., but must find some public and conspicuous place for that purpose in parish A. The pulling down of such notices from the parish church of B. by the incumbent is not an offence under section 25 of the Registration Act, 1843.—*Hildred* v. *Ingram*, Q.B.D.

11. *Parliament—Registration—Two names on voters list in respect of same qualifying property.*—The names of two persons were on the occupiers' list as parliamentary electors in respect of the same qualifying property. Objection was raised against one of them, but the revising barrister found he was duly qualified, and retained his name on the list. No objection was raised against the other, and no evidence was given as to his qualification.

Held, that the mere fact that another person, whether qualified or unqualified is on the register in respect of certain premises, is not enough to keep a person off who is properly qualified in respect of the same premises.—*Warren* v. *Maule*, Q.B.D.

12. *Proxy, vote by—Corporation—Vote by shareholder or officer—Returning officer—Judicature Act—Irregularity—Thames Conservancy Act*, 1894 (57 & 58 *Vict. c.* 197), *ss.* 22, 23, 25.—At an election of conservators of the River Thames by shipowners under section 22 of the Thames Conservancy Act, 1894, the returing officer received and counted proxies given by bodies corporate to electors who were not shareholders in, or officers of, those bodies,

Held, that the only way in which a body corporate could exercise its right of voting by proxy was by a shareholder or officer, and, therefore, that the proxies had been wrongly received.

Held also, that by section 23 of the same Act, the returning officer, in making his return, had acted judicially and that the return was conclusive, and further, that the improper reception of the proxies was such an "error or irregularity" as was contemplated by section 25 of said Act, and could not invalidate the election.—*Reg.* v. *Samuel*, Q.B.D.

ELECTRIC LIGHTING.—See INJUNCTION, 2.

ESTOPPEL:—

Judgment by consent—Res judicata—*Action to recover an instalment of a debt—Proof—Company—Winding up.*—A judgment by consent upon which the court has not exercised its mind raises an estoppel between the parties just as much as in a case where the court has exercised a judicial discretion in the matter after hearing an argument. The principle being, that when once the parties have litigated a matter the judgment should put an end to the litigation, and if the parties agree on a judgment, that raises an estoppel just as much as if all the questions had been fought out.

Jenkins v. *Robertson*, L. R. 1 H. L. Sc. 117, 15 W. R. H. L. Dig. 7, distinguished.

A judgment by consent for the plaintiffs in an action against a company to recover an instalment of a debt under an alleged agreement, held to preclude the liquidator in the winding up of a company from denying the existence of the agreement upon a proof being sent in for the whole amount due under the agreement.—*South American and Mexican Co., Re*, C.A. 131.

See also, BILL OF EXCHANGE, 1; SALE OF GOODS, 3.

EVIDENCE:—

Admission in letter—Subsequent qualification in same letter—Presumption as to continuance of previous state of circumstances—Evidence to go to jury.—A letter, written in January, 1893, by a person who was sued as a partner in a firm for the price of goods supplied to the firm between June, 1893, and February, 1894, was as follows:—"I have not banked any money this last eight months, as I have dissolved partnership with my brother last April."

Held, that the letter was evidence to go to a jury that the partnership, which was admitted to exist down to April, 1892, still existed at the time the goods sued for were supplied, notwithstanding the subsequent statement that the partnership had been dissolved.—*Brown* v. *Wren*, Q.B.D. 351.

See also PRACTICE, 35-37.

EXECUTOR:—

Business—No power to carry on in will—Executor's right to indemnity.—An executrix of a will, in which the testator gave no power to his executors to carry on his business, did carry it on with the knowledge of the creditors.

Held, that the principle of *Dowse* v. *Gordon*, [1891] App. Cas. 190, applied, and the executrix was entitled to be indemnified.—*Brooke, Re, Brooke* v. *Brooke*, CH.D. KEKEWICH, J.

See also BANKRUPTCY, 9; INLAND REVENUE, 16, 17; PRACTICE, 1; PROBATE, 10, 11; TRUSTEE, 5; WILL, 20, 23.

EXTRADITION:—

Political offence—Anarchism—Evidence of accomplice.—The essence of a political offence is the existence of two parties, each seeking to impose its government on the other.

An Anarchist who is the opponent of all government and whose criminal operations are directed primarily against the general members of society, and only incidentally against the Government, is not a political offender so as to escape extradition. —*Meunier, Re*, Q.B.D.

FACTOR:—

Bankruptcy—Delivery or transfer—Sale, pledge, or other disposition—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9.—A person, in possession of a gas engine under a hiring agreement, assigned to a trustee for creditors all his stock, machinery, &c. The trustees took possession of the stock, including the gas engine, but subsequently the person from whom the engine was hired broke into the premises and seized the engine. In an action for trepass by the trustee:

Held, that the engine not being the property of the assignor, but only hired, did not pass to the trustee under the assignment, and that consequently there was no "transfer" within the meaning of section 9 of the Factors Act, 1889, that there was also no "delivery" within the meaning of the same section, as, though physical delivery of the engine was made to the trustee, still the debtor did not intend to deliver anything not included in the assignment, and this engine was not so included.—*Kitto* v. *Bilbie*, BKCY.

See also SALE OF GOODS, 1, 4.

FACTORY:—

Dangerous machinery—Fencing—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16). *s.* 5, *sub-section* 3—*Factory and Workshop Act*, 1891 (54 & 55 *Vict. c.* 75), *s.* 6, *sub-section* 2.—By section 5, sub-section 3, of the Factory and Workshop Act, 1878, it is provided, with respect to the fencing of machinery in a factory, that "every part of the mill gearing" shall be securely fenced. The Factory and Workshop Act, 1891, s. 6, sub-section 2, amends the former section by inserting before the words "every part" the words "all dangerous parts of the machinery and."

Held, that the section, as amended, was not confined to motive machinery, but applied also to machinery performing an industrial operation.—*Redgrave* v. *Lloyd*, Q.B.D. 527.

FISHERY:—

1. *Licence—Rod and line—Using three rods and lines—Freshwater Fishery Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 7.—The respondent, who held a licence to fish for trout and char "with a rod and line," fished with three rods and three lines at one and the same time. The scale of licence duties fixed by the conservators was as follows: "For each and every rod and line, one shilling." The respondent was charged under section 7 of the Freshwater Fisheries Act, 1878, with unlawfully fishing for trout without having a licence in force authorising him so to do. The justices dismissed the charge.

Held, that the respondent had committed the offence charged, and ought to have been convicted.—*Combridge* v. *Harrison*, Q.B.D.

2. *Salmon fisheries—Salmon Fishing Act*, 1865 (28 & 29 *Vict. c.* 65), *s.* 3—*Fishery district—Definition of limits—Meaning of tributary.*—A fishery district was defined as including "the river S. and all its tributaries" A streamlet ran into a brook C., which ran into a river V. The river V. ran into the river S.

Held, that the streamlet was a tributary of the river S.—*Evans* v. *Owen*, Q.B.D. 237.

FRAUDS, STATUTE of:—

1. *Agreement in consideration of marriage—Statement of consideration.*—An agreement in consideration of marriage, to satisfy the Statute of Frauds, requires the consideration to be so clearly stated that a person of ordinary intelligence must infer from the perusal of it that such and no other, is the consideration upon which the undertaking was given.—*Eyre, Re, McAndrew* v. *Norris*, CH.D. ROMER, J., 538.

2. *Contract—Sale of land—Letters—Memorandum signed by agent*—29 *Car.* 2, *c.* 3, *s.* 4.—In an action for specific performance of a contract for the sale of real estate: the purchaser relied on several letters taken together as constituting a sufficient memorandum signed by the vendor's agent authorized to sell the estate. The last letter was written by the vendor's agent to the purchaser's solicitor and contained the essential terms of the contract, except the price which, however, was specified in earlier letters written to the vendor by a clerk in the employment of the vendor's agent by the agent's authority. There was nothing on the face of the last letter to show that the vendor's agent was referring to the former letter written by his clerk.

Held, that parol evidence was not admissible to connect the documents, and that there was no sufficient memorandum in writing to satisfy the Statute of Frauds.—*Potter* v. *Peters*, CH.D. KEKEWICH, J.

See also COMPANY, 10; CONTRACT, 8; LANDLORD AND TENANT, 11.

FRIENDLY SOCIETY:—

Trusts exhausted—Unexpended funds — Charity — Cy-près — *Resulting trust* — Bona vacantia. — A friendly society was formed to provide annuities for the widows of its ordinary members. The annuity fund was raised by the subscriptions of ordinary and honorary members, but the widows of honorary members took no benefit.

Held (there being no poverty qualification), that the society was not a charity.

The members and annuitants being all dead, and there being an unapplied balance of the annuity funds in the hands of the trustees of the society, to which neither the trustees nor the representatives of the honorary members made any claim.

Held, that there was a resulting trust in favour of the ordinary members from time to time, or their representatives, in proportion to their contributions, and the fact that the difficulty and expense of ascertaining the parties entitled would more than exhaust the fund did not entitle the Crown to claim it as *bona vacantia.*— *Cunnack* v. *Edwards*, CH.D. CHITTY, J., 325.

See also COMPANY, 19.

GAMING:—

1. *Betting—Place used for betting—"Betting with persons resorting thereto"—Betting Act*, 1853 (16 & 17 *Vict. c.* 119). *s.* 1.—Defendant was convicted on three counts, which charged him with using the bar of a beerhouse on three different days for the purpose of betting with persons resorting thereto, contrary to section 1 of the Betting Act, 1853. It was proved that on each of the three days the defendant was in the bar, and that a number of persons came in, took slips of paper hanging up on the wall, wrote on the slips the names of the horses they wished to back for races, wrapped up in the slips the money they wished to stake, and handed the slips, with the money enclosed, to the defendant, usually outside the house; but on one of the three days the defendant received two of the slips with the money enclosed in the bar.

Held, that there was evidence to go to the jury that the defendant had used the bar for the purpose of betting with persons resorting thereto on each of the three days, and that the defendant was rightly convicted.—*Reg.* v. *Worton*, C.C.R.

2. *Betting—Place used for betting—Club—Betting among members — "Persons resorting thereto" — Betting Houses Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 2, 3.—The Betting Houses Act, 1853, does not apply to the case of members of a *bonâ fide* club using the club premises for the purpose of betting with each other.—*Downes* v. *Johnson*, Q.B.D. 556.

3. *Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Using a house for betting with persons "resorting thereto"—Bets made by letter or telegram—Summary Jurisdiction Acts—Practice—Election to be tried by jury—Indictment for offences not included in summons before justices—Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *s.* 25—*Summary Jurisdiction Acts*, 1848 (11 & 12 *Vict. c.* 43) *and* 1879 (42 & 43 *Vict. c.* 49)—*Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *s.* 1—*Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35), *s.* 1.—A defendant was charged before a court of summary jurisdiction, under section 1 of the Betting Act, 1853, with having used rooms in a certain house for the purpose of betting with persons resorting thereto. He elected to be tried by a jury, and the magistrates, after hearing evidence, committed him for trial.

The first count of the indictment charged that the defendant, being occupier of the rooms in question, had used them for the purpose of betting with persons resorting thereto. The second count was framed under the latter part of the section, and charged him with having used the rooms for the purpose of money being received by him and on his behalf upon an undertaking, promise, and agreement to pay thereafter money on the contingency of and relating to horse-races. It was proved that persons had gone to the house for the purpose of paying money to the defendant under the circumstances alleged in the second count. It was also proved that the defendant kept the house for the purpose of betting with persons who wrote or telegraphed to him, asking him to make bets with them. The recorder directed the jury upon the first count that if persons were in the habit of sending letters and telegrams to the house asking the defendant to make bets with them, such persons resorted to the house within the meaning of section 1 of the Betting Act, 1853, and the jury might find the defendant guilty of using the house for betting with persons resorting thereto. The jury convicted the defendant on the first and second counts.

Held, that, even if the indictment contained charges differing from those upon which the defendant was summoned before the magistrates (which the court did not decide), the indictment was not thereby invalidated, it being lawful, after the accused had elected to be tried by a jury, to indict him for any indictable offence disclosed by the depositions, and that the conviction on the second count was good.

Held, also, that the word "resorting" must be construed in its ordinary sense, and that the sending of letters and telegrams to the house asking the defendant to make bets was not a resorting to the house within the meaning of the section, and that, the recorder having misdirected the jury on this point, the conviction on the first count was bad.

Quære, whether section 1 of the Betting Act, 1853, creates two distinct offences, and whether separate penalties can be imposed for acts done upon the same day in violation of the provisions of the earlier and the latter parts of that section.—*Reg.* v. *Brown*, C.C.R. 222.

4. *Stakeholder—Revocation of authority to pay—Action by depositor—Gaming Act*, 1892 (55 *Vict. c.* 9), *s.* 1.—The plaintiff and H. deposited £5 each in the hands of the defendant. It was agreed that

the £10 so deposited should be handed to the winner of a race run between the plaintiff and H. The plaintiff, having lost the race, demanded that his money should be returned. The defendant paid the £10 to H.

Held, that the £5 was not a "sum of money paid" by the plaintiff within the meaning of the Gaming Act, 1892, and that the plaintiff was entitled to recover the £5 from the defendant.—*O'Sullivan* v. *Thomas*, Q.B.D. 269.

5. *Stock Exchange—Principal and broker—Canada, Law of—Quebec*—8 & 9 *Vict. c.* 109, *s.* 18—*Civil Code of Lower Canada, Article* 1927.—Article 1927 of the Civil Code of Lower Canada does not differ substantially from 8 & 9 Vict. c. 109, s. 18, and renders null and void all contracts by way of gaming and wagering, A broker was employed to make actual contracts of purchase and sale, in each case completed by delivery and payment, on behalf of a principal whose object was not investment, but speculation:—

Held, that these were not gaming contracts within the meaning of the Code.—*Forget* v. *Ostigny*, P.C. 590.

6. *Unlawful game—"Baccarat chemin de fer"*—32 *Hen.* 8, *c.* 9, *s.* 11—17 & 18 *Vict. c.* 38, *s.* 4—*Lessor and lessee—Breach of covenant.*—The game of "chemin de fer" is a form or variety of the game of baccarat, and is an unlawful game within the meaning of 17 & 18 Vict. c. 38.

Jenks v. *Turpin*, 13 Q. B. D. 505, 32 W. R. Dig. 84 considered and approved.—*Fairtlough* v. *Whitmore*, CH.D. STIRLING, J., 421.

See also STOCK EXCHANGE, 2.

GARNISHEE.—See COMPANY, 12.

GLEBE.—See ECCLESIASTICAL COMMISSIONERS; SETTLED LAND, 2.

GRANT:—

Presumption—Title—Legal origin of title—Parish lands—Long continued and uninterrupted—Possession and acts of ownership—Rent-charge.—The plaintiff, as surviving feoffee of parish lands, alleged that from the time of legal memory a certain part of such lands had been vested in the feoffees upon trust for the vestry, subject to a rentcharge of £3 6s. 8d., and that the defendant corporation had been tenants of the vestry at a rent of £150 per annum since 1838, which tenancy had expired.

Held, that a legal origin of title was not impossible, and must, therefore, be presumed, for after such a possession it was plainly incumbent on the court to find a legal origin if such could be found.

Held also, that the omission of the land in question from the feoffments of the parish before 1838 was not sufficient to rebut the inference which the long possession compelled the court to draw.

Decision of Kekewich, J., (71 L. T. 659) reversed.—*Eliot* v. *Bristol Corporation*, C.A.

GUARANTEE:—

Principal and surety—Provision for notice of withdrawal by obligors or their respective representatives—Death of obligor—Notice of death—Liability of estate—Express notice.—In the case of a guarantee determinable on the express notice of any of the obligors or their personal representatives, a mere notice of the death of an obligor is not sufficient to exonerate his estate from the obligation.—*Silvester, Re, Midland Railway Co.* v. *Silvester*, CH.D. ROMER, J., 443.

See also CONTRACT, 4.

HABEAS CORPUS:—

Practice—Irregularity—Attachment for contempt by disobeying writ—Service of original writ necessary—Crown Office Rules, rule 239—*R.S.C.*, 1883, *ord.* 70, *r.* 1.—A writ of *habeas corpus* can be properly served only by delivering the original writ itself to the person served, or to the principal person where there are more than one. If the original writ is not so served it is impossible for the person served, by appearing to the writ, and waiving its proper service, to obey the writ, and consequently he cannot disobey it, and so commit contempt of court.

If the original writ has not been delivered to the principal of several persons served, the service of a copy is not a good service upon any of the others.—*Reg.* v. *Rowe*, Q.B.D.

HIGHWAY:—

1. *Driver leaving horse unattended whilst "passing upon" highway—Horse and cart left standing—Penalty—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 78.—Where a person in charge of any carriage passing upon a highway negligently or wilfully leaves such carriage so that he ceases to have the direction or government of the horses or cattle drawing the same, he is liable, under the Highway Act, 1835, upon conviction, to a fine not exceeding £5; and the fact that the carriage was standing still during the whole time that the driver was absent, and had in fact caused no obstruction on the highway, is no defence.—*Phythian* v. *Baxendale*, Q.B.D. 412.

2. *Extraordinary traffic—Mode of conducting traffic—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The carting of coal along a main road in carts driven every weekday in strings of four or five carts at a time, each cart being drawn by one horse, with only two or three drivers in charge, the number of journeys per day being five each way, and the carts being so driven that they keep the same track, and thus do not distribute the wear of the road, is "extraordinary traffic," as it is a carriage of articles over a road in a mode which substantially increases the burden.—*Wolverhampton (Mayor)* v. *Salop County Council*, Q.B.D. 494.

3. *Extraordinary traffic—"Person by whose order such traffic has been conducted"—Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—The appellants, having undertaken to supply ballast for the purposes of the construction of a railway as and when the contractor might direct, entered into arrangements with three several traction engine proprietors for the carriage of the ballast. In accordance with these arrangements the appellants from time to time, on receiving directions from the contractor, required one or other of the engine proprietors to carry the ballast which was wanted and deliver it as directed. The appellants exercised no control over the proprietors as to the weights they should carry or otherwise. The carriage of the ballast by all the engine proprietors together constituted extraordinary traffic on a certain highway.

Held, that the appellants were liable, under section 23 of the Highways and Locomotive Amendment Act, 1878, to pay the expenses incurred by the highway authority in consequence of such extraordinary traffic, as being the person by whose order such extraordinary traffic had been conducted.—*Kent County Council* v. *Vidler & Sons*, C.A. 273.

4. *Extraordinary traffic—Surveyor's certificate—Highway and Locomotives Amendment Act*, 1878 (41

& 42 Vict. c. 77), *s.* 23.—A surveyor's certificate under section 23 of the Highway and Locomotives Act, 1878, is not invalid by reason only that more highways than one are included in the certificate.

The surveyor of a highway gave a certificate under section 23 to the effect that extraordinary expenses had been incurred by reason of extraordinary traffic caused by the respondent in repairing roads in four separate townships. Six months later he gave another certificate which referred to extraordinary expenses incurred partly before and partly after the date of the first certificate on a single road in one of the townships.

Held, that the first certificate was good, and that, with regard to expenses incurred before it was made, the period of six months limited by 11 & 12 Vict. c. 43, s. 11, for recovering the amount began to run from the date of the first certificate.—*Wirral Highway Board* v. *Newell*, Q.B.D. 328.

5. *Local Government—Highway commissioners—Tranfer of their powers, duties, and liabilities to district council—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *sections* 11, 12, 22, 100—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *section* 24.—By the Isle of Wight Highways Acts, 1813 (53 Geo. 3, c. xcii.) and 1883 (46 & 47 Vict. c. ccxxvi.), section 5, commissioners were appointed for the purpose of maintaining and repairing the highways in the island.

From 1883 until the Local Government Act, 1888, the highways were repaired and maintained by such commissioners. By section 12 of the Local Government Act, 1888, turnpike roads were abolished in the isle, and the Highways and Locomotives (Amendment) Act, 1878, was made to apply to it. In 1889 the isle was made an administrative county of itself. Since 1890 the Highway Commissioners maintained and kept in repair as main roads the highways in the isle. By section 25 of the Local Government Act, 1894, it was provided that there should be transferred to the district council of every rural district all the powers, duties, and liabilities of any highway authority in the district, and that all highway boards should cease to exist, and that rural district councils should be the successors of the highway authority. Section 100 of the Local Government Act, 1888, provides that the expression "highway authority" shall mean, as respects a highway district, the highway board or authority having the powers of a highway board.

Held, that the powers, duties, and liabilities of the Isle of Wight Highway Commissioners had been transferred to the district council of the rural districts of the island, and that the Isle of Wight Highway Commissioners had ceased to exist by virtue of section 25 of the Local Government Act, 1894. That, though the district council had become the actual highway authority, the expenses would still have to be defrayed by the County Council.—*Isle of Wight Highway Commissioners, Re*, Q.B.D.

6. *Local government—Local board—Right of local board to have old level of highway maintained—Obstruction by third party—Highways Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 27—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149.—A local board had vested in them a highway across which a railway company carried its line on the level of the highway. The defendants, by mining operations, caused a subsidence in the highway and surrounding country without damaging the surface. The railway company, to keep their line at the original level, placed ballast under the rails as the highway subsided, so that an embankment was created which effectually obstructed the highway.

Held, that, as there was no evidence that the defendants intended to further work the mines, there was no right to an injunction; and, also, that the damage to the highway flowed from the railway company, and not from the defendants.

Semble (per Collins, J.), that the local board had a cause of action for infringement of their right to have the highway kept at its original level.—*Attorney-General* v. *Conduit Colliery Co.*, Q.B.D. 366.

7. *Repair—Non-repair—Action for damages.*—An action for damages will not lie for non-repair of a highway, even in cases where the non-repair constitutes an indictable offence.

Cowley v. *Newmarket Local Board*, [1892] A. C. 345, followed.

Bathurst (*Borough*) v. *Macpherson*, 4 App. Cas. 256, explained.

Hartnall v. *Ryde Commissioners*, 4 B. & S. 361, overruled.—*Sydney Municipal Council* v. *Bourke*, P.C.

8. *Turnpike road—Statute—Closing public rights of way—Effect of repeal as to rights of way closed thereunder.*—A local Act was passed in 1819, to continue in force for twenty-one years, enacting that a new turnpike road should be made, and a certain public bridleway across a farm closed to prevent the evasion of tolls, and vesting in the owner of the farm the freehold of the bridleway in exchange for land of his taken for the purposes of the turnpike road, and imposing penalties on any person using the bridleway in future. The Act was, by subsequent Acts, continued in force till 1856, and then repealed.

Held, that the public right of bridleway was not revived by the repeal.—*Gwynne* v. *Drewitt*, CH.D. ROMER, J., 551.

See also WATER, 3.

HUSBAND and WIFE.—See DIVORCE, 7, 8; INLAND REVENUE, 10; MARRIED WOMEN, 2, 3.

INCLOSURE:—

Construction of Act—Separate ownership of surface and minerals—Right to work minerals—Right to let down surface—Compensation clause—General canons of construction of Inclosure Acts.—In the construction of Inclosure Acts, where the ownership of the surface and minerals is severed, regard must be had to the following rules:—

(1) *Primâ facie* the surface owner has the common right of support from the subjacent minerals.

(2) The surface owner can only be deprived of this right of support (*a*) by unequivocal words, or (*b*) by implication from the general context.

(3) In case (*b*) the absence or inadequacy of any provision for compensation tends strongly against such implication.—*Bell* v. *Earl Dudley*, CH.D. CHITTY, J., 122.

See also LOCAL GOVERNMENT, 6.

INFANT:—

1. *Contract—Company—Agreement to take shares—Repudiation—Failure of consideration—Right to recover money paid up on shares.*—The plaintiff, while an infant, agreed to take, and was allotted, shares in the defendant company, but before attaining her majority repudiated the agreement. No dividend on her shares had been paid, nor had she taken any part in the management of the company or attended any meetings, the only consideration for her contract being that her name remained for a time on the register of shareholders.

Held, that the plaintiff was entitled to repudiate the agreement, and to recover the money she had paid in respect of the shares.

Corpe v. *Overton*, 10 Bing. 252, followed. — *Hamilton* v. *Vaughan-Sherrin Electrical Co.*, CH.D. STIRLING, J., 126.

2. *Legacy—Interest—Will—Advancement clause—Provision for maintenance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.—Where a testator had by his will, made in 1892, given legacies to his eight children, two of whom were infants at the date of his decease, and had given the residue of his estate equally among all his children who, being sons, should attain the age of twenty-one years, or, being daughters, should attain that age or marry; and

Where the will contained a power for the trustees to raise and apply for his or her advancement, preferment, or benefit, a portion of the expectant share of any child, but did not contain any express provision for maintenance,

Held, that, though section 43 of the Conveyancing Act, 1881, must be taken to be incorporated in the will, neither the statutory power contained in that section nor the advancement clause in the will were such a provision for maintenance as to prevent a contingent legacy to an infant by a parent or person *in loco parentis* carrying interest from the date of the death, and that the infants were accordingly entitled to interest at four per cent. per annum from that date.—*Moody, Re, Woodroffe* v. *Moody*, CH.D. KEKEWICH, J., 462.

3. *Maintenance—Will—Specific contingent legacy—Right to intermediate income.*—Where a legacy is severed from the residue for the benefit of a tenant for life and remaindermen, the residuary legatees cannot claim the income accruing after the death of the tenant for life, though the remaindermen have not yet attained vested interests in the legacy. Such intermediate income is applicable for the maintenance of the remaindermen.

Kidman v. *Kidman*, 40 L. J. Ch. 359, 19 W. R. Ch. Dig. 4, approved.

Furneaux v. *Rucker*, W. N., 1879, p. 135, overruled.—*Woodin, Re, Woodin* v. *Glass*, C.A., 615.

See also BANKRUPTCY, 28; LANDLORD AND TENANT, 10; VENDOR AND PURCHASER, 6.

INJUNCTION:—

1. *Injunction or damages—Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Nuisance—Right of Reversioner to an injunction—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 56), *ss.* 10, 17, 32.—Lord Cairns' Act does not alter the principles upon which courts of equity granted injunctions to restrain the infringement of a legal right; and, therefore, where a legal right and also its substantial infringement in the past and further infringement in the future is established, the person so injured is entitled to an injunction restraining such infringement, unless his conduct has been such as in any way to prevent him from obtaining an injunction.

The defendants, an electric lighting company, having, by the vibration caused by their engines, substantially damaged the fabric of a house of which the plaintiff S. in the first action was lessee and the plaintiff M. in the second action was the freeholder, and it being established that such injury would continue and increase,

Held, (1) that, upon the construction of the defendants' statutory powers, they were not justified in committing a nuisance; and (2) that each of the plaintiffs was entitled to an injunction restraining the defendants from so injuring the house, and also to damages for past injuries.

Decision of Kekewich, J. (42 W. R. 644), reversed.—*Shelfer* v. *City of London Electric Lighting Co.*, C.A., 238.

2. *Nuisance by noise—Nuisance from acts of several persons.*—If the acts of several persons amount in aggregate to what is remediable by injunction, each is separately liable and amenable to the remedy against the aggregate cause of complaint, and it is no defence for any one among them to show that he is not acting in concert with the others, and that what he does is by itself inappreciable.

On a motion, in each of two actions, to restrain a nuisance by noise from the acts of the defendant.

So held, applying the *dictum* of James, L.J., in *Thorpe* v. *Brumfitt*, L. R. 8 Ch. App. 650, 656.—*Lambton* v. *Mellish*, CH.D. CHITTY, J., 5.

See also CONTRACT, 7; COPYRIGHT, 5, 8; EASEMENT, 1; LANDLORD AND TENANT, 10; LIBEL, 6, 7; LIS PENDENS; PARTNERSHIP, 3; PRACTICE, 42; TRADE NAME, 3.

INLAND REVENUE:—

1. *Account duty — Administration — Power of appointment — Successive appointments — Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* (2) (*c*).—The donee of a general power of appointment (who died in 1893) made successive appointments by deed of specific parts of the fund, subject to her own life interest therein, and by her will (made in 1887) appointed the residue of the fund not appointed by the prior deeds.

Held, that the account duty payable under the Inland Revenue Act, 1881, and the costs of administering the fund must be borne by the appointees rateably.—*Shaw, Re, Tucket* v. *Shaw*, CH.D. NORTH, J., 315.

2. *Account duty—Marriage settlement of widow—Children by former marriage—Voluntary disposition—Volunteers—Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 38, *sub-section* (a) (c)—*Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7), *s.* 11.—The consideration of marriage extends only to the husband and wife and the children of that marriage; all other persons are volunteers in some sense.

In a marriage settlement made by a widow on her second marriage, shares belonging to her were given to her adult sons by her former marriage, and other shares belonging to her were assigned to trustees upon trust as to some, for the benefit of other children of the widow by her former marriage, and as to the residue upon trust in the events that happened, but subject to certain life interests, to all her children by her former marriage. The settlor died in 1890, within five months of the execution of the settlement.

Held (reversing the decision of the Queen's Bench Division, *ante*, p. 253), that the children by the former marriage were not within the marriage consideration, but were volunteers; that, therefore, the Crown was entitled to account duty under the Customs and Inland Revenue Acts, 1881 and and 1889, as upon a voluntary disposition in respect of the shares taken by the children of the former marriage.

Gale v. *Gale*, 25 W. R. 772, 6 Ch. D. 144, distinguished.—*Attorney-General* v. *Jacobs-Smith*, C.A. 657.

3. *Account duty — Voluntary disposition — Gift inter vivos—Release of mortgage debt—Covenant to pay annuity to releasor—"Benefit to the donor by contract"—Customs and Inland Revenue Acts*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-section* 2 (a), and

1889 (52 & 53 *Vict. c.* 7), *s.* 11, *sub-section* 1.—A mortgagee of freehold hereditaments obtained an order for foreclosure, but before the order was made absolute a deed was made, in 1886, between the mortgagee, the mortgagor, and the defendant (the mortgagee's son), by which, after reciting that the defendant had agreed to purchase the mortgaged hereditaments from the mortgagor, it was witnessed that in consideration of a sum of money (the difference between the price agreed to be paid by the defendant to the mortgagor and the sum due on the mortgage) paid by the defendant to the mortgagor, and of the covenant by the defendant thereinafter contained, such covenant being accepted by the mortgagee in satisfaction of his mortgage debt, from which he thereby released the mortgagor and the defendant, the mortgagee and the mortgagor conveyed the hereditaments to the defendant in fee simple discharged from the mortgage; and the defendant covenanted to pay an annuity to the mortgagee during his life. Upon the death, in 1890, of the mortgagee, account duty was claimed upon the amount of the mortgage debt under section 38, sub-section 2 (*a*), of 44 & 45 Vict. c. 12, and section 11, sub-section 1, of 52 & 53 Vict. c. 7.

Held, that there was a "gift" of the mortgage debt by the mortgagee to the defendant within the meaning of section 11, sub-section 1, of 52 & 53 Vict. c. 7, and by reason of the covenant by the defendant to pay the annuity there was a "benefit to the donor by contract" within the meaning of that sub-section, such "benefit" not being confined to a benefit or reservation out of the subject-matter of the gift, and that, as the mortgage debt was personal property, account duty was payable. —*Attorney-General* v. *Worrall*, C.A. 118.

4. *Account duty—Voluntary settlement—Articles of partnership—Annuity payable out of gross profits—Property within meaning of section* 38, *sub-section* 2 (c) *of the Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *and section* 11 *of Customs and Inland Revenue Act*, 1889 (52 *Vict. c.* 7).—Where by articles of a partnership deed it is declared that, on the death of one of the partners, his share shall be sold to the surviving partner subject to an annuity payable to the widow of the deceased partner out of the gross profits of the business, such annuity is property passing under a voluntary settlement, and is part of the deceased partner's personal estate within section 38, sub-section 2 (c) of the Customs and Inland Revenue Act, 1881, and section 11 of the Act of 1889, and account duty is payable in respect of such annuity. — *Attorney-General* v. *Wendt*, Q.B.D. 701.

5. *Income tax — Allowances — Public library — Urban authority—"Building the property of any literary or scientific institution"—Public Libraries Act*, 1892 (55 & 56 *Vict. c.* 53)—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 61, *r.* 6 (*Schedule A*).—Section 61, rule 6, of the Income Tax Act, 1842, provides for allowances to be made in respect of duties charged "on any building the property of any literary or scientific institution used solely for the purposes of such institution."

Held, by Lindley and Rigby, L.JJ. (Lord Esher, M.R., dissenting), that the above exemption does not extend to a public free library established by a municipal corporation as the urban authority under the Public Libraries Acts, such library not being the property of a "literary or scientific institution" within the meaning of the enactment.

Andrews v. *Mayor of Bristol*, 61 L. J. Q. B. 715, approved. — *Manchester* (*Mayor*) v. *McAdam*, C.A. 438.

6. *Income tax—Appeal against assessment—Unsatisfactory schedule—Right of appellant to be put on oath—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35).—The appellant appealed against his assessment for income tax. He sent in a schedule of accounts, and, on appearing before the special commissioners, tendered himself for examination on oath for the purpose of verifying his schedule. The commissioners refused to put him upon oath, and upon the evidence before them confirmed the assessment. The appellant obtained a rule *nisi* for a *mandamus* to the commissioners to hear and determine the matter, or to state a special case.

Held (affirming the decision of the Queen's Bench Division), that the decision of the commissioners was a decision merely on a question of fact; but, assuming that there was a point of law in the appellant's contention that the commissioners were bound to put him on oath, and that his oath as to the correctness of his schedule would be conclusive, nevertheless it was not one in respect of which the court ought to grant a *mandamus*.—*Reg.* v. *Chew*, C.A.

7. *Income tax — "Cost-book" mines — Capital — Capital expenditure—Whether there can be capital in such mines—Cost of sinking new shaft—Right to deduct cost—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Schedule D.*, *r.* 3.—Commissioners of Inland Revenue having decided that in the case of cost-book mines, and under the Stannaries Acts, there was no such thing as capital, and that there could be no profit in working such a mine until every expenditure had been met, and that, therefore, the cost of sinking a new shaft was not capital expenditure, but working expenditure, and could be deducted in assessing the annual profits for income tax purposes.

Held, that the commissioners were wrong in their finding that in such mines there could be no capital; that in this respect there was no difference between a cost-book mine and and any other mine, and that the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one and partly the other, was a question to be decided on the circumstances of the case.—*Morant* v. *Wheal Grenville Mining Co.*, Q.B.D.

8. *Income tax—Fines upon renewal of lease—Temporary deposit at interest in bank—Application as productive capital—Exemption—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *Schedule A*, *No.* 11., *r.* 5.—Money received in respect of fines upon renewals of leases and placed by the tenant for life under a will in the names of the trustees on contemporary deposit at interest in a bank until required for permanent investment, is not exempt from income tax, as being "applied as productive capital," within the meaning of rule 5 of section 60, Schedule A, II., of the Income Tax Act, 1842. —*Mostyn* v. *London*, Q.B.D. 330.

9. *Income Tax—Foreign business—Foreign principal resident abroad—Agents in England—Trade exercised within United Kingdom—Foreign principal chargeable to income tax in the name of agents—Assessment of agents—Liability of agents—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 41, 44—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—The appellants were the agents in Great Britain for the sale of the wine of a foreign wine merchant and champagne shipper, whose chief place of business was in France. The agents obtained orders and transmitted them to their principal. The wine was invoiced by the principal to the customers in his name as vendor, but the invoices were sent by

him to the agents, who forwarded them to the customers. The amounts due in respect of the wine so sold were sometimes collected by the agents, but more frequently the customers remitted the amount of their invoices by cheque or draft direct to the principal. The agents were entitled to a commission, on which they paid income tax, and had no other interest in the sale of the wine. The cash received by them on behalf of their principal rarely exceeded the commission due to them, and that excess was occasionally absorbed in the payment of charges on the principal's behalf. An assessment to income tax was made on the foreign principal in the name of the agents, under Schedule D.

Held, first, that the foreign principal exercised a trade within the United Kingdom within the meaning of the Income Tax Acts, 1842 and 1853; and, secondly, that the appellants were agents within the meaning of section 41 of the Income Tax Act, 1842, and that the assessment was rightly made in their name.—*Grainger* v. *Gough*, C.A. 184.

10. *Income tax — Husband and wife—Divorce—Annuity to wife—Recovery of past income tax.*—The trustees of a deed of arrangement made pursuant to an order of the Divorce Court, by which deed an annuity was secured to a wife on whose petition the divorce has been obtained, may deduct income tax in respect of the annuity, but cannot recover income tax which they have neglected to deduct in the past. — *Warren* v. *Warren*, CH.D. KEKEWICH, J., 490.

11. *Income tax — Profits and gains of business—English company owning railway abroad—Business carried on partly in England and partly abroad—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2—*Schedule D, cases* 1 *and* 5.—An English company, resident in England, was incorporated for the purpose of making and working a railway in Brazil. The business of the company was carried on under the control and direction of a board of directors in London. The directors were in the habit of buying in England and sending out to Brazil materials for the repair and extension of the railway.

Held (reversing the decision of the Divisional Court), that, though all the profits of the company were received in Brazil, the business of the company was not carried on entirely abroad, and, therefore, the decision of the House of Lords in *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493, did not apply, but the company was chargeable to income tax on the full amount of the profits and gains of its business within case 1 of Schedule D of the Income Tax Act, 1842.

London Bank of Mexico and South America v. *Apthorpe*, 39 W. R. 564, [1891] 2 Q. B. 378, followed.—*Denver Hotel Co.* v. *Andrews, San Paulo Railway Co.* v. *Carter*, C.A. 339.

12. *Inhabited house duty — Training stables—"Belonging to and occupied with" a dwelling-house—* 48 *Geo.* 3, *c.* 55, *Schedule B, rule* 2—14 *&* 15 *Vict. c.* 36, *Schedule — Customs and Inland Revenue Act* (41 *Vict. c.* 55), *s.* 13, *sub-section* 2.—Schedule B, rule 2, of 48 Geo. 3, c. 55, provides that, for the purpose of charging the inhabited house duty, every coachhouse or stable "belonging to and occupied with" any dwelling-house shall, in charging the said duty, be valued with such dwelling-house. The appellant was assessed to the inhabited house duty upon premises occupied by him in his business as a trainer of racehorses. The premises consisted of a lodge, in which a head stable lad of the appellant resided, and three ranges of stables, over a part of which were rooms used as sleeping quarters by the appellant's stable-boys.

Held, that the stables belonged to and were occupied with the dwelling-house, and that the premises were rightly charged with the duty.—*Lambton* v. *Kerr*, Q.B.D. 541.

13. *Justices—Prosecution by information—Proof that commissioners have ordered information—Allegation in information—"Letter or instructions"—7 &* 8 *Geo.* 4, *c.* 53, *s.* 71—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *ss.* 21 (1), 24, 27.—An officer of the Inland Revenue took proceedings by information to recover an excise penalty. The information alleged that he prosecuted for her Majesty by order of the Commissioners of Inland Revenue.

Held, that the allegation in the information was sufficient proof that the commissioners had ordered the prosecution, and that the 7 & 8 Geo. 4, c. 53, s. 71, was not repealed by the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), ss. 21 (1) and 24 (2).—*Dyer* v. *Tully*, Q.B.D. 61.

14. *Legacy duty—Annuity bequeathed by will—Charge upon real estate*—8 *&* 9 *Vict. c.* 74, *s.* 4.—A testator devised all his real estate to trustees for a term of 500 years, and subject thereto he devised the same to the use of C. H., for life, with remainder (in the events that happened) to the use of R. H. for life remainder to J. H. for life with remainders over. The trusts of the term were out of the rents and profits to raise and pay certain annuities, and in particular to raise and pay to the person who for the time being should (subject to the said term) be entitled under the will to the possession or receipt of the rents and profits of the devised estates an annuity of £3,000, and subject thereto to accumulate the rents and profits during the period of twenty-one years from the death of the testator, and after the determination of the said period of twenty-one years to pay the rents and profits to the person for the time being entitled to the said hereditaments in reversion expectant upon the said term.

The testator died in 1876; R. H. died in 1892; C. H. died in 1893; and thereupon J. H. became entitled to the £3,000 annuity.

Held, that during the term of twenty-one years from the death of the testator, J. H. had a mere charge upon the rents and profits of the devised estates, and that therefore legacy duty, and not succession duty, was payable by J. H.

Attorney-General v. *Jackson*, 2 Cr. & Jer. 101, followed.—*De Hoghton, Re*, CH.D. STIRLING, J., 630.

15. *Legacy duty—Personal estate to be laid out in land—Reversion in fee to tenant for life—"Begun to enjoy benefit"—Legacy Duty Act* (36 *Geo.* 3, *c.* 52), *ss.* 12, 19—*Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 41.—Residuary personal estate of a testator who died in 1854 was given to trustees upon trust to invest the same in purchase of lands to be settled (after some prior life estates) upon K. (the testator's grandson) for life, with remainder to K.'s first and other sons in tail, with remainder in fee to K. absolutely. K. became tenant for life in possession in 1864, and legacy duty at 1 per cent. was then paid on the value of K.'s life interest in the residuary personal estate not then invested in land, but no legacy duty was paid on the capital of such residuary personal estate, no person being at the time absolutely entitled thereto. K. died without issue in 1893, having by his will declared that all money which should be liable to be invested

in land under the will of his grandfather, and to which he (K.) should be absolutely entitled in default of male issue, should be considered part of K.'s personal estate. K.'s executors paid account duty under the Inland Revenue Act, 1881, at 3 per cent. on the net value of K.'s personal estate (including such residuary personal estate of his grandfather).

Held, that upon K.'s death legacy duty at 1 per cent. became payable under sections 12 and 19 of the Legacy Duty Act (36 Geo. 3, c. 52) under the grandfather's will on the capital value of the residuary personal estate then subsisting uninvested in land, notwithstanding the payment of the account duty already paid on K.'s estate, as, at the moment of K.'s death without issue, K. must be deemed to have "begun to enjoy the benefit" of his grandfather's residuary personal estate within the meaning of section 12 of the Legacy Duty Act.—*Kenlis* v. *Hodgson*, CH.D. KEKEWICH, J.

16. *Probate duty—Estate duty—Legatees identified by reference to will of another testator—Whether duties under both wills must be paid—Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12)—*Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 5.—A testator bequeathed his personal estate to his brother, and in case of his death in the testator's lifetime directed that it should go and be paid to his brother's executors or administrators as part of his personal estate, as if his brother had survived him and died immediately after him. The testator's brother died before the testator, leaving a will under which he appointed executors.

The Crown claimed in addition to the probate and estate duties paid by the testator's executors a second probate duty and estate duty from the executors of his brother's will.

Held, that the brother's executors were not chargeable with the duties claimed.

Lord Advocate v. *Bogie*, [1894] A. C. 83, followed. —*Attorney-General* v. *Loyd*, Q.B.D.

17. *Probate duty—Personal estate invested in mortgage securities abroad.*—When a testator, domiciled in England at the time of his death and possessing as part of his personal estate mortgage securities on lands abroad, bequeaths his residuary estate upon trust as to part of it for his wife, and she dies while the estate is being administered, and bequeaths her personal estate to trustees for sale and conversion, that portion of such estate as consists of the mortgage securities abroad remains a foreign asset, and is not subject to probate duty under the Customs and Inland Revenue Act, 1881.—*Attorney-General* v. *Sudeley* (*Lord*), Q.B.D. 700.

18. *Stamp duty—Agreement in consideration of fixed quarterly payments—"Bond, covenant, or instrument being the only or principal or primary security—"Lease or tack"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *schedule.*—By an agreement under seal a railway company agreed to permit an automatic machine company to place their machines at certain railway stations in positions approved by the railway company, to whom power was reserved of altering those positions, and, under certain circumstances, of removing the machines entirely. The automatic company agreed to pay to the railway company for this privilege a fixed "yearly rent" by equal quarterly payments. The agreement was determinable by three months' notice on either side.

By an agreement under seal a telephone company agreed to supply a theatrical ticket agent with the means of telephonic communication between a head office and other places, the company undertaking to erect and keep in good working order the telephonic lines and apparatus. The agreement was to continue for ten years, and thereafter from year to year, determinable by three months' notice; but the company might determine it at any time if the quarterly payments were in arrear. The ticket agent agreed to pay, quarterly in advance, an "annual sum" per line, the minimum to be calculated on the "rent" of forty-five lines.

Held, in each case, that the agreement was not chargeable with stamp duty as a "lease or tack," but was chargeable with *ad valorem* stamp duty under the head "bond, covenant, or instrument of any kind whatsoever, being the only or principal primary security for a sum or sums of money at stated periods for an indefinite period."—*Sweetmeat Automatic Delivery Co. and Jones* v. *Inland Revenue Commissioners*, Q.B.D. 318.

19. *Stamp duty—Promissory note—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 33, 82 (1) (b), 122.—An instrument stating on its face that for value received the maker promised to pay so many months after date to the order of himself a certain sum of money and interest, and that it is one of a series of notes for a sum of money secured by deposit of bonds (the principal and interest upon which the maker of the instrument guarantees to pay) and which also has stamped across its face a certificate that it is one of the series mentioned, and is secured by the deposit of the securities referred to, is not a marketable security as described by section 82 (1) (*b*) of the Stamp Act, 1891, but is a promissory note, and is only chargeable with Stamp Duty as such.—*Brown, Shipley, & Co.* v. *Inland Revenue Commissioners*, Q.B.D.

INNKEEPER:—

Lien—Goods of third person.—A commercial traveller of the plaintiffs went in the course of their business to stay as a guest at the defendant's inn. While there the plaintiffs sent him parcels of goods for sale in the district, which goods the defendant knew belonged to the plaintiffs and not to their traveller. The traveller having failed to pay for his board and lodging in the inn,

Held, that the defendant had a lien upon the goods in respect of the debt.—*Robins* v. *Gray*, Q.B.D.

INSURANCE:—

1. *Debenture, insurance of—Agreement to indemnify insurers for sums paid under policy—Scheme of arrangement by insurers—Payment under scheme—Principal and surety.*—The plaintiff corporation, by a policy of insurance, guaranteed the payment of the principal and interest secured by debentures in a limited company. The defendants agreed to repay to the plaintiff corporation "all sums which the plaintiff corporation shall have paid under the policy." The limited company made default in payment of the debentures. The plaintiff corporation afterwards went into voluntary liquidation and a scheme of arrangement was sanctioned by the court whereby the plaintiff corporation were given time to pay off the principal sum due by them, but were in the meantime to pay interest thereon. The plaintiff corporation having accordingly paid to the debenture-holders certain sums for interest, claimed to recover the same from the defendants under the agreement entered into by the defendants,

Held, that the defendants were not liable, as the payment made by the plaintiff corporation was not a payment "under the said policy," but under the scheme of arrangement, and, therefore, that the

event had not happened upon which the defendants had agreed to indemnify the plaintiff corporation.—*Mortgage Insurance Corporation* v. *Pound*, C.A.

2. *Life—Benefit of wife and children—Foreign assurance company*—Lex loci contractûs—Lex loci solutionis.—A policy of insurance on the life of a husband for the benefit of his wife and children was effected by an Englishman domiciled in England through the English branch of an insurance company which carried on business in New York.

Held (affirming the decision of Kekewich, J., *ante*, p. 572), that the policy, so far as it consisted of a settlement of the policy moneys, must be construed in accordance with the law of the domicile of the insuring party.

The decision of Kekewich, J., upon the construction of the policy reversed.—*Crosland* v. *Wrigley*, C.A., 673.

3. *Life—Warranty of truth of statements in the proposal—Statements offered as a consideration of the contract—Truth of statement a condition precedent.*—In the proposal to an insurance company for an insurance on his life, the assured had made certain statements as to his health and previous applications for insurance, and had also agreed that these statements were by him "warranted to be true, and were offered to the company as a consideration of the contract." A policy was afterwards issued by the company in consideration of the application for the policy, which was thereby made a part of the contract, and of the payment of the premium. In an action upon the policy by the administrator of the assured:

Held, that by the agreement in the proposal, the truth of the statements, therein warranted, was a condition precedent, and that, the statements being in fact untrue, the defendants were not liable under the policy.—*Hambrough* v. *Mutual Life Insurance Co. of New York*, C.A.

4. *Marine — Collision — Loss — Collision with "toe" of breakwater.*—By a contract of marine insurance entered into by the plaintiff company with the defendant, the plaintiff company insured a vessel against risk of loss or damage through collision with (*inter alia*) "harbours or wharves or piers or stages or similar structures." The vessel became a total loss through being driven by stress of weather on to the "toe" of a breakwater. The "toe" consisted of a mound of loose stones, upon which the superstructure of the breakwater was built.

Held, that the loss was covered by the words of the contract of insurance.—*Union Marine Insurance Co.* v. *Borwick*, Q.B.D.

5. *Marine—Damage to part of insured goods—Costs of examining undamaged part.*—A cargo of galvanized iron consisting of a number of cases each containing several sheets of iron was insured by a policy warranting the subject matter of the insurance free from average under 3 per cent., and declaring average to be recoverable on each package separately or on the whole. The insurance was from Bristol to London until safely delivered on board export vessels if so forwarded.

During the voyage to London some of the iron was damaged by perils insured against, and the whole was, on arrival in London, landed, unpacked and examined. It appeared from the examination that the iron in some of the packages had been damaged, but in others had been undamaged. The contents of the damaged cases were sold and the rest of the iron was repacked and sent on to its destination by the shippers, who claimed from the underwriters the whole expense arising from the unloading of the cargo for examination.

Held, the underwriters were not liable to indemnify the assured in respect of the expenses incurred by them in relation to any part of the cargo other than those cases containing iron damaged by the perils insured against.—*Lysaght* v. *Coleman*, C.A.

6. *Marine—General average—Damage to engines in getting ship off ground—Coal consumed in working engines.*—A steamship, while on a voyage, stranded (without any negligence on the part of those on board), and remained aground for three days. Owing to the bad weather she and her cargo were in imminent danger of being lost, and, in order to refloat her and to save both ship and cargo, her engines were kept working until she came off. The engines were thereby put to unusual strain, and were considerably damaged.

Held, that the damage to the engines and the cost of the coal consumed in working them were the subject of a general average contribution.—"*Bona*" *The*, C.A., 290.

7. *Marine—General average—Payment in cash to insurance broker — Bill of Exchange — Custom.*—Policies of insurance upon certain of the plaintiffs' ships were effected with the defendants by a firm of insurance brokers on behalf of the plaintiffs. The plaintiffs subsequently authorized the brokers to settle their claim against the defendants under these policies, and to receive payment in cash in accordance with the recognized custom. Instead of cash the brokers took a bill of exchange at three months in payment of a general account including the plaintiffs'. This bill they afterwards discounted, and it was eventually paid by the defendants. The brokers failed without having paid the plaintiffs. In an action by the plaintiffs to recover the amount due to them from the defendants,

Held (affirming Bruce, J.), that the taking of the bill was not within the authority conferred upon the brokers by the plaintiffs, that it was contrary to the recognized business custom, and even when discounted it did not constitute a payment to the insured.—*Hine* v. *Steamship Insurance Syndicate*, C.A.

8. *Marine—Insurance of profit—Warrants against average—Concealment of fact.*—A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were taken on board under bills of lading at freights which, in aggregate, exceeded the charter freight. The charterers insured their "profit on charter" by a policy which contained a warranty against average. On arrival of ship part of the cargo was delivered, and freight was payable under the bills of lading for that portion; but the rest of the freight (fruit) was not merchantable owing to sea damage, and freight was not payable on it; the result was that the total amount of the freight payable under the bills of lading was less than the charter freight, and consequently the charterers' profit was lost.

Held, that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty.

Held, also, that the fact that the charter freight was a lump sum and not a tonnage rate, was one which the assured was not bound to disclose, as the underwriters were put upon inquiry to ascertain the terms of the charter, the profit on which they undertook to insure.—*Asfar* v. *Blundell*, Q.B.D.

9. *Marine—Policy on freight—Exception for cancelling of charter—Delay caused by perils insured*

against—Termination of adventure.—In a policy of insurance on freight it was provided that no claim arising from the cancelling of any charter should be allowed. The ship, while proceeding to the port of loading under a charter-party, which did not contain any cancellation clause, was damaged by reason of perils insured against, and in consequence of the delay caused thereby the adventure came necessarily to an end. The shipowner made a claim on the underwriters in respect of his loss of freight.

Held, that the claim was not a claim arising from the cancelling of a charter, and that the underwriters were liable.—*Jamieson & Newcastle Steamship Insurance Association Arbitration, Re*, C.A. 530.

10. *Marine—Policy—Clause partly in print and partly in writing—Rejection of words wholly inapplicable.*—A marine policy partly printed and partly in writing, declared in the part in writing, that the insurance was upon "freight of meat at and from Monte Video," to any ports in the River Plate including the Boca, and thence to the United Kingdom, and that the underwriter should be liable for any loss occasioned by the breakdown of machinery, until the final sailing of the ship. By a subsequent clause in the policy it was declared that the assurance should commence upon the freight, goods, and merchandise on board, from the loading of the said goods or merchandise on board the ship at Monte Video. This clause was in print except the words "Monte Video," which were in writing.

After the arrival of the ship at Monte Video on her outward voyage she proceeded to the Boca, where a cargo of meat was ready for shipment, but the refrigerating machinery then broke down, so as to render it necessary to abandon the loading of the meat.

At the date of the policy both the underwriters and the assured knew that meat never was and could not be loaded at Monte Video owing to the absence of appliances for freezing the meat at that port.

Held, that the words in clause defining the commencement of the risk with regard to the loading of the goods, being absolutely inapplicable under the circumstances of the case, they must be rejected, and consequently that the policy attached although no meat was ever loaded.—*Hydarnes Steamship Co.* v. *Indemnity Marine Insurance Co.*, Q.B.D.

11. *Marine—Time policy—"Hull and machinery" of a steamship—Disbursements—"Warranted uninsured—Honour policies.*—The plaintiff effected a time policy of insurance with the defendants on the hull and machinery of a steamship of the value of £10,000, and by the policy warranted that £5,000 was uninsured. The total insured on the hull and machinery was £5,000, but the plaintiff had effected honour policies—(*i.e.*, policies void under 19 Geo. 2, c. 27) on "disbursements" to the extent of £2,600. The disbursements were made in respect of coal stores, provisions, and port expenses.

Held, that the disbursements were not covered by the words "hull and machinery," and that there had been no breach of the warranty.

Quære, whether the "honour policy" being null and void at law, could under any circumstances constitute an infringement of the warranty given.—*Roddick* v. *Indemnity Mutual Marine Insurance Co.* C.A.

INTEREST.—See COMPANY, [32; LIMITATION, STATUTE OF, 7; MORTGAGE, 1, 11; VENDOR AND PURCHASER, 7.

INTERPRETATION ACT, 1889.—See LOCAL GOVERNMENT, 7.

JOINTURE:—

Rent charge — Settlement — Charge on income—Arrears—Jurisdiction to sell corpus.—Where a jointure rent-charge, although only a charge on the income of a settled estate, has fallen in arrear and cannot be recovered by the powers of distress and entry, the court has jurisdiction to order a sale or a mortgage of the *corpus* of the estate to raise the arrears.

Taylor v. *Taylor*, 22 W. R. 349, L. R. 17 Eq. 324, and *Horton* v. *Hall*, 22 W. R. 391, L. R. 17 Eq. 437, discussed.—*Hambro, Re, Hambro* v. *Hambro*, CH.D. NORTH, J., 92.

See also SETTLEMENT, 4.

JUSTICES:—

1. *Appeal—Recognizance—"A court of summary jurisdiction"—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 31, *sub-section* 2.—The recognizance into which an appellant has to enter under section 31, sub-section 2, of the Summary Jurisdiction Act, 1879, may be fixed and entered into before any court of summary jurisdiction, even though it is done at a court in another county to that in which the order or conviction was made.

It is not essential that the order or conviction, or a copy thereof, be produced to the court before whom the recognizance is entered.—*Reg.* v. *Durham Justices*, Q.B.D. 423.

2. *Committal warrant — Civil debt — Wrongful arrest — Money paid to obtain release — Special damages—Costs*—43 *Eliz. c.* 2, *s.* 4.—The plaintiff was arrested under a committal warrant signed and issued by the defendant, a justice of the peace, for non-payment of a debt made up of a certain sum of money alleged to be due from the plaintiff to the local sanitary authority, under an order made at quarter sessions, and of the costs awarded.

Held, that such a warrant was altogether bad, and that the plaintiff was entitled to recover from the defendant, as special damages, the whole amount so paid by him to obtain his release from gaol.

Clark v. *Woods*, 17 L. J. M. C. 189, followed.—*Norton* v. *Monckton*, Q.B.D. 350.

3. *Disqualification — Bias — Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 361—*Charge against unqualified pilot—Conviction—Qualified pilot a member of the court.*—An unqualified pilot was charged before justices and convicted under section 361 of the Merchant Shipping Act, 1854, of assuming and continuing in charge of a ship after a qualified pilot had offered to take charge of her. M., one of the justices, was a qualified pilot. He carried on his business in the same district as the defendant, but was in the exclusive employment of one firm of shipowners who never employed unqualified pilots on their ships, and did not compete with pilots who took part in the "turn" system at pilot stations.

On an application for a *certiorari* to quash the conviction,

Held, that M. had such an interest in the conviction as to create a reasonable probability of bias, and that the conviction must be quashed.—*Reg.* v. *Huggins*, Q.B.D. 329.

4. *Jurisdiction—Limitation of time—Disobedience to closing order—Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 5 (9)—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.—The limitation by section 11 of the Summary Jurisdiction Act,

1848, of the period of six calendar months for the making of a complaint, applies to proceedings under section 5, sub-section (9) of the Public Health (London) Act, 1891, for acting contrary to a closing order; and a conviction under that sub-section, by which a penalty is imposed in respect of each day of a period exceeding six calendar months, is bad.—*Reg.* v. *Slade, Saunders, Ex parte*, Q.B.D.

5. *Jurisdiction—Title, claim of.*—Appellant was summoned by the conservators of Banstead Commons for cutting turf from and digging for loam upon Banstead Commons. The appellant had authority to do so from the lord of the manor. In 1889 in an action of *Robertson* v. *Hartopp*, 43 Ch. D. 484, the court had declared that the cutting and digging of turf or loam in or upon the waste lands of the manor by the lord of the manor constituted an injury to the rights of the tenants of the manor over said waste lands. The justices were of opinion that, having regard to the decision in *Robertson* v. *Hartopp* the appellants claim of right to dig turf, &c., though *bonâ fide*, was not reasonable, and they convicted the appellant.

Held, that it was impossible to say, without enquiring into the circumstances as they at present existed, that the appellants claim of right was absurd in law, and that the justices had no jurisdiction to hear such evidence,

Held also, that as the claim was *bonâ fide* the jurisdiction of the justices was ousted.—*Scott* v. *Baring*, Q.B.D.

6. *Licensing law — Appeal—Costs—"Party" to appeal—Discretion of justices at quarter sessions—* Mandamus—9 *Geo.* 4, *c.* 61, *s.* 29—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49, *ss.* 31, 32—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *s.* 6.—Licensing justices who, being served with a notice of appeal, appear at the hearing of the appeal and actively oppose it are "a party" within clause 5 of section 31 of the Summary Jurisdiction Act, 1879.

Section 29 of 9 Geo. 4, c. 61, so far as it applies to such licensing justices, is inconsistent with section 31 of the Summary Jurisdiction Act, 1879, as altered by the Summary Jurisdiction Act, 1884, and, by virtue of section 55 of the Act of 1879, must be taken to have been repealed.

In such cases the justices at quarter sessions have a discretion as to costs, and the court will not grant a *mandamus* to compel them to order costs to be paid to licensing justices.

Semble, as to licensing justices who do not make themselves parties to the appeal, section 29 of 9 Geo. 4, c. 61, is still applicable, and the court of quarter sessions has no jurisdiction to deprive them of their costs.

The Summary Jurisdiction Act, 1884, which repeals section 32 of the Summary Jurisdiction Act, 1879, down to the words "in accordance with the conditions and regulations contained in this Act," repeals that section down to where those words occur for the second time.

Decision of the Divisional Court (287) affirmed. *Reg.* v. *London Justices*, C.A. 387.

7. *Practice—Appeal to quarter sessions—Statutory notice setting out the general grounds of appeal sent, but returned through the Dead Letter Office—Service bad—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49). *s.* 31, *sub-sections* 2, 7—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 4, 6.—An appeal to quarter sessions against an order made at petty sessions can only be brought by the person seeking to appeal, after a proper notice setting out the general grounds of the appeal has been duly served by him on the other party, as required by section 31, sub-section 2, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).—*Reg.* v. *Essex Justices* (*No.* 2), Q.B.D. 378.

8. *Summary conviction—Penalty—Civil debt—Refusal to pay cab fare—Criminal offence—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s.* 66—*Summary Jurisdiction Act*, 1879 (41 & 43 *Vict. c.* 49), *ss.* 6, 35—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *s.* 4.—A cab fare recoverable under the Town Police Clauses Act, 1847, is a civil debt within the meaning of section 6 of the Summary Jurisdiction Act, 1879, and refusal to pay a cab fare is not a criminal offence whereby the person refusing is liable to a conviction and a term of imprisonment.

The words "and not on information" in section 6 are only intended to exclude cases where an information on oath is required by statute.—*Reg.* v. *Torquay Justices*, Q.B.D. 59.

See also ADULTERATION, 2, 3; CRIMINAL LAW, 5, 6; DIVORCE, 8; INLAND REVENUE, 13; LANDS CLAUSES ACTS, 1; LIBEL, 3; LICENSING LAW, 1; LOCAL GOVERNMENT, 4, 7; METROPOLIS MANAGEMENT, 15; METROPOLITAN CARRIAGE.

LANDLORD AND TENANT:—

1. *Compensation to tenant for improvements—Larger sum due to landlord for breach of covenant—Summary proceedings by landlord to recover balance—Agricultural Holdings Act*, 1883 (36 & 37 *Vict. c.* 61), *ss.* 6, 24.—Where a tenant has made a claim for compensation for unexhausted improvements under the Agricultural Holdings Act, 1883, and the landlord has made a counter-claim for damages for breach of covenant, and an arbitrator has awarded that the sum due to the lordlord exceeds that due to the tenant, the landlord cannot make use of the summary procedure of the Act to recover the balance due to him.—*Holmes* v. *Formsby*, Q.B.D. 205.

2. *Covenant—Building estate—Adjoining lessee—Covenants against building and annoyance—Trellis screen—Injunction.*—The erection by a lessee above his boundary fence of an open trellis-work screen, about 58 feet long and 12 feet high, which interfered to some extent with the light flowing to the ground-floor windows of the adjoining premises leased by the same lessor,

Held to be a breach of a covenant by the lessee "not to erect any building whatsoever, except a stable and coach-house, upon the demised premises, and not to do any act or thing which might be an annoyance or nuisance to any tenant of the lessor": and an injunction granted accordingly.—*Wood* v. *Cooper*, CH.D. ROMER, J., 201.

3. *Distress for rent—End of tenancy—Occupation under agreement of part of premises—Landlord's right to distrain on part for rent due for whole—8 Anne, c.* 14, *ss.* 6, 7.—The tenant of a farm gave, and the landlord accepted, notice to quit with regard to the farm. Before the expiration of such notice the tenant agreed to continue to occupy, and the landlord agreed to let to the tenant, a part of the farm, and, after the expiration of the old tenancy and the giving up of possession of the remainder, the tenant continued to occupy such part under the agreement. Arrears of rent being due in respect of the whole farm,

Held, that there was no right to distrain upon the part of the farm retained and occupied by the tenant for the rent due for the whole farm, inasmuch as, with regard to such part, a new tenancy

had been created, and there was no holding over by the tenant.—*Wilkinson* v. *Peel*, Q.B.D. 302.

4. *Ejectment — Forfeiture — Distress — Waiver of forfeiture—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 210.—In an action of ejectment under section 210 of the Common Law Procedure Act, 1852, on a right of re-entry for non-payment of rent, the levying a distress after the right of forfeiture has accrued is not a waiver of the forfeiture if, after the distress and before the issue of the writ in the action there remains one half-year's rent due.

Brewer v. *Eaton*, 3 Doug. 230, followed.

Colesworth v. *Spokes*, 10 C. B. N. S. 103, distinguished.—*Thomas* v. *Lulham*, C.A. 689.

5. *Ejectment—Relief against forfeiture for non-payment of rent—Right of mortgagee by sub-demise—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 210—*Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.—By section 210 of the Common Law Procedure Act, 1852, the proceedings in ejectment for non-payment of rent under that section are subject to the following proviso: "Provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor . . . and perform all the covenants and agreements which on the part and behalf of the lessee are and ought to be performed."

Held, that a mortgagee of a lease by sub-demise was, according to the settled practice in equity, entitled to relief upon the terms of the above proviso, unless a right in some third party had accrued between the date of the judgment and the application for relief.—*Newbolt* v. *Bingham*, C.A.

6. *Ejectment by Crown—Equitable defence—Specific performance.*—In an action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff.

Where, therefore, the defendant proved the existence of a concluded contract with the Crown entitling him to the issue of a grant in respect of the land in suit.

Held, that he had a good defence to an action of ejectment by the Crown.—*Attorney-General for Trinidad* v. *Bourne*, P.C.

7. *Furnished lodgings—Agreement to let—Implied promise—Fitness for occupation—Sanitary condition.*—In an agreement to let furnished lodgings and to supply ordinary household attendance there is no implied promise that the lodgings shall be in a sanitary condition throughout the period for which they are let.—*Sarson* v. *Roberts*, C.A. 690.

8. *Game—Agreement by tenant occupier to let the "sole right of killing all winged game, hares, and rabbits" on farm land to a person other than his landlord—Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), *ss.* 1-3.—Section 3 of the Ground Game Act, 1880, applies only to an agreement made as between a tenant and his landlord whereby the tenant agrees to divest himself of his right to take the ground game, and does not prevent a tenant occupier from assigning any sporting rights he may have to a third party for money value.—*Morgan* v. *Jackson*, Q.B.D. 476.

9. *Implied grant — Nuisance — Vibration from engines on adjoining land of lessor — Damages, measure of.*—A demised house was shaken down by the vibration caused by the working of steam-engines on the adjoining land of the lessor, and the lessee was obliged to remove his business to other premises, and in consequence incurred expense. The demised house, at the time the lease was made, was to the knowledge of both lessor and lessee in an unstable condition, and a house of ordinary stability would not have been injured by the vibration.

Held, that the lessee had a cause of action against the lessor for damages for nuisance, for that there was an implied obligation on the part of the lessor not to derogate from his grant by using his adjoining property so as to interfere with the stability of the demised premises, and that the lessor could not, therefore, set up by way of defence that the demised premises were in an unstable condition at the time of the demise.

Held also, that in estimating the damages, not merely the loss of the term demised, but also all loses fairly attributable to the wrongful act of the lessor, such as the expense incurred by the lessee in removing his business to other premises, should be regarded.—*Grosvenor Hotel Co.* v. *Hamilton*, C.A.

10. *Lease—Agreement for lease—Infant specific performance—Injunction.*—An agreement for a lease to the plaintiff was entered into by the defendants, an infant and an adult, as joint owners, through their agent. In an action for specific performance of the agreement the plaintiff applied for an injunction to restrain the defendants till after the trial leasing the premises to any other person.

Held, that an injunction ought only to be granted where a case was made out for specific performance; and that one of the defendants being an infant, the plaintiff was not entitled to specific performance as against him; nor as against the adult, in respect of his share, in the absence of any evidence of misrepresentation or misconduct on the part of the adult.—*Lumley* v. *Ravenscroft*, C.A., 584.

11. *Lease — Agreement for underlease — Specific performance — Omission of date of commencement of lease — Statute of Frauds — Covenant not to underlet without licence of lessor — Respectable and responsible tenant — Unreasonable refusal.*—On the 28th of March, 1894, the plaintiff and defendant signed a memorandum of agreement, by which the defendant was to take an underlease of a house on certain terms. The date from which the underlease was to commence was omitted in this agreement, but it was understood by the parties, at the time, that it was to be the 7th April, 1894. This date was specifically agreed to in writing by subsequent letters.

Held, that there was a contract made on the 28th March, 1894, sufficiently evidenced in writing to satisfy the Statute of Frauds.

By the lease under which the plaintiff held, there was a covenant that the lessee would not assign or underlet without the licence in writing of the lessor, but the licence was not to be withheld in the case of the lessee obtaining a respectable and responsible person as tenant. The defendant was a respectable and responsible tenant, but the lessor declined to consent to the underlease, unless a certain undertaking was given by the defendant.

This refusal to consent was also pleaded as a defence to an action by the plaintiff for specific performance of the agreement.

Held, that the defendant would get a good title and run no substantial risk of having it impeached on the ground of any breach of covenant by the granting of the underlease. He was, therefore,

ordered to specifically perform the contract.—*White* v. *Hay*, CH.D. ROMER, J.

12. *Lease under seal—Implied covenant for title—Implied covenant for quiet enjoyment—Expiration of lessor's term—Duration of covenants after such expiration.*—A covenant for title *sensu stricto* is not imported or implied by law from a lease under seal, nor from the relation of lessor and lessee; but a covenant for quiet enjoyment is so implied by law, though, where the lease has been granted by the lessor in good faith, such implied covenant for quiet enjoyment endures only during the continuance of the interest of the lessor, and determines with such interest.—*Baynes* v. *Lloyd*, Q.B.D. 524.

13. *Lease—Encroachment by tenant—Presumption of occupation as part of the holding—Action of trespass during tenancy—Limitation, Statutes of* (3 & 4 *Will.* 1 & c. 27; 37 & 38 *Vict.* c. 57).—A tenant under a lease for years encroached upon and occupied a piece of land belonging to the landlord and adjoining the demised premises, for more than twelve years. The landlord, during the continuance of the tenancy under the lease, brought an action for trespass and an injunction,

Held, that the action would not lie; the tenant must be deemed to have occupied the piece of ground as part of the holding and was entitled to so occupy it during the residue of the lease.—*Tabor* v. *Godfrey*, Q.B.D.

14. *Lease—Re-entry—Without process of law—Right to relief from forfeiture—Preamble to section* 2, 4 *Geo.* 2, c. 28—*Common Law Procedure Act*, 1852, *ss.* 211, 212—*Bankruptcy Act*, 1883, *ss.* 44, 168.—In a proper case a lessee is entitled to relief from even forfeiture where the re-entry of the lessor has been a peaceable one and made without process of law.

The effect of the preamble to section 2 of 4 Geo. 2, c. 28, and of section 112 of the Common Law Procedure Act of 1852, is not such as to limit the jurisdiction of the court to grant such relief only in those cases were ejectment proceedings have been taken.

The right to relief from forfeiture is not a right purely personal to the lessee, but vests on his bankruptcy in his trustee in bankruptcy, and may be assigned by such trustee.—*Howard* v. *Fanshaw*, CH.D. STIRLING, J. 645.

15. *Lease—Repair—Covenant to keep in repair—Measure of damages.*—The measure of damages for breach of a covenant to keep demised property in repair, is not the same in the case of an underlease as in that of a direct lease with a freehold reversion.

Where the underlessee has notice that there is a superior landlord, the liability of the intermediate lessor to the head landlord for breach of covenant to repair must be taken into account in ascertaining damages for breach of such covenant as between the intermediate lessor and the underlessee, in such a case, therefore, an approximate estimation of the cost of putting the property in good repair at the end of the term held by the intermediate lessor, may be taken into consideration in measuring damages for breach of covenant to keep in repair as between the intermediate lessor and the underlessee.—*Ebbetts* v. *Conquest*, C.A.

16. *Lease—Sub-lease for a longer term—Assignment by lease—Reversion by estoppel.*—B. demised certain premises to W. for a term of twenty-one years. W. demised the premises to the defendant for a term of forty years less three days. Subsequently W. assigned to the plaintiff the premises demised by B., subject to the under-lease by W. to the defendant. In an action brought by the plaintiff against the defendant to recover arrears of rent,

Held, that, assuming, but not deciding, that W. had a reversion by estoppel subject to the under-lease for forty years less three days, that reversion was not purported to be conveyed to the plaintiff by the assignment from W., and, therefore, the right to sue on the covenants in the under-lease remained in W., and did not pass by the assignment to the plaintiff.—*Norris* v. *Craig*, Q.B.D. 480.

17. *Notice to quit—Sufficiency of notice—Option.*—The defendant demised to the plaintiff certain premises for a term of twenty-one years from the 25th of December, 1887, subject to a proviso that the lessee might determine the demise at the end of the seventh or fourteenth year on giving notice of his desire to do so six months before the expiration of such seventh or fourteenth year. On the 21st of October, 1893, the plaintiff wrote to the defendant: "I see that my first seven years will be determined on the 25th of December, 1894. . . . I understand that the rent is £50 too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this so that you may have ample time to consider what course you would like to adopt." Negotiations by letter for a reduction of the rent took place and continued until within six months of the 25th of December, 1894, when the first seven years of the demise came to an end, but the parties were unable to agree as to the amount of the reduction.

Held, that the letter of the 21st of October, 1893, was a good notice to determine the lease at the expiration of the seven years.—*Bury* v. *Thompson*, C.A. 338.

18. *Notice to surrender—Sufficiency.*—On the 11th of January, 1892, a tenant wrote to the landlord's agent as follows: "I hereby give you notice that I wish to terminate my tenancy of the offices. . . . Will you kindly let me know when my tenancy will expire?" The reply dated the 13th of January, 1892, was: "On referring to your agreement we find that six months notice must be given to terminate on the 1st of July in any year; you, therefore, hold the rooms till July, 1893."

Held, that a valid notice to surrender had been given and accepted, and that the tenant was not liable for rent after the 1st of July, 1893.—*General Assurance Co.* v. *Worsley*, Q.B.D.

19. *Quiet enjoyment—Interference by landlord—Reinstatement—Mandatory order to reinstate—Injunction.*—A tenant was in possession of rooms on the fourth and fifth floors of certain premises for residential purposes, with the use of the entrance hall, staircase and lift.

The landlord, without the consent of the tenant and during his temporary absence, proceeded to remove the staircase and to substitute another giving access to the plaintiff's rooms in a circuitous and less convenient way.

On a motion for injunction by the tenant the court granted a mandatory order against the landlord to reinstate the staircase.—*Allport* v. *Securities Corporation*, CH.D. NORTH, J.

20. *Yearly tenancy—Notice to quit on anniversary of commencement of term—Validity.*—A notice to determine a yearly tenancy ought to expire on the last day of the current year; nevertheless, a half year's notice to quit on the anniversary of the day on which the tenancy commenced, is a valid notice.

In determining tenancies commencing at a particular time, the expressions "at," "on," "from," or "on and from" are equivalent expressions.

H. became yearly tenant of S. under an agreement dated the 19th of May, 1890, such yearly tenancy "commencing on the 19th day of May instant." On the 17th of November, 1893, S. gave written notice to H. to quit and deliver up "possession to him on the 19th of May next" of the premises.

Held, that such notice to quit was a valid notice; the tenancy commenced on the 19th of May, and would be determined at midnight of the 18th of May. A notice to quit on the 18th of May would equally have been a good notice.—*Sidebotham* v. *Holland*, C.A. 228.

See also BANKRUPTCY, 26; COMPANY, 45; GAMING, 6; LIMITATIONS, STATUTES OF, 1, 6; SETTLED LAND, 4.

LAND REGISTRY:—

Land securities company—Securities deposited with registrar—Power of court to order re-delivery—Mortgage Debenture Act, 1865 (28 & 29 *Vict. c.* 78), *ss.* 10, 16, 41, 46—*Mortgage Debenture (Amendment) Act*, 1870 (33 & 34 *Vict. c.* 20), *ss.* 7-10.—The court has no power to direct the registrar of the Land Registry Office to deliver up securities deposited with him by a land securities company to a receiver appointed in a debenture-holder's action, or to a liquidator of the company, unless they have been redeemed in accordance with the provisions of the Mortgage Debenture Acts, 1865 and 1870, or have been sold.

Decision of Wright, J. 42 W. R. 623, reversed.—*Somerset* v. *Land Securities Co.*, C.A. 132.

LANDS CLAUSES ACTS:—

1. *Compensation—Tenancy for less than a year—Injury to adjoining property held on thirty years' lease—Jurisdiction of magistrate—Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *ss.* 68 *and* 121.—The respondent was tenant of a piece of land held upon a lease from the Crown for the term of thirty years from 1889, subject to a right reserved to the Crown to give him a three months' notice to quit as to any part of the land comprised in the lease. The appellants, a railway company, gave him notice to treat in respect of a strip of this land required by them for their railway. Afterwards the Crown gave him a three months' notice to quit this strip of land. A metropolitan police magistrate, before whom a summons was afterwards taken out by the appellants to assess, under section 121 of the Lands Clauses Act, the compensation to be paid to the respondent, included in such assessment, compensation for the injuriously affecting of the remainder of the respondent's land upon the basis of a thirty years' tenancy.

Held, that the magistrate had no jurisdiction to include such compensation, and that the only compensation he had jurisdiction to assess was, for the loss of the strip of land and damage for its severance for three months.—*Bexley Heath Railway Co.* v. *North*, C.A.

2. *Costs of arbitration—Offer by promoters—Withdrawal—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 34.—By section 34 of the Lands Clauses Consolidation Act, 1845, the costs of an arbitration under that Act are to be borne by the promoters unless the arbitrators shall award a less sum than shall have been offered by the promoters, in which case each party shall bear his own costs incident to the arbitration.

A municipal corporation, being desirous of taking certain land for the purposes of a local Act which incorporated the provisions of the Lands Clauses Act, 1845, appointed a committee to negotiate with owners of the property. The town clerk, acting upon the instructions of some members of the committee, made an offer to the plaintiffs for a piece of land. This offer the plaintiffs refused. Each party appointed arbitrators, and upon the day that the umpire accepted his appointment the town clerk gave notice to the plaintiffs withdrawing the offer. This withdrawal the plaintiffs assented to in writing. The umpire awarded the plaintiffs a less sum than that which had been offered by the town clerk. Subsequently the corporation passed a resolution in ratification of the offer.

Held, that the corporation was liable to pay the costs of the arbitration.

Per Lord Esher, M.R.: An offer made by the promoters can be withdrawn by them, and in such a case they cannot claim the benefit granted them by section 34.—*Foster* v. *Sheffield (Corporation)*, C.A.

3. *Railway company—Notice to treat—Part of a building — "House" — "Manufactory" — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.—Where a railway company gives notice to treat for part of a building, another part of which building is used, together with the adjacent land and premises, for the purposes of a manufactory, the company is requiring the sale of a part of the manufactory within the 92nd section of the Lands Clauses Act, and cannot resist a counter-notice calling upon the company to take the whole manufactory.—*Brook* v. *Manchester, Sheffield, &c., Railway Co.*, CH.D. CHITTY. J.

See also DEED, 2; POOR LAW, 8; RAILWAY, 21; RENT-CHARGE; SETTLED LAND, 2; SOLICITOR, 11.

LEASE.—See BANKRUPTCY, 23, 41; COMPANY; LANDLORD AND TENANT: LIMITATIONS, STATUTES OF, 1; SOLICITOR, 8-10; TRUSTEE, 2.

LIBEL—

1. *Privilege—Communication by Secretary of State—Act of State.*—An action of libel cannot be maintained against a Secretary of State in respect of a communication made by him in the course of his official duty to a subordinate officer of State. Such an action may rightly be dismissed as vexatious on an application at chambers.—*Chatterton* v. *Secretary of State in Council*, C.A.

2. *Company — Privilege — Privileged occasion — Defamation in a circular issued by secretary of company—Malice.*—The secretary of an incorporated company issued a circular to customers containing defamatory statements. In an action against the company for libel, the judge held that the occasion was privileged, and the jury found that the statement complained of was in excess of the privilege, but did not find actual malice on the part of the secretary.

Held, that the occasion being privileged, in the absence of a finding of actual malice, the defence of privilege was not rebutted, and that the action should be dismissed.

Quære, whether malice on the part of their secretary would have made the company liable.—*Neville* v. *Fine Arts Insurance Co.*, C.A.

3. *Privilege—Licensing sessions—Report by head constable on licensed houses—Publication of report by order of justices.*—The head constable of a borough, by direction of the licensing justices, sold copies of a report containing remarks upon the various licensed houses in the borough, which had been prepared by him for the use of the justices, to per-

sons who had business at the general annual licensing sessions in order to facilitate their business at the sessions.

In an action for libel by the licensee of a public-house against the head constable in respect of certain remarks made by him in the report upon the public-house in question.

Held, that, as the report was published by direction of the licensing justices for the proper and effective discharge of the business of the licensing sessions, the occasion of the publication was privileged, and in the absence of actual malice the action would not lie.—*Andrews* v. *Nott-Bower*, C.A. 582.

4. *Privilege—Publication of information to which the public had access by statute—Trade protection society—Information supplied by Government official inaccurate—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 4, 6, 7, 11, 12.—A trade protection society published in their gazette information of a registered deed of inspectorship as set out in an official office extract. The information was inaccurate, inasmuch as under the column headed "Property included under the deed" there appeared the words "Estimated assets—Nil." As a matter of fact, if the debtor's property had been realized, it was sufficient to pay all the creditors in full.

The debtor brought an action for libel.

Held, that the plaintiff could recover, on the broad principle that a person who published information concerning another for his own profit was responsible for its accuracy; and the fact that in the present case the information was published without malice and was copied from an authorized official document was no defence.

Per Wright, J.—It is questionable whether a trade journal can safely publish the contents of the statutory affidavit merely made by the debtor as to his property, as there is nothing in the Act which expressly entitles a person to see and make extracts from the affidavit as distinguished from the deed itself.—*Reis* v. *Perry*, Q.B.D. 648.

5. *Slander—Imputation of misconduct in office—Office of honour—Words actionable without special damage—A motion, power of—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50).—Words spoken of a person imputing to him misconduct in an office of honour are actionable *per se*, without proof of special damage.

Hence an action for slander will lie, without proof of special damage, where the words impute to the plaintiff want of integrity or dishonesty to his office of alderman of a town council.

Per Lopes, L.J.—The action was also maintainable upon the grounds (1) that a corporation has the power of removing a member from office for corrupt or dishonest conduct in that office; and (2) that the words imputed a criminal offence.—*Booth* v. *Arnold*, C.A. 360.

6. *Trade libel—Masters and workmen—Trade union—Intimidation—Malicious injury—Actionable wrong—Interlocutory injury.*—In consequence of a dispute with reference to an alleged preferential employment of non-union men by a building firm, the defendants, a trade union published a poster headed "Trollope's Black List," containing the names of non-union men employed by the firm.

Held, that a *primâ facie* case had been established that the defendants were doing more than was in fact necessary for their own protection; and that, therefore, an order for an interlocutory injunction to restrain the publication of the poster ought to be granted.—*Trollope* v. *London Building Trades Federation*, C.A.

7. *Trade libel—Rival traders—Disparagement of another's goods — Advertisement — Injunction.*—The appellant retailed a patent food of the respondent's, and affixed thereto a label stating that certain other goods used for similar purposes, and in which he had a proprietary interest, were better than any other preparation yet known. An action for an injunction was brought by the respondent to restrain the appellant from doing so. There was no evidence of special damage given by or on behalf of the respondent.

Held, that this was merely a puffing advertisement of the appellant's goods, that there was no actionable wrong, and, consequently, that no injunction could be granted.

In the case of disparagement of a person's goods, whether the remedy sought is injunction or damages, the plaintiff must show that the representations of the defendant were made of and concerning his (the plaintiff's) goods, and untrue, and that they have occasioned him special damage.

Decision of the Court of Appeal (42 W. R. 549) reversed.—*White* v. *Mellin*, H.L. 353.

See also CRIMINAL LAW, 7; MAINTENANCE; PRACTICE, 69.

LICENSING LAW:—

1. *Justices—Appeal to quarter sessions—Time—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 57—*Summary Jurisdiction Act*, 1879, *s.* 31—*Summary Jurisdiction Act*, 1884, *s.* 6.—Notice of appeal from the licensing justices of quarter sessions under the Alehouse Act, 1828, s. 57, should now be given in accordance with the provisions of section 31 (2) of the Summary Jurisdiction Act, 1879, within seven days after the day on which the judgment was given.—*Rex* v. *West Riding, Yorkshire, Justices*, Q.B.D.

2. *Licence—Renewal—Beerhouse licensed since 1st of May*, 1869, *pulled down and, in rebuilding, house enlarged and material improvements made—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *s.* 19.—Where a beerhouse licensed prior to the passing of the Wine and Beerhouse Act, 1869, is pulled down, and, in rebuilding, is enlarged and considerably improved, a new licence is not required, unless one of the four grounds of objection set out in section 19 of that Act can be supported.—*Deer* v. *Wirrall Justices*, Q.B.D., 286.

3. *Licence—Renewal—General annual licensing meeting—No notice of objection—Objection made in court—Justices—Jurisdiction to adjourn meeting—Grounds of objection—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.—Where at a general annual licensing meeting an objection is made in open court to the renewal of a licence in respect of which no previous notice of opposition has been given to the applicant, the justices have jurisdiction, under section 42 (2) of the Licensing Act, 1872, to adjourn the application, although neither the grounds nor the nature of the objection are stated by the objector.—*Daykin* v. *Parker*, C.A.

4. *Off-licence—Orders taken at one place executed at another—Payment for goods ordered on delivery—Sale of liquors at a place not authorized by licence—Licensing Act*, 1872, *s.* 3.—P., holding an ordinary licence to sell intoxicating liquors, to be consumed off the premises, at his licensed premises in Stanley-street, Burnley, was in the habit of sending his carman round weekly to certain customers, who received their orders for beer sold by him in gallon

jars. These orders were supplied from goods stored on the said licensed premises, and duly delivered by the carman on his next journey, who then received payment for the beer supplied, together with the empty jar.

Held, that the sale was not effected at the licensed premises at Stanley-street, but at the house of the customer.—*Pletts* v. *Campbell*, Q.B.D. 634.

5. *Refreshment houses in Wales—Refreshment house open on Sunday—Refreshment Houses, &c., Act*, 1860, (23 *Vict. c.* 27), *s.* 6—*Licensing Act*, 1874, (37 & 38 *Vict. c.* 49) *s.* 11—*Sunday Closing (Wales) Act*, 1881, (44 & 45 *Vict. c.* 61), *s.* 1.—The Licensing Act, 1874, s. 11, regulates the hours at which refreshment houses in Wales must be closed. Such refreshment houses are not governed by the Sunday Closing (Wales) Act, 1881, s. 1.—*Berni* v. *Thorney*, Q.B.D. 411.

6. *Supplying liquor to a police-constable on duty—Knowledge of licensed victualler—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 16, *sub-section* 2.—Section 16, sub-section 2, of the Licensing Act of 1872 provides that "if any licensed person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable, he shall be liable to a penalty not exceeding, for the first offence, ten pounds."

Held, that a licensed person who supplied liquor to a constable on duty under the *bonâ fide* belief that he was not on duty had been guilty of no offence under the section.—*Sherras* v. *De Rutzen*, Q.B.D. 526.

See also JUSTICES; LIBEL, 3.

LIMITATIONS, STATUTE of:—

1. *Building agreement—Builder entitled to lease at peppercorn rent—Possession taken under agreement—No lease granted—Right of lessor to enter—Tenant at will*—3 & 4 *Will.* 4, *c.* 27, *ss.* 2, 7, 15.—Where builders, under a building agreement, have entered into possession of land and erected buildings thereon, and have become entitled to have leases granted to them of certain houses so built by them at a peppercorn rent for a term of ninety-nine years, but no such leases have ever been granted, and no rent has ever been paid in respect thereof, the Statute of Limitations does not run against the landlord during the currency of the ninety-nine years.

Drummond v. *Sant*, 20 W. R. 18, L. R. 6 Q. B. 763, approved.—*Warren* v. *Murray*, C.A. 3.

2. *Charge on lands—Settlement of charge—Devise of lands charged to tenant for life of charge - Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—A father charged a certain real estate in favour of the trustees of his son's marriage settlement (the son being tenant for life thereunder), and covenanted to pay the money charged. The estate he subsequently devised in fee to the son, who took possession of the lands, but made no claim on the personal estate for twelve years.

Held, that the claim was barred against the personal estate.

Coope v. *Cresswell*, 15 W. R. 252, L. R. 2 Ch. App. 112, followed.

Burrell v. *Lord Egremont*, 7 Beav. 205, and *Topham* v. *Booth*, 35 W. R. 715, 35 Ch. D. 607, distinguished.—*England, Re, Steward* v. *England*, CH.D. KEKEWICH, J., 491.

3. *Contingent interest in land—Charge created by will—Remedy of person entitled—Sale or mortgage, not foreclosure—"Present right to receive" moneys charged—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 74), *ss.* 1, 2, 8.—The remedy of a person entitled to a charge created by will on real estate is sale or mortgage, not foreclosure.

A testator, who died in 1854, by his will, made in October, 1853, gave his wife absolutely certain personal estate exonerated from his debts, which he charged on his real estate. He devised his real estate, and also a contingent interest in real estate to which he was entitled, to his wife for life, and after her decease he charged the same with the payment of certain sums of money which he bequeathed to his children. He appointed his wife executrix, but there was no residuary bequest of personal estate. She died in February, 1880. The testator's contingent interest fell into possession in February, 1893, it not having been previously realized.

Held, that the "present right to receive" the sums charged on the testator's real estate accrued on the death of the testator's widow in 1880, when they might have been raised by sale or mortgage, but not by foreclosure, and that, therefore, the right to recover the same was barred by section 8 of the Real Property Limitation Act, 1874.—*Owen, Re*, CH.D. STIRLING, J., 55.

4. *Creditor holding bonds as security for loan—Agreement to pay—Deficiency on realization of security—Sale of bonds*—21 *Jac.* 1, *c.* 16.—On the occasion of a loan which became repayable in 1883 certain bonds were deposited with the lender by way of collateral security, and the borrower authorized the lender, in the event of the loan remaining unpaid after it became due, to realize the securities, and undertook to pay any difference between the net proceeds of the securities and the amount due. The bonds were sold in 1889, but did not realize sufficient to satisfy the whole of the debt; and in 1891 the lender claimed the amount of the deficiency in an action for administration of the estate of the borrower.

Held (reversing North, J., 42 W. R. 491), that the undertaking to pay the deficiency did not create a new obligation distinct from the obligation to pay the original debt, and giving rise to a new cause of action in 1889 in respect of the deficiency; and that the creditor's claim to the deficiency was, therefore, statute barred.—*Barker, Ex parte, McDermott* v. *Boyd*, C.A. 20.

5. *Hedge and ditch—Ownership, presumption—Dispossession—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.—Plaintiff and defendant were owners of adjacent houses, the gardens of which were formerly separated by an open ditch, and on the plaintiff's side of the ditch was a hedge. In 1868 the owner of the plaintiff's house laid drain-pipes along the ditch, into which he allowed the drainage of his own and the defendant's house to run, and at the same time covered in the ditch. From that time the surface of the ditch was used by the owner of the defendant's house as part of his garden, and more than twelve years before action brought, the defendant paved part of such surface with cobble-stones, and planted a rose garden and made a fowl house on other parts. The plaintiff, however, had continued to cut his hedge on the defendant's side, and on two occasions opened the ditch to clean out the drain.

Held, that assuming the plaintiff was the original owner of the ditch, he had lost the ownership of the surface by lapse of time, the acts of ownership by the defendant having been sufficient to dispossess the plaintiff under section 3 of 3 & 4 Will. 4, c. 27.

Leigh v. *Jack*, 5 Ex. Ch. D. 264, distinguished.—*Marshall* v. *Taylor*, C.A.

6. *Occupation — Tenancy at will — Character of occupation.*—The owner of a house allowed his sisters to reside therein, and contributed to their support. He paid the rent and taxes and executed all necessary repairs.

Held, that the occupation of the sisters was not that of tenants at will, but that they were merely guests of the owner, and that the Statute of Limitations did not run against the owner.—*Peakin* v. *Peakin*, Q.B.D. (Ir.).

7. *Partnership—Dissolution—Partnership debt—Liability of retired partner—Payment of interest by continuing partners—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.—Where a partner who was jointly liable with his co-partners to T. for a debt of the partnership, retired from the partnership in 1883, under an agreement by which the retiring partner still retained an interest in the partnership business and by which it was agreed that his retirement should be kept secret, and that the continuing partners should pay interest on the partnership debts so as to prevent them being called in, and where interest on T.'s share was accordingly paid down to 1891 by the continuing partners, the payments being made in the name of the old firm,

Held, in an action instituted in 1893 by T.'s representatives for the recovery of the debt, that the retired partner was liable therefor, and that section 14 of the Mercantile Law Amendment Act, 1856, did not protect the retired partner from such liability, because under the above circumstances the fair inference was that the payments of interest on T,'s debt by the continuing partners were made for and on behalf and as agents of the retired partner, as well as on their own account.—*Tucker* v. *Tucker*, C.A.

8. *Will—Advancement.*—Testator who died in 1854 bequeathed the residue of his property to trustees on trust for sale and to invest £1,800, part thereof, for the benefit of his six daughters, and as each daughter should marry with the consent of the trustees, or should require her portion to advance herself in life, then with the like consent to pay such daughter. The trustees appointed, renounced, and administration with the will annexed was granted to testator's widow.

In 1875 one of the daughters wished to acquire a millinery business and applied for payment of her share, but no payment was made; no interest had been paid her since 1877. In 1891 she brought an action for payment of her share.

Held, that the plaintiff's right to receive her share had accrued in 1875, and that her claim was barred by the statute.—*Rudd* v. *Rudd*, C.A. (Ir.).

See also COPYHOLD, 2; LANDLORD AND TENANT, 13; MORTGAGE, 9, 11; TRUSTEE, 2.

LIS PENDENS:—

Personal estate—Choses in action—*Book debts—Injunction—Receiver—Notice—Judgments Act*, 1839 (2 & 3 *Vict. c.* 11), *s.* 7.—The doctrine of *lis pendens* is inapplicable to *choses in action* and to all personal property other than chattels real.

Opinion of Romilly, M.R., in *Berry* v. *Gibbons*, 21 W. R. 255, L. R. 8 Ch. App. 749n, dissented from.

The plaintiff, being first mortgagee of the book debts owing to the defendant, brought an action to enforce his mortgage, and obtained the appointment of a receiver and an injunction to restrain the defendant dealing with the book debts. This action (which was still pending) was registered as a *lis pendens*. Neither the plaintiff nor the receiver gave any notice whatever to the book debtors of the defendant, nor did the receiver take possession. Afterwards the defendant executed another mortgage of the book debts to B., who thereupon gave notice to the book debtors. B. had then no notice of the mortgage to the plaintiff, or of the pending action, or of the appointment of a receiver, or of the injunction.

On seeking to enforce his mortgage, B. first became aware of these facts, and thereupon took out a summons in the action pending between the plaintiff and the defendant, claiming priority over the plaintiff's mortgage.

Held (1), that B., being the first to give notice to the book debtors, was *primâ facie* entitled to priority over the plaintiff; and (2) that such priority was not prevented by the fact of the registration of the plaintiff's action against the defendant as a *lis pendens*, nor by the appointment of a receiver and the granting of an injunction in that action, B. being no party to that action and having no notice of these facts.—*Wigram* v. *Buckley*, C.A. 147.

LOCAL GOVERNMENT:—

1. *Building line—Street—"Front main wall"—"Building on either side in the same street"—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—In November, 1892, T. built a house near to, but not abutting on, the west side of Westbourne-grove (part of Ormesby-road), 240 yards north of a house on the west side erected in 1886. The house fronted towards the south. In February, 1894, T. bought some land, seventy feet deep, along the west side of Ormesby-road, to the north of his house, with the object of erecting cottages upon it. On the east side of Ormesby-road a number of houses had been built close up to the road. The building plans showed that the cottages would be somewhat nearer Ormesby road than T.'s house was. The urban authority decided that the cottages must be in line with T.'s house, under section 3 of the Public Health (Buildings in Streets) Act, 1888. There was no continuous line of buildings where it was proposed to build the cottages.

Held, that the cottages need not be in line with T.'s house, as, under the above circumstance, there would be no erection of a "house or building beyond the front main wall of the house or building on either side thereof in the same street."—*Reg.* v. *Ormesby Local Board*, Q.B.D. 96

2. *Building—Streets — Uniformity of building line—Building "on either side" "in the same street"—Public Health (Buildings in Streets) Act*, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.—In 1887, R., the owner of a plot of ground on an estate laid out for building purposes, abutting on a new street, built two semi-detached villas on his property, leaving a space of sixty-two feet between their front wall and the road. In 1889 R. acquired the adjoining plot on the east side, and built other two villas at the same distance back from the road as the first. In 1894, L., who had in 1887 acquired the plot adjoining R.'s plot on the west side, proposed to erect a house on his property with a clear space of only twenty-one feet between the house and the road. The local authority considered that the proposed new house was a building in a street "beyond the front main wall of the house or building on either side thereof in the same street," within the meaning of section 3 of the Public Health (Buildings in Streets) Act, 1888, and in the

exercise of the discretion conferred upon them by that section refused to admit the plans.

Held, that R.'s villas, although they were buildings "on either side" of the proposed new building, were not buildings "in the same street," within the meaning of section 3, and that a *mandamus* should go against the local authority to admit the plans.—*Reg.* v. *Fulwood Local Board*, Q.B.D.

3. *Bye-laws—New building—Wall partly combustible and partly incombustible—Wooden frame covered with corrugated iron—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.—By one of the bye-laws made by a rural sanitary authority in pursuance of section 158 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it was provided that "every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stones, or other hard and incombustible materials, properly bonded and solidly put together with good mortar . . . or good cement . . ."

Held, that a sanatorium, the walls of which were constructed of a framework of wooden upright and horizontal posts and rails, with sheets of corrugated galvanized iron one-thirty-second of an inch in thickness, with a layer of felt inside three-sixteenths of an inch in thickness fixed to the outside of such framework, the inside of which was lined with matchboarding, was not a building enclosed with walls constructed of hard and incombustible materials, and was an offence against such bye-law.—*Badley* v. *Cuckfield Union District Council*, Q.B.D. 663.

4. *Clerks to Borough justices—Salaries—Fees—County fund—Borough fund—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 84.—A county council is bound under section 84 of the Local Government Act, 1888, to pay the salary of the clerk to the justices of a borough within the administrative county having a population under 10,000 and a separate commission of the peace.

All fees and costs payable to such clerk which are not excluded in fixing of his salary should be paid into the county fund.—*Herefordshire County Council, Re*, Q.B.D.

5. *County council—Licence—Music and dancing—Licensing committee—Appeal to council—Bias of councillor—Validity of proceedings—Bias—Administrative or judicial functions of council—Writ of* certiorari *or* mandamus.—A committee of the London County Council for hearing and determining applications for music and dancing licences, recommended to the council the renewal of such licence upon certain conditions. The council affirmed the recommendation of the committee.

The applicant applied for a rule for a *mandamus* to compel the county council to rehear, or for a *certiorari* to quash the resolution of the county council on the ground that P. (one of the councillors) had, previous to the application being made, attended a meeting to which he had been invited, and at which meeting some of those who opposed the renewal of the licence were present, and the evidence that was to be adduced before the committee was discussed. P. in an affidavit stated that he took no part in the discussion other than by telling the meeting the course of the procedure to be taken to oppose the licence being renewed. It did not appear that P. in any way other than by his vote affected the resolution of the council.

Held, that the rule for a *mandamus* must be discharged, as sufficient bias had not been shown to disqualify the councillor from acting upon the council.

Quære, per Wright, J., whether the rule as to interest applicable to purely judicial bodies is applicable to proceedings of administrative bodies, exercising functions, involving something of a judicial character.—*Reg.* v. *London County Council, Empire Theatre, Re*, Q.B.D.

6. *Commonable lands—Turbary—Inclosure—Allotment of waste to lord of manor on charitable trusts—"Owner"—Expenses—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 151, 257.—A claim for expenses incurred by a local authority for works executed under section 150 of the Public Health Act, 1875, may be sustained in respect of property vested by the Inclosure Act in a trustee for charitable purposes, even although the property cannot be let by reason of a special condition imposed by the Legislature.—*Christchurch Inclosure Act, Re, Meyrich* v. *Attorney-General*, CH.D. STIRLING, J.

7. *Married woman—Owner—Rates—Arrangement with overseers—Recovery of rates—Warrant of distress and commitment*—43 *Eliz. c.* 2—12 & 13 *Vict. c.* 14, *s.* 2—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c* 120), *s.* 161—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35, 50—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2—*Summary Jurisdiction Act*, 1884 (47 & 48 *Vict. c.* 43), *ss.* 5, 7, 10—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-section* 11.—A married woman, the the rated owner of houses which were her separate property, arranged with the overseers of the parish, under sections 3 and 4 of the Poor Rate Assessment Act, 1869, to pay rates in respect of her houses, whether they were occupied or not, the overseers allowing her an abatement of thirty per cent. from the amount of the rates. The vestry had previously made an order under section 4 of the same Act that the owners of property to which section 3 extended should be rated instead of the occupiers. The married woman failed to pay the sewers, lighting, and general rates a year after the arrangement was made, and was committed to prison under 12 & 13 Vict. c. 14, s. 2.

Held, that the liability of the married woman to pay the rates did not arise out of any contract made by her in respect of her separate property, but arose from the order of the vestry made under section 4; that the ordinary remedy for the non-payment of rates was that provided by 12 & 13 Vict. c. 14, and the Metropolis Local Management Act, 1855, s. 161—viz., warrant of distress and commitment in default of sufficient distress; and that such ordinary remedy applied to married women.—*Allen, Re*, Q.B.D. 141.

8. *Metropolis—Streets and footways—Duty to clean—Penalty—Action for damages by person injured through non-feasance—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 29.—It is the duty of every sanitary authority to clean the streets and footways of their district or incur a penalty of £20 under section 29 of the Public Health Act, 1891.

Held, that a person injured by the neglect of a sanitary authority to clear frozen snow from a footway had no right of action for damages against them.

Municipality of Pictou v. *Geldert*, 42 W. R. 114, [1893] A. C. 524, and *Cowley* v. *Newmarket Local*

Board, [1892] A. C. 345, 41 W. R. Dig., followed.—*Saunders* v. *Holborn Board of Works*, Q.B.D. 56.

9. *Metropolis—Water company—Vestry—Improper application of rates—Contributing towards resisting claim of a water company—Charge for water supply to fixed baths—Metropolis Management Act*, 1855, *s.* 92.—A metropolitan water company had obtained a declaration by a judge of first instance that it was entitled to make a special charge for water supplied to fixed baths in addition to the assessed water rate. The vestry of the district passed a resolution that the ratepayers be advised not to pay this special water charge pending the obtaining of a final decision on the subject, and that a portion of the rates should be devoted towards defraying the costs of the obtaining of such decision by other persons.

Held (on application by the water company who were ratepayers in the parish) that the vestry had no power to expend any part of the rates for such purpose, and should be restrained by injunction, but such injunction was not to be deemed to prevent the vestry from itself resisting any claim made against it by the water company in respect of such special water charge.—*Attorney-General* v. *Camberwell Vestry*, CH.D. NORTH, J.

10. *Nuisance—Night refuge—House—Overcrowding — Superintendent — Liability — Public Health (London) Act*, 1891, *s.* 2 (1) (*e*).—A building used in the daytime for religious services and at night as a refuge for the destitute poor, but which contains no sleeping accommodation is nevertheless a "house" within section 2, sub-section (1) (*e*) of the Public Health (London) Act, 1891, and the superintendent of such a building who gives orders to the caretaker for the admission of destitute persons at night can, in the event of the building being so overcrowded as to be injurious to health, be summoned for nuisance.—*Reg.* v. *Mead, Gates Ex parte*, Q.B.D.

11. *Nuisance — Offensive trade — Complaint — Notice to abate—Condition precedent—Justices—Jurisdiction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 2, 4, 21.—Section 4 of the Public Health (London) Act, 1891, which provides that the sanitary authority if satisfied of the existence of a nuisance liable to be dealt with summarily under that Act, shall serve a notice on the person responsible for the nuisance requiring him to abate it, applies only to the classes of nuisances enumerated in section 2, and not to the nuisances arising from offensive trades dealt with by section 21, and accordingly the service of such a notice is not a condition precedent to the jurisdiction of the magistrate to hear a complaint under the latter section.—*Bird* v. *St. Mary Abbotts, Kensington, Vestry*, Q.B.D.

12. "*Owner*" *of premises — Nuisance — Public Health (London Act) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 4, 141.—A lessee of certain premises sub-let them for the whole term of the lease less a few days. The sub-lease contained the same covenants and conditions, and reserved the same rent (not a rack-rent), as the lease. The lease and the sub-lease were subsequently assigned to different persons.

Held, that the assignee of the sub-lease was, but the assignee of the lease was not "owner" of the premises within the meaning of the Public Health (London) Act, 1891, s. 141.—*Truman, Hanbury, & Co.* v. *Kerslake*, Q.B.D. 111.

13. "*Owner*"—*Trustees of settled land—Drainage expenses—Repairs—Public Health Act*, 1848 (11 & 12 *Vict.* 63), *s.* 2.—The trustees of a will, whereby the testator settled certain messuages in trust for two persons jointly for life, with divers equitable remainders over, held to be "owners" within the meaning of the definition clause of the Public Health Act, 1848, and to have properly incurred drainage expenses under that Act.

The testator declared that "the parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair and properly insured from fire."

Held, that the drainage expenses were not repairs within the meaning of that declaration, but were to be considered as a charge upon the property.—*Barney, Re, Hurrison* v. *Barney*, CH.D. STIRLING, J., 105.

14. *Parish council—Election of parish councillors —Mode of questioning*—Mandamus— *Election petition—Powers of county council with respect to disputed elections—Demand for a poll by a candidate who is not an elector—Power of chairman*—Functus officio —*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 48 (3) (5), 80 (1); *Schedule I., Part* 1, *r.* 7; *Schedule I., Part* 2, *r.* 1—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 87.—A *mandamus* is not the proper mode of questioning an election of parish councillors. In the case of an election for the first parish council there are two ways of questioning such election—by an election petition, or by application to the county council under sections 48 (5) and 80 of the Local Government Act, 1894.

Where, at a parish meeting held for the purpose of electing parish councillors, upon a demand for a poll by an unauthorized person, the chairman has announced that a poll will take place, he is *functus officio*, and cannot afterwards declare the candidates who received the majority of votes at the meeting to be duly elected; and the candidates who, notwithstanding the irregularity in the demand for a poll, subsequently received a majority of votes at the poll are the persons who are properly filling the office of parish councillors.—*Reg.* v. *Mills*, Q.B.D. 445.

15. *Paving expenses—A street not being a highway repairable by the inhabitants at large—Liability of the frontager—Works done to the satisfaction of the urban authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.—Section 150 of the Public Health Act, 1875, provides that "where any street within an urban district (not being a highway repairable by the inhabitants at large) . . . is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority," such authority may, by notice, require the adjoining owners to make it good.

So long as a street has not become repairable by the inhabitants at large under section 152, the urban authority are not precluded from requiring the owners to level, pave, &c., the street under section 150 by reason only that, on a former occasion, the street has been levelled, paved, &c., to their satisfaction, whether expressed on implied.—*Barry* v. *Parry*, Q.B.D. 504.

16. *Police — County council — Borough police—Liability of county council to contribute—Additional constables introduced into a borough for an emergency —Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 24, *sub-section* 2 (j)—*Police Act*, 1890 (53 & 54 *Vict. c.* 45), *s.* 25.—The liability of a county council to pay one-half of the costs of the pay and clothing

of the police of each borough, under section 24, sub-section 2 (*j*), of the Local Government Act, 1888, extends to the costs of the pay of additional constables introduced into a borough for a special emergency under section 25 of the Police Act, 1860. *Rotherham (Mayor of)* v. *West Riding of Yorkshire County Council*, C.A. 386.

17. Quo warranto—*Treasurer to district council—Local Government Act*, 1894 (56 & 57 *Vict.* c. 73), *s.* 81, *sub-section* 1.—The office of treasurer to a district council is not one with respect to which the remedy of *quo warranto* will apply.—*Reg.* v. *Wells*, Q.B.D, 576.

18. "*Sewer*"—*Pipe receiving drainage of two adjoining houses—Nuisance—Liability to repair—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 4, 15, 41—*Adoption of Act of* 1890 *by public authority—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict.* c. 59), *ss.* 3, 19.—The defendants, the local authority, served a notice on the plaintiff, the occupier of a semi-detached house in the defendants' district, to abate a nuisance arising from a defect in a drain. The plaintiff had the ground opened, and it was then found that the drain was connected with that of the adjoining house, and that it in fact served both houses. Plaintiff, however, completed the necessary repairs under the supervision and to the satisfaction of the district surveyor, paid the expenses, and sought to recover the cost so incurred from the defendants.

Held, that the defendants, having adopted Part III. of the Public Health Acts Amendment Act, 1890, were not liable to execute the repairs, as they might, under section 19 of that Act, have compelled the plaintiff to have done so; and also that the notice could not be assumed to imply a request, express or implied, from the defendants to the plaintiff to do the work on their behalf.

Travis v. *Uttley*, 42 W. R. 461, [1894] 1 Q. B. 233, explained and distinguished.—*Self* v. *Hove Commissioners*, Q.B.D. 300.

19. *Sewer—Sewer made by landowner—"For his own profit"—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *s.* 13 (1).—Where a landowner is laying out a building estate and has constructed a sewer for the sole purposes of his own property, but with the intention of being recouped for his outlay, although he makes a fixed charge for the permission to connect drains with his sewer, the sewer will nevertheless not be made "for his own profit" within the meaning of the exception contained in section 13 (1) of the Public Health Act, 1875, but will vest in the local authority.—*Vowles* v. *Colmer*, CH.D. ROMER, J.

20. *Sewer—Single private drain—Local Act—Public Health Acts*, 1848 (11 & 12 *Vict.* c. 63); 1875 (38 & 39 *Vict.* c. 55), *ss.* 4, 13, 15, 41; 1890 (53 & 54 *Vict.* c. 59), *s.* 19.—A single private drain, constructed prior to the passing of the Public Health Act, 1848, and carrying the combined drainage of the several houses, originally into a ditch, and subsequently into a public sewer, is a sewer within the meaning of the Public Health Act, 1875, and is not a "single private drain" within the meaning of a section of a local Act containing provisions similar to those of section 19 of the Public Health Acts Amendment Act, 1890. Such drain is, therefore, repairable by the local authority, and the local authority are not entitled to exercise against the owner of one of the houses the powers conferred upon the local authority by section 41 of the Public Health Act, 1875.

Self v. *Hove Commissioners* (*ante*, p. 300) discussed.—*Hill* v. *Hair*, Q.B.D. 651.

21. *Street—New streets—Construction of new street—Bye-laws—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55) *s.* 157.—The defendant was the owner of a strip of land on one side of a lane in an urban district. The lane led from a high road, and ended in a *cul-de-sac*, and on the other side of it stood a row of houses, which had been built for many years. On part of his strip of land the defendant built three small houses fronting the high road, and having access solely therefrom. The side wall of one of the houses abutted on the lane, and the garden wall extended along the lane for a distance of 80 feet.

Held, that what the defendant had so done did not constitute the lane a new street so as to be subject to bye-laws with respect to new streets made by the urban sanitary authority under section 157 of the Public Health Act, 1875.—*St. George's Local Board* v. *Ballard*, C.A. 409.

22. *Street—Notice by urban authority to frontager to sewer, &c.—Notice partly within and partly in excess of jurisdiction—Liability under—Apportionment of expenses, when conclusive—Public Health Act*, 1875 (38 & 38 *Vict.* c. 55), *ss.* 150, 257.—An urban authority gave notice under section 150 of the Public Health Act, 1875, to a frontager to a street within their district, to sewer, &c., the street, including carriage way and footway, according to the frontage of his premises. The notice not being complied with, the urban authority executed the works, and sought to recover the expenses apportioned on the frontager before the justices. No notice disputing the apportionment had been given within three months by the frontager under section 257, but it was proved and found as a fact by the justices that the carriage way of the street was a highway repairable by the inhabitants at large, though the footway was not.

Held (following *Wake* v. *Mayor, &c., of Sheffield*, 11 Q. B. D. 291, 31 W. R. Dig. 99, 12 Q. B. D. 142, 32 W. R. Dig. 23), that the urban authority had jurisdiction to give the notice to sewer, &c., in respect of the footway, and that such notice was good *pro tanto*; that, the apportionment not having been disputed by the frontager, it was conclusive as to the amount of his liability, and could not be questioned in respect thereof before the justices.—*Derby (Mayor of)* v. *Grudgings*, Q.B.D. 74.

23. *Street—Private streets works—Frontagers—Objection—Private Streets Works Act*, 1892 (55 & 56 *Vict.* c. 57), *ss.* 6, 7, 8—*Sheffield Corporation Act*, 1890 (53 & 54 *Vict.* c. cxxv.), *ss.* 52-54.—Upon the hearing of a frontager's objection to a private street work under section 53 (*d*) and section 54 of the Sheffield Corporation Act, 1890, the justices have jurisdiction, when determining whether the proposed work is itself unreasonable—*e.g.*, sewering a street, to take into consideration the existing state of the drainage of the houses in such street.

Semble, the same doctrine applies under section 7 (*d*) and section 8 of the Private Streets Works Act, 1892.—*Sheffield (Corporation)* v. *Anderson*, C.A.

24. *Street—Private street works—New street—Houses on one side only—Footpath on that side—Cost of footpath—Apportionment—Private Street Works Act*, 1892 (55 & 56 *Vict.* c. 57), *ss.* 6, 10.—Where proposed works under the Private Street Works Act, 1892, consist of a roadway in a new street having houses on one side only, and a footpath on the side where the houses are, the expenses of this footpath, as well as the expenses of the roadway, are to be apportioned, under section 10 of the Act,

amongst the owners of premises abutting on both sides of the street.—*Clacton Local Board* v. *Young*, Q.B.D. 219.

25. "*Waterworks*"—"*Commencing to construct*"—*Restriction on construction of waterworks by local authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 51, 52.—By the Public Health Act, 1875, s. 51, any local authority may provide their district with a supply of water, and may construct and maintain waterworks; and, by section 52, before commencing to construct waterworks within the limits of supply of any water company having parliamentary powers, the authority must give such notice as is thereby required to the company; and section 75 of the Public Health Act, 1848, contained similar enactments.

After the predecessor of R. Local Board had exercised the power of providing a water supply conferred by section 75 of the Public Health Act, 1848, the C. Water Co. was incorporated by Act of Parliament to supply a district comprising R. The R. Board having resolved to make considerable additions to their waterworks, involving the acquisition of land and a fresh source of water supply, the C. Co. thereupon applied for an injunction unless and until the board gave them notice pursuant to section 52 of the Act of 1875.

Held, that sections 51 and 52 of the above Act must be read together, and that, on the true construction of the enactments, section 52 was not applicable to the case where the local authority had, previously to the Act incorporating the water company, substantial waterworks already in existence; and, therefore, that the application for an injunction must be dismissed.—*Cleveland Water Co.* v. *Redcar Local Board*, CH.D. CHITTY, J., 90.

See also ARBITRATION, 4; ELECTION LAW, 4; HIGHWAY, 5, 6; METROPOLIS MANAGEMENT, 7, 16; TRAMWAY, 2; WATER, 5.

LOCKE KING'S ACT.—See ADMINISTRATION, 6.

LORD'S DAY:—

Observance—Action for penalty—Sunday lecture—Keeper of house or place opened for public entertainment—Person managing or conducting entertainment—Lord's-day Observance Act, 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2.—A Sunday lecture society hired a hall for the purpose of giving a series of lectures. The company to whom the hall had belonged being in liquidation, the letting was arranged by an agent for the liquidator. This agent had applied for and obtained a licence for the hall. A lecture of an entertaining character, to which the public were admitted on payment, having been given on a Sunday, an action was brought under section 1 of the Lord's-day Observance Act, 1781, to recover penalties from the agent and from the person who acted as chairman at the lecture.

Held, that the agent was not liable as the keeper of the hall, neither was the chairman liable as the person managing or conducting the entertainment. *Reid* v. *Wilson*, C.A. 161.

LUNACY:—

1. *Practice—Documents filed upon a petition for an inquiry—Inspection.*—By two wills a testator bequeathed all his property to E. S. In April, 1894, a petition for an inquiry as to the sanity of the testator was presented by J. A. S., and with it certain affidavits were filed in the Lunacy Office. The testator died in June, 1894, without having been found a lunatic.

An action was commenced in the Probate Division by J. A. S. against E. S. to set aside the wills of the testator on the ground of want of testamentary capacity and undue influence. E. S. applied for liberty to inspect the above-mentioned petition and documents filed therewith.

Held, that, under the circumstances, such liberty ought not to be given.

The practice as to the inspection of documents filed in Lunacy considered.—*Strachan, Re*, LUN. 369.

2. *Practice—Exercise on behalf of a person lawfully detained as a lunatic, of a power of appointing new trustees—Vesting of right to call for a transfer of stock—Lunacy Act*, 1890, *ss.* 116, 128, 129.—S., a person lawfully detained as a lunatic, had vested in her a power to appoint new trustees of a settlement all the trustees whereof were dead. By an order made by the judge in Lunacy, A. was appointed to exercise such power on behalf of the lunatic by appointing certain persons named in the order, and by the same order it was declared that, upon the appointment of such new trustees, they should be, and they were thereby, appointed to call for a transfer of certain Government stock standing in the names of the deceased trustees.

Held, that the judge in Lunacy had jurisdiction, under the Lunacy Act, 1890, to make such an order.

In re Bowmer, 7 W. R. 313, 3 De G. & J. 658, discussed and followed.

Observations as to the future practice under such orders.—*Shortridge, Re*, C.A. 257.

3. *Practice—Jurisdiction—Settled land—Lunatic tenant for life—Bill in Parliament—Costs of opposition—Payment out of* corpus *of settled property—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 36, 62—*Judicature Act*, 1873 (36 & 37 *Vict c.* 66), *s.* 31.—The Lords Justices sitting in lunacy have jurisdiction to order the costs, charges, and expenses incurred in relation to an unsuccessful opposition to a Bill in Parliament, affecting the estate of a lunatic tenant for life of settled land, to be paid out of the *corpus* of the property subject to the settlement.—*Blake, Re*, LUN.

4. *Practice—Mental infirmity—Bank of England Stock—Dividends—Receiver—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108, 116, 146, 333—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 67 (4)—*Lunacy Rules*, 1892, *r.* 56.—The judge or Master in Lunacy has jurisdiction under section 116 of the Lunacy Act, 1890, to make an order appointing a receiver of dividends on stock standing in Bank of England in the name of a person who is "through mental infirmity arising from disease or age, incapable of managing his affairs"; and the Bank may, under sections 133, 146, safely act on such order.

But it is the more usual course for the judge or Master in Lunacy in such cases, instead of appointing a receiver of dividends, to order the stock to be brought into court: the title of such order should follow Form 1 (*e*) Schedule to the Rules in Lunacy, 1892.—*Browne, Re*, LUN. 175.

5. *Practice—Transmission of record to Ireland—percentage on clear annual income—Payment in Ireland—Remittance to England of sum for maintenance—Lunacy Regulation (Ireland) Act*, 1871 (34 *Vict. c.* 22), *ss.* 109, 114, 116—*Lunacy Act*, 1890 (53 *Vict. c.* 5), *ss.* 107, 148, 149—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27 (2) (3)—*Rules in Lunacy* 1892, *r.* 126.—Where a transcript of the record of an inquisition has been transmitted from England to Ireland, and percentage has been paid in Ireland upon the clear annual income of the lunatic, no further percentage is payable in England upon a sum ordered by the

Lord Chancellor of Ireland to be remitted to England for the maintenance of the lunatic.

So held by Lord Halsbury and Lindley, L.J.; A. L. Smith., L.J., dissenting.—*Grehan, Re*, LUN. 433.

See also PRACTICE, 27; PROBATE, 2.

MAINTENANCE:—

Action of libel—Defamation of two persons—Action brought by one maintained by other—Common interest.—The plaintiffs published in a newspaper an article condemning as worthless certain electropathic belts of which the defendant was maker and vendor. The defendant employed T. to write a favourable report of the belts. The plaintiffs then published another article, in which they reflected seriously on the character and conduct of T. in connection with the report, and on the conduct of the defendant as vendor of the belts. An action of libel in respect of this article was brought against the plaintiffs by T. at the instigation of the defendant, who undertook to pay the expenses. This action was dismissed with costs. The plaintiffs brought an action of maintenance against the defendant to recover the costs which they had been unable to obtain from T.

Held, that the defendant had no common interest with T. in the action for libel, and was, therefore, liable in the action for maintenance.—*Alabaster* v. *Harness*, C.A. 196.

MALICE:—

Judge—Privilege—Act done maliciously in judicial office—Immunity.—No action lies against a judge of a Court of Record for an act done by him in his judicial capacity, even though he does the act maliciously and for the purpose of gratifying private spleen.—*Anderson* v. *Gorrie*, C.A.

See also MASTER AND SERVANT, 6.

MANDAMUS.—See LOCAL GOVERNMENT, 5, 14.

MARGARINE.—See ADULTERATION, 3, 4.

MARRIED WOMAN:—

1. *Contract before marriage—Personal liability—Judgment—Order* 14.—Judgment can be entered against a married woman personally in respect of a liability upon a contract made by her before marriage, such liability not being taken away by the Married Women's Property Act, 1882.—*Robinson* v. *Lynes*, Q.B.D. 62.

2. *Husband and wife—Gifts of jewels during marriage—Claim by husband—Paraphernalia—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 17.—A husband possessed of considerable wealth gave to his wife jewels at Christmas time, on her birthdays, and at other times as "piece-offerings," they remained in her possession except when they were deposited at the bank for safe custody, and then in her name, and the cases were marked with her initials, and the husband never asserted any claim to them until a petition for divorce was presented, when he claimed them.

The court confirmed the registrar's finding on the evidence, that as a fact the jewels were given absolutely to the wife.

Semble, the Married Women's Property Act, 1882, does not affect the law as to paraphernalia.—*Tasker* v. *Tasker*, P.D. & AD.D. 255.

3. *Husband and wife—Separation agreement—Wife's power to sue—Intervention of trustee—Adultery of wife—Public policy—Covenant against molestation and annoyance—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—In a separation deed a covenant, by which the husband undertakes to pay an annuity to the wife without restricting her right by a *dum casta* clause, is good and not against public policy, although the wife afterwards commits adultery, and although the deed is made without the intervention of a trustee.

A married woman is not debarred from suing under section 1, sub-section 2, of the Married Women's Property Act of 1882 on a contract not made in respect of her separate estate.

In a separation deed the word "annoy" in a covenant not to molest, annoy, or interfere with the husband does not extend the meaning of the covenant so as to cover the adultery of the wife.—*Sweet* v. *Sweet*, Q.B.D. 303.

4. *Release of reversionary interest—Election.*—A covenant, by a woman married in 1873, to release a reversionary life interest under her marriage settlement is not binding even when contained in a separation deed; and the receipt by her of an annuity under the separation deed for a number of years does not raise any case of election.

Greenhill v. *North British and Mercantile Insurance Co.*, 42 W. R. 91, [1893] 3 Ch. 474, discussed.—*Harle* v. *Jarman*, CH.D., NORTH, J., 618.

5. *Separate estate—Gift for life with power of appointment by will, and in default of her executors, administrators, or assigns—Release of power—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).—Where property is held on trust for a woman married since the Married Women's Property Act, 1882, for life for her separate use, and in default of the exercise by her of a general power of appointment by will, then for her executors, administrators, or assigns, the married woman, on releasing the power of appointment, becomes entitled absolutely to the property.—*Davenport, Re, Turner* v. *King*, CH.D. KEKEWICH, J., 217.

6. *Separate estate — Restraint on anticipation — Ante-nuptial debt—Receiver—Equitable execution—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75.—Where a woman married after the 1st of January, 1883, is entitled to separate estate with a restraint on anticipation, under a settlement not being a settlement of her own property made by herself, an *ante*-nuptial creditor who has obtained judgment against her in the form settled in *Scott* v. *Morley*, 20 Q. B. D. 120, after her marriage, cannot enforce such judgment by the appointment of a receiver over the separate estate so restrained from anticipation or the income thereof.—*Molony* v. *Harney*, Q.B.D. (Ir.)

7. *Separate estate—Restraint on anticipation—Appeal by married woman defendant—Costs—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.—The words "action or proceeding instituted," in section 2 of the Married Women's Property Act, 1893, which gives the court power to order the payment of costs out of property of a married woman which is subject to a restraint on anticipation, mean some action or proceeding in the nature of an action instituted by a married woman as plaintiff, and do not include any motion made or steps taken by a married woman in an action in which she is defendant.

Where, therefore, since the Act, an appeal by a married woman, defendant in an action, had been dismissed with costs,

Held, that the court had no jurisdiction to order payment of these costs out of property of the married woman which was subject to a restraint on anticipation.—*Hood Barrs* v. *Cathcart*, C.A.

8. *Separate estate—Restraint on anticipation—Arrears of income—Judgment creditors—Application for appointment of receiver—Equitable execution—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 19.—A married woman was entitled as tenant for life to the income of real estate, with restraint on anticipation; and on the 29th of September, 1894, certain rent became due to her. Creditors who had obtained judgment against the married woman on the 1st of October took out a summons on the following day asking for the appointment of a receiver of the rent by way of equitable execution. The rent had not come to the hands of the married woman, being either in the possession of her trustees, or remaining unpaid by the tenants of the property. On the 1st of November the summons came before the Divisional Court (Wright and Collins, JJ.), who decided that the restraint on anticipation attached to the overdue rent, and, therefore, refused to appoint a receiver.

The judgment creditors appealed.

Held, that the judgment creditors were not entitled to equitable execution over rents of property of which the married woman was tenant for life without power of anticipation, even though such rents were due and payable to her before the date of the judgment sought to be enforced.

Hood Barrs v. *Cathcart*, [1894] 2 Q. B. 559, 567, and *Hood Barrs* v. *Cathcart*, App., July 23, 1894, unreported, considered and applied.—*Pillers* v. *Edwards*, C.A.

9. *Separate estate—Restraint on anticipation—Costs of action—Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *s.* 2.—Section 2 of the Married Women's Property Act, 1893, applies to an action commenced prior to, and pending at, the 5th of December, 1893, the date of the passing of that statute.—*Godfrey, Re, Thorne-George* v. *Godfrey*, C.A., 244.

10. *Separate estate — Restraint on anticipation—Counter-claim—"Action or proceeding instituted"—Costs of the opposite party—Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *s.* 2.—The plaintiff had obtained a judgment against the defendant, a married woman having separate property subject to a restraint on anticipation. This judgment was affirmed by the Court of Appeal, but the defendant was given leave to prosecute a counter-claim against the plaintiff. Various interlocutory proceedings in the counter-claim were then taken by the defendant, which were dismissed, with costs to be taxed and paid by her. In some of these orders the judge merely directed the defendant to pay the costs incurred; in others she was expressly ordered to pay the costs notwithstanding any restraint on anticipation. Subsequently a judge at chambers made an order by which he appointed a receiver to take over the rents and profits accruing from a certain part of the defendant's estate, and directed that, "notwithstanding any restriction against anticipation, . . . such sums to be paid, in or towards satisfaction of what shall for the time being be due in respect of the" various orders in question.

Held, on appeal, that the counter-claim was "an action or proceeding" within section 2 of the Married Women's Property Act, 1893, and that that section, by the words, "the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party," gave the judge the power to make the order appealed from, although it included, and thus varied, those orders which did not expressly direct that the costs were to be paid, notwithstanding any restriction on anticipation, by the defendant.—*Hood Barrs* v. *Cathcart*, Q.B.D. 560.

11. *Separate estate — Restraint on anticipation — Judgment—Executor—Arrears of income accrued due before judgment.*—A judgment obtained against a married woman possessed of separate estate, but restrained from anticipation, cannot be enforced by any kind of process against arrears of income due to her in respect of such estate, even though they accrued due before the date of the judgment. —*Loftus* v. *Heriot*, C.A.

12. *Separate estate — Restraint on anticipation — Judgment for costs against married woman—Equitable execution—Receiver—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *ss.* 1 (2), 19—*Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *s.* 2.—On the 31st of October, 1893, an action brought by a married woman having separate estate with a restraint on anticipation was dismissed, with costs to be payable out of her separate estate not restrained from anticipation. A gale of an annuity to which the plaintiff was entitled, subject to a restraint on anticipation, fell due on the 1st of May, 1894. The defendant, on the said 1st of May, 1894, applied for, and obtained from a judge in chambers, an order appointing a receiver by way of equitable execution over this gale.

Held, by the Court of Appeal, that the judge had no jurisdiction to make such order, and that it should be set aside.

Section 2 of the Married Women's Property Act, 1893, does not give the court power to alter or vary an order for payment of costs made before that Act came into operation, or to make a new order for payment of the same costs.—*Lowry* v. *Derham*, C.A. (Ir.)

13. *Separate estate—Restraint on anticipation—Orders for payment of costs—Sequestration—Arrears of rent due after date of orders—Married Women's Property Act*, 1882 (45 & 46 *Vict.* c. 75), *s.* 1—*Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *ss.* 1, 2.—In 1893, prior to the Married Women's Property Act, 1893, orders for the payment of costs were made against a married woman, tenant for life of real estate, subject to a restraint on anticipation, execution being limited to her separate property not subject to the restraint. On the 15th of January, 1894, a writ of sequestration, with the same proviso as to restraint, to enforce payment of the costs was issued against such separate estate. On application for a second writ of sequestration, or for a receiver of the rents of the separate estate in arrear on the 25th of March, 1894,

Held, that judgment could not be enforced against the arrears of rent, and that section 2 of the Married Woman's Property Act, 1893, did not give the court jurisdiction to alter an order for payment of costs made before that Act came into operation, or to make a new order therefor.—*Hood Barrs* v. *Cathcart, Lumley, Re*, C.A.

14. *Will—Wills Act*, 1837 (1 *Vict.* c. 26), *s.* 24—*Married Women's Property Act*, 1893 (56 & 57 *Vict.* c. 63), *s.* 3—Section 3 of the Married Women's Property Act, 1893, applies to every will of a married woman who dies after the coming into operation of the Act.

Held, therefore, that the will of a married woman dying after the Married Women's Property Act, 1893, made during coverture and before the Act, and not re-executed or republished after the death of her husband, passed all the estate, whether

separate or other, of the testatrix.—*Wylie, Re, Wylie* v. *Moffat*, CH.D. ROMER, J., 475.

See also ADMINISTRATION, 8; BANKRUPTCY, 16, 27, 38; TRUSTEE, 1.

MARSHALLING. — See ADMINISTRATION, 1, 2; BANKER, 1; WILL, 29.

MASTER and SERVANT:—

1. *Damages—Remoteness—Warranty by contractor to employer—Breach of warranty—Negligence of employer—Injury to workman of employer—Liability of contractor for injury to workman.*—The plaintiffs undertook to discharge cargo from the defendant's ship, and the defendant undertook to supply them with all necessary cranes and chains. The defendant supplied a chain so defective that whilst it was being used it broke, and thereby a workman of the plaintiffs' was injured. The injured workman thereupon brought an action against the plaintiffs, which they settled by paying the workman £125. It was admitted that the defendant was guilty of a breach of warranty to the plaintiffs in supplying a defective chain; that the plaintiffs were guilty of negligence inasmuch as they might, by reasonable care, have discovered the defect, and so have avoided the accident, and that they were, therefore, under a legal liability to their workman, and it was admitted that the payment to the workman was a reasonable one.

Held, that the injury to the plaintiffs' workman was a natural consequence of the breach of warranty by the defendant, and that the defendant was, therefore, liable to pay to the plaintiffs the sum which the plaintiffs had paid to their workman, notwithstanding that the plaintiffs' own negligence was the immediate cause of the accident.—*Mowbray* v. *Merryweather*, Q.B.D. 528.

2. *Partnership—Servant employed by partnership—Dissolution of partnership—Wrongful dismissal—Damages.*—The defendants, a partnership consisting of four members, agreed to employ the plaintiff as a manager for a certain period. Before the expiration of the period two of the partners retired, and the business was transferred to and carried on by the other two. The continuing partners were willing to employ the plaintiff on the same terms as before for the rest of the period, but the plaintiff declined to serve them, and brought an action for wrongful dismissal.

Held (per Lopes and Rigby, L.JJ.; Lord Esher, M.R., dissenting), that the dissolution of the partnership operated as a wrongful dismissal of the plaintiff, but that he was only entitled to nominal damages.—*Brace* v. *Calder*, C.A.

3. *Right of servant to delegate duty—Necessity—Opportunity of communicating with master—Liability for negligence of volunteer—Agent of necessity.*—An omnibus belonging to the defendants was being driven by a driver in their employment. A police inspector, noticing that the driver was drunk, ordered him to discontinue driving. The omnibus was then a quarter of a mile from the defendants' yard. A person, who happened to be standing by, at the request of the driver, and with the acquiescence of the conductor, drove the omnibus home. While doing so that person negligently drove over the plaintiff and caused him injuries, in respect of which he sued the defendants.

Held, that, inasmuch as there was an opportunity of communicating with the owners, it was not necessary for the driver to delegate his duty, and, therefore, the defendants were not liable.

Decision of the Queen's Bench Division, 43 W. R. 400, reversed.—*Gwilliam* v. *Twist*, C.A., 566.

4. *Scope of authority—Assault committed by servant in course of employment—Conviction of servant—Liability of master—24 & 25 Vict. c. 100, s. 45.*—The defendant, the proprietor of a furniture business, appointed an agent to be the manager of a local branch of his business. The agent, whilst engaged in removing from the plaintiff's house some furniture which he had let under a hire-and-purchase agreement to a person who had been a lodger there, committed an assault on the plaintiff, who was trying to resist the removal. For this assault the agent was convicted and fined. The plaintiff then brought an action against the defendant to recover damages for the assault.

Held, first, that the jury were justified in finding that the agent was acting within the scope of his authority; secondly, that the conviction of the agent did not, by virtue of 24 & 25 Vict. c. 100, s. 43, operate so as to release the defendant from liability to pay damages.—*Dyer* v. *Munday*, C.A., 440.

5. *Shop assistant—"Young person" employed in shop—Neglect of employer to exhibit notice as to provisions of Act and number of working hours—Liability of employer to penalties—Shop Hours Act, 1892 (55 & 56 Vict. c. 62), ss. 3, 4, 5.*—An employer who neglects to exhibit in his shop the notices as to the provisions of the Act required by section 4 of the Shop Hours Act, 1892, which imposes no penalty for such neglect, does not thereby render himself liable to the penalties imposed by section 5 for employing a young person in his shop "contrary to the provisions of the Act."—*Hammond* v. *Pulsford*, Q.B.D., 236.

6. *Trade union—Procuring dismissal of servant—Intention to injure—Malice—Inducing third person not to contract with plaintiff — Delegate of trade union—Liability of members of union for act of delegate.*—An action lies for maliciously, and with intent to injure the plaintiff, inducing the plaintiff's employers to dismiss him from their service, even though such dismissal does not involve a breach of contract.

An action lies for maliciously, and with intent to injure the plaintiff, inducing a third person not to enter into a contract with the plaintiff.

A delegate of a trade union is not the servant or agent of the members of the union so as to render them liable for wrongful acts done by him.—*Flood* v. *Jackson*, C.A., 453.

See also CONTRACT, 6, 7; LIBEL, 6; RAILWAY, 12.

MAYOR'S COURT:—

Judgment debt under £20—Judgment summons—Debtor not resident or trading in city—Mayor's Court Act, 1857 (21 & 22 Vict. c. clvii.), s. 36—Debtors Act, 1869, s. 5.—The jurisdiction given by section 36 of the Mayor's Court Act, 1857, to the Mayor's Court, where a judgment debt is under £20, to issue and serve a judgment summons upon a debtor residing out of and not carrying on business in the City of London, is not affected by section 5 of the Debtors Act, 1869.—*Schuller* v. *Wood*, Q.B.D.

See also PRACTICE, 49.

MERGER:—See BANKRUPTCY, 30; MORTGAGE, 8.

METROPOLIS MANAGEMENT:—

1. *Building—Erection of buildings of excessive height—Continuation of building—Penalties for a continuing offence—Complaint within six months—Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 85, 107—Summary Convictions*

Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.—The builders of a house having been convicted in October, 1893, for the offence of "erecting" a building of excessive height under section 85 of the Metropolis Management Act, 1862, (the owner knowing that the offence was being committed), and the builders having completed and handed over the house to the owner on the 8th of February, 1893, the London Council more than six months after the completion of the building sought to recover penalties from the owner under section 85 for that he, "having on the 31st day of December, 1893, and on each of the then succeeding days up to and including the 7th day of March, 1894, . . . committed an offence . . . by erecting a building" of excessive height, "unlawfully did continue the said offence . . . by continuing the said building, . . . and by permitting and suffering the said building to continue erected."

Held, that the penalties were recoverable from the owner, as the permitting such building to continue was a continuing offence within section 85 and the complaint of the county council had been made within six months next after the commission of such offence, within the meaning of section 107 of the same Act.—*London County Council* v. *Wortley* Q.B.D. 11.

2. *Building—General line of buildings—"Building, structure, or erection"—Wall and advertisement hoarding—Appeal from architect's certificate—Issue of summons—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.—The appellants were the owners of a house the forecourt of which had for many years been bounded by a dwarf wall between 2 and 3 feet high, with an iron railing upon it 5 feet 6 inches high. Upon this wall the appellants erected a hoarding for advertisements, which was removed in consequence of a notice from the London County Council. The appellants then replaced the old wall by a new wall 11 feet high and 14 inches, thick, to act as a screen for advertisements. A summons was taken out by the London County Council charging the appellants with having erected a structure beyond the general line of buildings, contrary to section 75 of the Metropolis Local Management Act, 1862. The summons was taken out before the superintending architect had given his decision as to the general building line, and was heard by the magistrate while that decision was still under appeal. The magistrate ordered the demolition of the wall.

Held, that the magistrate had jurisdiction to deal with the summons, and that the appellants' new wall was a "building, structure, or erection" within section 75 of the Act.—*Lavy* v. *London County Council*, C.A. 677.

3. *Buildings—Land laid out as a street for foot traffic—Metropolis Management and Buildings Acts (Amendment) Act*, 1882 (44 & 45 *Vict. c.* 14), *ss.* 7, 8.—The respondent commenced to erect on land previously vacant two blocks of building, which were designed for artizans' dwellings. They were to contain forty separate tenements or sets of rooms, sufficient to accommodate 150 persons. Between the buildings there was a space or passage, which was made for the convenience of, and as a means of access for, those living in the buildings. The space was shut off from the street by means of gates. All the tenements had separate access to it those on the ground floor by separate doors into it, and those above by means of a common staircase and balcony.

Held, that the magistrate could properly hold that the space was not a "road, passage, or way laid out as a street for foot traffic" within the meaning of the Metropolis Management and Buildings Act (Amendment) Act, 1882, ss. 7, 8.—*London County Council* v. *Davis*, Q.B.D. 574.

4. *Building—Wooden structure or erection of a movable or temporary character—Wooden building erected for the purpose of exhibition and sale—Metropolis Management and Building Acts Amendment Act*, 1882 (45 *Vict. c.* 14), *s.* 13.—A building constructed of wood and corrugated iron, and capable of being easily moved, was placed by a firm whose business it was to manufacture such building upon a piece of land adjoining their manufactory within the metropolis. It was placed there for the purpose of exhibition, with a view to its being purchased and removed by the purchaser.

Held, that, as the building was not intended for use on the spot where it was placed, but was placed there for sale as a part of a tradesman's wares, it was not an erection of a movable or temporary character within section 13 of 45 Vict. c. 14, and no licence from the London County Council was required for its erection.—*London County Council* v. *Humphreys*, Q.B.D. 13.

5. *Churchyard—Purchase-money of—Application of purchase-money—Purchase and repair of a vicarage-house.*—Funds representing the purchase-money of a churchyard taken for metropolitan street improvements, may be applied in the purchase and repairs of a house for a vicarage.—*Saint Botolph, Aldgate (Vicar of), Re*, CH.D., NORTH, J.

6. *Land taken compulsorily by vestry—Compensation assessed by a jury—Costs of landowner—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c. xxix.*)—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 73. Where a vestry of a metropolitan parish acquires land compulsorily under Michael Angelo Taylor's Act for the purpose of widening a street, and the compensation to be paid by the vestry to the owner of the land is assessed by a jury, there is no power to order the vestry to pay to the landowner his costs of the proceedings.—*Reg.* v. *London Justices* (*No* 2), Q.B.D. 590.

7. *Local Government—"Owner"—"Occupier"—Intermediate tenant—"The person . . . receiving the rack-rent"—"Agent or trustee"—"Beneficial Owner"—Liability for paving—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250.—Where a lessee sub-lets the premises at the same rent as he was liable for to his landlord, and though collecting the rent from the sub-lessee pays it over to his own landlord, and derives no benefit or profit therefrom for himself, he is not liable to contribute as "owner" to the expense of paving the street by the district board.—*Walford* v. *Hackney Board of Works*, Q.B.D. 110.

8. *Footway—Expenses—Apportionment—Land extra commercium—Owner under Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 12), *s.* 250—*Metropolis Open Spaces Act*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolis Management Amendment Act*, 1890 (53 & 54 *Vict. c.* 54), *s.* 1.—A local authority had acquired under the Metropolis Open Spaces Act, 1877, for the purpose of a public garden, the residue of the lease of a piece of land subject to the covenants of the lease.

Held, that the local authority were owners within the meaning of the Metropolis Management Acts of 1855 and 1890, and liable to contribute towards the expense of flagging the footways on which the land abutted.—*St. Mary's, Islington, Vestry*, v. *Cobbett*, Q.B.D. 44.

9. *Rating—Sewers—Special rate—Distress warrant—Metropolis Management Act*, 1855, *ss.* 159, 161—

Metropolis Management Act, 1862, *ss.* 52, 53.—A distress warrant was granted by a metropolitan police magistrate to recover a special sewers rate made under section 159 and issued pursuant to a precept of a district board of works under section 161 of the Metropolis Management Act, 1855, for a special district in the parish. The rate had not been appealed against.

Held, that as the rate was good on the face the distress warrant was rightly issued, as the magistrate had no jurisdiction to entertain an objection that the expenses for which the rate was levied were recoverable only under sections 52 and 53 of the Metropolis Management Act, 1862, in which case the property rated would have come within the exemption in section 52.—*Bates* v. *Plumstead Overseers*, Q.B.D.

10. *Sewer—Drain—County Council—Local Government—Power to order vestry to construct sewers—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 138.—The London County Council have no power under section 138 of the Metropolis Management Act, 1855, to make an order on the vestry of a parish in the metropolis, in which are situate houses discharging their sewage directly into the river Thames, to construct a new sewer for the purpose of receiving the drainage of such houses and preventing its discharge into the river.—*Reg.* v. *St. George, Hanover-square, Vestry*, Q.B.D.

11. *Sewer—"Drain"—Drainage of Arcade—Liability to repair—"Premises within the same curtilage"—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.—An arcade consisted of a central passage, arched over by a common roof, with a number of houses and shops on each side, the defendant being the owner of the whole. The houses and shops were let on leases to different occupiers. The passage, over which there was no public right of way, gave access to the houses and shops. A central drain ran down this passage into a main sewer in the street outside, receiving in its course the drainage of the houses and shops forming the Arcade.

Held, that the central drain was not used for the drainage of "one building only or premises within the same curtilage," and was, therefore, a "sewer," and not a "drain," within the meaning of section 250 of the Metropolis Management Act, 1855, and that the vestry was liable for its repair.

Judgment of the Queen's Bench Division, affirmed.—*St. Martin's Vestry* v. *Bird*, C.A. 194.

12. *Sewer—Drain—Liability to repair—Order of sanitary authority—Disobedience of builder—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120, *s.* 250.—In 1887 a builder built four houses in the metropolis, which contrary to the order of the sanitary authority, he caused to be drained into one drain situate in one of the premises. He subsequently sold the houses to different persons. The sanitary authority took proceedings to compel the purchaser of the house in which was situate the drain receiving the drainage of the four houses to repair the drain for the purpose of remedying a nuisance caused by its defective condition.

Held, that having regard to section 250 of the Metropolis Management Act, 1855, the drain in question was a sewer and not a drain, and was therefore repairable by the sanitary authority and not by the purchaser of the house.

Held also, that the purchaser was not estopped by reason of the wrongful act of his predecessor in title from alleging that the drain was a sewer.—*Kershaw* v. *Taylor*, Q.B.D.

13. *Sewer—Drain—Liability to repair—"Premises within the same curtilage"—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.—The appellant was owner of buildings consisting of forty-six sets of apartments, divided into two blocks, separated by a causeway 20 feet wide, which opened at one end into a public thoroughfare. Access to one of the block was obtained from the causeway; the only access to the other was from the thoroughfare. In the causeway was a dustbin used in common by the occupiers of the dwellings in both blocks. The drainage was by means of twelve branch drains running into a main drain under the causeway, which ran into a sewer within 100 feet of the buildings.

Held (by Lord Esher, M.R., and Lopes, L.J., Rigby, L.J., dissenting), that the main drain was a "drain," and not a "sewer," within the meaning of section 250 of the Metropolis Management Act, 1855, being a "drain of and used for the drainage of premises within the same curtilage"; and that, therefore, the appellant was liable to pay the expenses incurred by the vestry in necessary works of cleansing, alteration, and amendment of such drain.—*Pilbrow* v. *St. Leonard's, Shoreditch*, C.A. 342.

14. *Street—New street—Paving expenses—Apportionment—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 128), *s.* 105—*Metropolis Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.—Section 112 of the Metropolis Management Act, 1862, does not restrict the meaning of the expression "new street," and that expression, as used in the Metropolis Management Acts, includes a new street in the ordinary and popular sense of the term. The court cannot question the principle on which the expenses of paving a new street have been apportioned by a district board amongst the owners liable in respect thereof. The authorities referred to in section 112 of the Metropolis Management Act, 1862, are authorities having control of the pavements or highways generally in the parish or place, and do not include turnpike trustees.

A road which was a turnpike road down to 1865, and previously to 1869 was of a rural character, subsequently became a new street in the ordinary sense of the term by having buildings erected alongside it.

Held, that it was within the terms of section 105 of the Act of 1855, and that, therefore, the district board might pave it under that section and charge the costs upon the frontagers.

Held, also, that the fact that slight temporary repairs had been previously done to the footway of the road by the district board at the expense of the rates did not prevent the board from exercising the powers given by section 105 of the Act of 1855.

Wilson v. *St. Giles, Camberwell* ([1892] 1 Q. B. 1), followed.—*Davis* v. *Greenwich District Board*, Q.B.D.

15. *"Street, place, or row of houses" in which building situate—Determination of—Superintending architect—Magistrate—Metropolis Local Management Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.—For the purposes of section 75 of the Metropolis Local Management Act, 1862, it is the function of the superintending architect, and not of the magistrate, to determine the question in what "street, place, or row of houses" a building is situated.

Barlow v. *Vestry of St. Mary Abbotts, Kensington*, 34 W. R. 521, 11 App. Cas. 257, considered and applied.—*Allen* v. *London County Council*, C.A., 674.

16. *Vestryman—Qualification—Rating and occupying—Ceasing to occupy—Penalty—Vacancies caused by death or otherwise—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 6, 10, 54—*Le*

Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 79, *sub-sections* 8, 10.—By section 6 of the Metropolis Local Management Act, 1855, rating and occupying are necessary qualifications for election to the office of vestryman.

By section 54 a person who acts as a member of any board or vestry without being qualified by rating and occupation shall be liable to a penalty.

Held, that a vestryman who was properly qualified at the time of his election did not cease to be a member of the vestry before the expiration of his term of office because he had ceased to occupy a house in the parish.—*Reg* v. *Williams, Visger, Ex parte*, Q.B.D., 140.

See also ADULTERATION, 3; LOCAL GOVERNMENT, 9; POOR LAW, 12.

METROPOLITAN CARRIAGE:—

Defacement of driver's licence—Jurisdiction of police magistrate—"Matter of complaint"—Evidence of loss and damage—Metropolitan Carriages Act (6 & 7 *Vict. c.* 86), *ss.* 8, 22.—Under 6 & 7 Vict. c. 86, s. 8, the registrar is authorized to grant licences to the drivers of hackney carriages, and the proprietors are required to indorse on the licences of drivers whom they employ the dates of entering and leaving their service. A proprietor, by his agent, in entering the dates, omitted one of the dates of entering and added a signature, the effect of which was to prejudice the driver in the eyes of other proprietors. The driver produced two proprietors who said they would not have employed a man producing a licence so marked.

Held, that this was a "matter of complaint" within section 22 of the Metropolitan Carriages Act, 1843, and that the magistrate had jurisdiction to hear the claim.

Held, also, that there was a defacement of the licence, and that there was evidence of loss and damage whereon the magistrate could assess compensation.—*Norris* v. *Birch*, Q.B.D. 271.

MINES:—

Canal company—Mines under canal—Compensation for minerals left for support of canal—Undertaking by canal company not to sue for damage caused by not leaving the minerals—Right of action—34 *Geo.* 3, *c.* 78, *ss.* 39 *and* 40.—Under the provisions of a special Act of Parliament for the building of a canal, the owner of minerals near and under the canal brought an action for a declaration that a certain amount of the minerals should be left unworked so as to avoid injury to the canal, and that the canal company should pay to the mine-owners the value of the minerals to be left unworked. It was proved that, if these minerals were worked and taken away, no such injury would be caused to the canal as would involve any damage to the interests of the public in its navigation. After the action had been commenced the canal company offered an undertaking not to sue the mine-owners for any injury that might be caused to the canal by the working and taking away of the minerals which the mine-owners proposed to leave unworked, and in respect of which they asked compensation.

Held, that since the mine-owners, by reason of the undertaking of the canal company, would incur no danger of an action for injuring the canal by working the minerals proposed to be left unworked, they are not entitled to the benefit of the Act, and their action should be dismissed.—*Chamber Colliery Co.* v. *Rochdale Canal*, C.A.

See also INCLOSURE.

MORTGAGE:—

1. *Attornment clause—Death of mortgagor—Payment of interest and occupation by heir-at-law—Bankruptcy of heir—Distress by mortgagee.*—A mortgagor of real estate who, in pursuance of an attornment clause in the mortgage, had attorned tenant to the mortgagee, died intestate, and his heir-at-law entered into possession and paid the interest on the mortgage, but subsequently became bankrupt. The mortgagee having distrained for arrears of interest,

Held, (1) that the original tenancy determined by the death of the mortgagor; (2) that a new tenancy between the mortgagee and the heir-at-law was not created by the mere payment of interest by the heir; and (3) that the distress was consequently illegal, and that the trustee in bankruptcy of the heir was entitled to the proceeds of the distress.

West v. *Fritche* (3 Exch. 216) distinguished.—*Scobie* v. *Collins*, BKCY.

2. *Colliery—Mortgage of leaseholds and fixtures—Implied mortgage of colliery business—Receiver and manager—Mortgagee in possession—Validity of instrument—Seal of company—Quorum of directors not present.*—The defendant company, who were the lessees of a colliery, and carried on the business of a colliery, granted to the plaintiffs by sub-demise a first mortgage on the premises comprised in the lease; the movable plant and some of the machinery being excluded from the mortgage, and no mention being made of the business or goodwill of the colliery. Default having been made in the payment of the money due under the mortgage, the plaintiffs went into possession and appointed a receiver of the income of the property. Upon a motion by the plaintiffs for the appointment of a receiver and manager.

Held (reversing the decision of North, J.), that the mortgage included and implied the business carried on by the colliery, and that, in spite of the plaintiffs having gone into possession, a receiver and manager ought to be appointed.

Whitley v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64, distinguished.

The articles of association of the defendant company provided that the directors should fix the number of directors to form a quorum, and the directors had fixed three as the number. Only two directors were present at the meeting which sanctioned the mortgage to the plaintiffs and at the meeting at which the seal of the company was affixed to the mortgage.

Held, that, as between the defendant company and the plaintiffs, the mortgage was validly executed.

D'Arcy v. *Tamar, Kit Hill, and Callington Railway Co.*, 14 W. R. 968, L. R. 2 Ex. 158, distinguished.

Royal British Bank v. *Turquand*, 6 Ell. & B. 327, 4 W. R. Dig. 148, and *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, 24 W. R. Dig. 16 followed.—*Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, C.A., 486.

3. *Consolidation.*—Banks during the years 1863 to 1866 mortgaged several properties to different mortgagees to secure distinct sums, and in 1868 gave a second mortgage upon all the properties to Brockman and Harrison. All the first mortgages except one were, prior to 1877, transferred to Brockman. Brockman died in 1877. In 1888 Harrison transferred the second mortgage to the plaintiff. In 1890 the remaining first mortgage was transferred to the defendants, the executors of Brockman.

The plaintiff claimed to redeem some only of the

properties on paying the amounts due under the first mortgages of these properties only.

Held, that the defendants were entitled to consolidate all the first mortgages.

Vint v. *Padget*, 6 W. R. 641, 2 De G. & J. 611, followed.

Decision of Romer, J., 42 W. R. 620, affirmed.—*Pledge* v. *Carr*, C.A. 50.

4. *Consolidation — Redemption — Assignment of equity of redemption.*—J. B. mortgaged property A. to C. in 1864, and other properties to different mortgagees in 1863, 1865, and 1866. Subsequently J. B. mortgaged A. subject to the mortgage to C., to S., and it was eventually sold in 1890 to the plaintiff, subject to C.'s mortgage. In the meantime the mortgage to C. and the mortgages in the other properties became vested in the same persons, the defendants.

Held, that the plaintiff was entitled to redeem property A., and that the defendants could not consolidate as against him, the equity of redemption in A. having been dealt with before the mortgages became vested in the defendants.

Harter v. *Colman*, 30 W. R. 484, 19 Ch. D. 630, followed.

Decision of Romer, J. (42 W. R. 618) affirmed.—*Minter* v. *Carr*, C.A.

5. *Equitable mortgages — Priorities — Trustee — Breach of trust.*—A trust fund was settled upon S. for life, remainder to his wife for life, remainder to their children. The trustees of the fund had power to invest it upon leaseholds for an unexpired term of 100 years. The trustees applied the trust fund in building houses upon lands which S. held under a lease of 500 years, but the trustees obtained no assignment of such deed or no mortgage by deposit or otherwise of the said lease of 500 years. S. afterwards deposited the lease with his bankers to secure his then present and future indebtedness. One of the trustees, on being advised that a breach of trust had been committed, subsequently obtained judgment in an action against S. and his co-trustees, declaring that the trust fund was a lien upon the lands and premises comprised in said lease. The bankers had no notice of the breach of trust, and the trustees, though guilty of breach of trust, were not parties to the fraudulent conduct of S. in depositing the lease with the bankers to secure loans.

Held, that the bankers, notwithstanding that they had not called for a legal mortgage, were entitled to priority over the claims of S.'s wife and children, to the extent of the advances actually made to S. on foot of the equitable mortgage by deposit before they had notice of the claim of the trustees.—*Sloane's Estate, Re*, CH.D. (Ir.).

6. *Equity of redemption—Purchase—Transfer of mortgage to owner of equity of redemption—Intention to keep security alive.*—Where the owner of an equity of redemption pays off a mortgagee and takes an assignment of the mortgage, and the documents or circumstances show an intention to keep alive the security, it is not extinguished, but enures for the benefit of the owner of the equity of redemption.

Adams v. *Angel*, 5 Ch. D. 634, approved. *Toulmin* v. *Steere*, 3 Mer. 210, discussed and distinguished.—*Thorn* v. *Cann*, H.L.

7. *Fixtures—Trade machinery—No registration as a bill of sale—Validity.*—In 1887, by a mortgage, which was not registered as a bill of sale, a paper manufacturer granted and conveyed his mill and the fixed machinery and fixtures in and upon the said premises to a mortgagee to secure £10,080 and interest.

Held, that the mortgage deed was valid as to fixed machinery and fixtures.—*Brooke, Re, Brooke* v. *Brooke*, CH.D.

8. *Judgment—Merger.*—By a mortgage deed the mortgagor covenanted to pay the mortgage debt, and also by a separate covenant to pay interest at £60 per cent. so long as any principal money secured by the mortgage should remain unpaid.

The mortgagee obtained judgment against the mortgagor for the principal and interest then due.

Held, that the mortgage security was not merged in the judgment, but that the mortgagee was entitled to interest at £60 per cent. subsequently to the date of the judgment.

Popple v. *Sylvester*, 22 Ch. D. 98, followed.—*Lowry* v. *Williams*, C.A. (Ir.).

9. *Limitations, Statutes of—Possession by mortgagor—Outstanding legal estate existing during part of the statutory period—Extinguishment of charge—3 & 4 Will. 4, c. 27, s. 34.*—Where a mortgagor who remained in possession of the mortgaged property paid no interest and gave no acknowledgment for more than twelve years, the right and title of the mortgagee to the land is extinguished by virtue of section 34 of 3 & 4 Will. 4, c. 27, and the legal estate revests in the mortgagor. The existence, during the earlier part of the statutory period, of a prior mortgage will not prevent this result.—*Kibble* v. *Fairthorne*, CH.D. ROMER, J., 327.

10. *Redemption—Principal and agent—Deposit of title-deeds—Agent entrusted with title-deeds with authority to raise money on them—Agent exceeding authority.*—Where a principal employs an agent to raise a definite sum of money, entrusting him with the possession of certain title-deeds for that purpose, and the agent obtains a loan in excess of the amount authorized from a *bonâ fide* lender who has no notice of the limitation, then the principal is only entitled to redeem upon payment to the lender of the full sum advanced by him on the security of the deeds.

Decision of the Court of Appeal, 42 W. R. 68, [1893] 3 Ch. 130, affirmed.

Perry-Herrick v. *Attwood*, 6 W. R. 204, 2 De G. & J. 21, approved.—*Brocklesby* v. *Temperance Permanent Building Society*, H.L. 606.

11. *Reversionary interest—Proviso for redemption on payment of principal with interest—Covenant for payment of interest half-yearly—Arrears of interest—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 42.—A mortgage of a reversionary share in the proceeds of realty and in personalty in court contained a proviso for redemption upon payment, on or before the death of the life tenant, of the principal sum, "with interest for the same in the meantime" at the specified rate. Then followed distinct covenants for payment of principal on the life tenant's death and of interest in the meantime half-yearly respectively; but the proviso did not refer to these covenants. When the life tenant died some thirteen years' interest was unpaid.

Held, that the proviso for redemption was a distinct contract, and that the covenant for payment of interest ought not to be imported into it; and, therefore, that the mortgagees' right to all the interest unpaid, which was expressly given by the proviso, was unaffected by any statute of limitations or principle of equity.

Sutton v. *Sutton*, 31 W. R. 369, 22 Ch. D. 511, considered.—*Turner, Re, Turner* v. *Spencer*, CH.D. CHITTY, J., 153.

See also BUILDING SOCIETY, 3; COMPANY, 21;

LAND REGISTRY; LIMITATION, STATUTES OF, 3; PARTITION; PRACTICE, 38-40, 46; PRINCIPAL AND SURETY, 2; SHIP, 19, 20; SOLICITOR, 7, 17; TRUSTEE, 10.

MORTMAIN.—See CHARITY, 7, 8, 10, 11.

NATAL, LAW of:—

Gaming—Speculative transactions in shares—Syndicate.—The law of Natal does not render it illegal on the ground of gambling for any person or association to buy and sell shares as a speculation. *Laughton* v. *Griffin*, P.C.

NEGLIGENCE:—

Government officials—Bailee—Acquiescence.—The principle by which protection from the consequences of mere nonfeasance is afforded to commissioners or trustees representing public interests has no application to a case in which Government officials are under obligation to an individual member of the public to perform a duty, in consideration of remuneration for its performance.

A depositor of goods for safe custody, who by himself or his servants has had an opportunity of observing certain defects in the storehouse, cannot be taken to have agreed that any risk of injury to his goods which may possibly be occasioned by such defects should be borne by himself, and not by his bailee.—*Brabant* v. *King*, P.C.

See also BILL OF EXCHANGE, 1; CONTRACT, 5; COUNTY COURT, 15.

NEW SOUTH WALES, LAW of:—

1. *Appointment of new trustees by court—Vesting order—Practice—Statute* 16 *Vict. No.* 19, *ss.* 30 *and* 32—*Parties.*—The statute 16 Vict. No. 19, by section 30, empowers the Supreme Court of New South Wales, upon the application of any person beneficially interested, to appoint new trustees in certain cases, and, by section 32, provides that "it shall be lawful for the court upon making any order for appointing a new trustee, either by the same or by any subsequent order, to direct that any land subject to the trust shall vest in the person or persons" so appointed. By the practice of the court, embodied in rules of procedure, the appointment of a new trustee was referred to the master with directions "that upon such appointment the trust property and effects be vested in the" new trustee.

Held, that an order so made, upon a reference to the master, was sufficient to vest the legal estate in the new trustee, and that a subsequent order by the court was unnecessary. The Act does not require that all persons interested should be made parties to the suit, but leaves a discretion to the petitioner and to the court.—*Plomley* v. *Richardson*, P.C.

2. *Arbitration—Suit against company—Reference* —37 *Vict. No.* 19, *s.* 113—55 *Vict. No.* 32, *s.* 12.—The arbitration provisions in the Companies Act, 37 Vict. No. 19, only apply to voluntary arbitrations to which a company has submitted in writing under its common seal, not to references under section 12 of the Arbitration Act, 1892.—*Telma Gold Mining Co.* v. *Hoskins*, P.C.

3. *Crown lands—Right to make additional conditional purchases—Crown Lands Alienation Act*, 1861, *s.* 22—48 *Vict. No.* 18, *ss.* 2 (*b*), 42.—The appellant effected a conditional purchase under section 22 of the Crown Lands Alienation Act, 1861, of land adjoining to Crown land which had been previously granted to him in fee simple under section 25.

Held, that he did not thereby become a holder of an original conditional purchase within section 42 of 48 Vict. No. 18 so as to obtain the right to make additional purchases under that section.

Held, also, that, even if section 22 of the Act of 1861 (since repealed by the Act 48 Vict. No. 18) did confer on him as the fee simple holder of land the right claimed, yet that section 2, sub-section (*b*), of the later Act did not operate to preserve such right.—*Abbott* v. *Minister for Lands*, P.C.

NUISANCE:—

1. *Adjoining owners—Damage by overflow of rain-water—Ordinary user of premises—Provision for escape of water for common benefit—Liability of adjoining owner.*—An uncovered area belonging to the defendant and inclosed on two sides by his premises, on another side by the plaintiff's house, and on the fourth side by another house, was covered by the defendant with a flat roof, in one corner of which was a gully or hole for the escape of rain-water from the adjoining roofs. The plaintiff had the right of discharging rain-water from his roof on to this flat roof, and thence the water escaped through the gully down another pipe into the area, and so into the defendant's drain. The defendant had not in fact attended to or cleansed the roof or gully, and no complaint of their condition had been made to him, and there was no access to the roof from his premises. In consequence of an obstruction of the mouth of the gully, the rain-water accumulated on the flat roof, leaked into the plaintiff's premises, and damaged the same.

Held, by Wright, J., that, in the absence of negligence, the defendant was not liable for the damage, on the ground that he did no more than was ordinary and reasonable in conducting his own rain-water from the roof to the gully, and also upon the ground that the provision of the gully was for the common benefit.

Held, on appeal, that the plaintiff had consented to the new mode of discharging the rain-water, and, there being no negligence on the part of the defendant, the plaintiff was not entitled to recover. —*Gill* v. *Edouin*, C.A.

2. *Injury—Absence of direct evidence as to cause of—Contributory negligence—Onus of proof.*—Defendants were owners of a wall 18 inches high abutting on a public highway; on the top of the wall was a row of spikes, which the jury found was a nuisance to the highway. The plaintiff, a little girl, was found standing on the highway by the wall with her arm cut, in such a way as might have been occasioned by her falling on the spikes. The plaintiff sued the defendants for damages for the injury sustained. At the trial the plaintiff was not called as a witness, and apart from the circumstances above stated, there was no evidence as to how the accident happened, except that a witness who shortly, before the accident, saw the plaintiff climbing up on the wall, and told her to get down, which she did.

Held, that there was evidence to go to the jury that the nuisance was the cause of the plaintiff's injury.—*Fenna* v. *Clare*, Q.B.D.

3. *Interruption to flow of water—Trespass—Continuing damage*—Nemo bis vexari debet pro eadem causa.—The plaintiff in March, 1892, had recovered damages against the defendants in an action for trespass by reason of the defendants having, in 1887, unlawfully entered upon the bed of a stream (part of which was the plaintiff's property), and dug holes therein for the purpose of deepening it, and improving their own water supply.

In November, 1892, the plaintiff brought another action against the defendants claiming damages on the ground that, in consequence of the said acts of the defendants done in 1887, the water flowed more rapidly and at a less depth past the plaintiff's land.

Held, that the cause of damage was a continuing nuisance, and that the plaintiff was entitled to judgment.—*Clarke* v. *Midland Great Western Railway Co.*, C.A. (Ir.).

4. *Trees overhanging neighbour's land—Continuance for more than twenty years—Cutting down—Notice.*—The owner of land which is overhung by trees growing on his neighbour's land is entitled, without notice, if he does not trespass on his neighbour's land, to cut the branches as far as they overhang, although they may have done so for more than twenty years.

Decision of the Court of Appeal ([1894] 3 Ch. 1) affirmed.—*Lemmon* v. *Webb*, H.L.

See also INFORMATION, 1, 2; LANDLORD AND TENANT, 9; LOCAL GOVERNMENT, 10-12, 18; WATER, 3.

OPTION.—See ADMINISTRATION, 4; LANDLORD AND TENANT, 17; WILL, 17, 33.

PARTITION:—

Practice—Parties—Mortgage.—The owner of the equity of redemption of an undivided share of land subject to mortgages affecting the whole, brought an action for partition and made the plaintiff's mortgagee and the overriding mortgagees parties to the action without their consent.

Held, that the mortgagees were not proper parties and that the action should be dismissed as against them.—*Sinclair* v. *James*, CH.D. NORTH, J.

PARTNERSHIP:—

1. *Action for partnership account—Judgment—Costs—Insufficiency of assets—One partner indebted to the firm—Liability to make good his indebtedness before being paid his costs of action.*—In an action between two partners for dissolution of the partnership and taking the partnership accounts, it appeared that the partnership assets were represented by a fund in court; that there was a debt due by the defendant partner to the plaintiff partner, and that there was also a larger balance in respect of capital due to the plaintiff partner than to the defendant partner.

Held, that the fund in court ought to be applied first in payment of the debt, secondly, in payment of the excess of the balance of capital due to the plaintiff over the balance due to the defendant, and, thirdly, in payment, so far as the fund would extend, of the costs of the action, and that the rest of the costs should be borne by the partners in proportion to their interests in the partnership.—*Ross* v. *White*, C.A.

2. *Administration — Assets—Interest of deceased partner — Goodwill.*— One partner died while negotiations were pending for the sale of business premises to a railway company. By the partnership deed the share of a deceased partner was to be taken at the value put upon it by the last balance-sheet, and in the past balance-sheets there was no mention of goodwill.

Held, that in taking the accounts the deceased partner must be credited with a share of the premises, plant, &c., at the price subsequently paid for them by the railway company, but that his estate was not entitled to any share of the sum paid for goodwill.—*Hunter* v. *Dowling*, CH.D. NORTH, J., 19.

3. *Goodwill property of one partner—Right of partners to make copies of customers' names and addresses for use after expiration of partnership—Injunction—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 24, *sub-section* 3.—Articles of partnership for a term of seven years between A., B., and C. provided that, on the expiration of the term, the goodwill of the business should belong to A. alone.

Held (affirming Stirling, J.) that C. could not be restrained from copying from the partnership books a list of the customers of the firm, in order that, as he admitted, after the expiration of the term he might solicit those customers to transfer their custom to a new business to be started by himself in competition with the original business.—*Trego* v. *Hunt*, C.A. 371.

4. *Practice—Parties—Dissolution—Rights of persons nominated to succeed to shares in the partnership.* — Five persons carried on business in partnership under partnership articles which contained a clause empowering each partner to nominate a son to succeed to his share in the partnership, but no son so nominated was to succeed until he attained twenty-one. The power was exercised, and an action having been brought by four of the partners against the fifth, seeking a dissolution, the defendant applied to stay all proceedings until the nominated sons (who were all under twenty-one) were made parties.

Held, that the clause in question did not prevent the partners from dissolving the partnership, and that as a son would only succeed to his father's actual interest at the time the son became a partner, the sons were not necessary parties.

The observations of Cotton, L.J., in *In re Flavell*, 25 Ch. D. 89, discussed.—*Ehrmann* v. *Ehrmann*, CH.D. STIRLING, J., 125.

5. *Practice—Separate liability—Judgment against one partner—Judgment creditor—Execution—Order charging debtor's interest—Right to account against other partners—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *ss* 23, 31.—Under section 23 of the Partnership Act, 1890, there is jurisdiction to order accounts and inquiries against a partnership firm on the application of a judgment creditor of one of the partners; but such jurisdiction ought to be exercised only in special circumstances.—*Brown* v. *Hutchinson* (*No.* 2), C.A. 545.

6. *Practice—Separate liability of one partner—Judgment against such partner—Foreign firm—Branch office in England—Receiver of debtor's interests in partnership assets—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 23.—Where a partnership business is carried on partly in England and partly abroad, section 23 of the Partnership Act, 1890, applies, by which a receiver of a partner's interest in the assets of the partnership business can be appointed at the suit of a judgment creditor.—*Brown* v. *Hutchinson*, C.A. 533.

7. *Profits—Share in—Loan to trader.*—For the purpose of determining whether a person is a partner in a trade firm, the test is whether the trade in question is carried on on behalf of the person sought to be charged as a partner.—*Hollom* v. *Whichelow*, Q.B.D.

See also ARBITRATION, 5; BANKRUPTCY, 28; INLAND REVENUE, 4; LIMITATION, STATUTES OF, 7; MASTER AND SERVANT, 2; PRACTICE, 70; PRINCIPAL AND SURETY, 1; SOLICITOR, 17, 18.

PATENT:—

1. *Action for infringement—Discontinuance—Costs of particulars of objections—Patent Act*, 1883, *s.* 29,

sub-section 6—*Patent Amendment Act*, 1852, s. 43.—Section 29, sub-section (6), of the Patents Act, 1883, is not confined in its application to those cases only where an action is brought to trial; and the costs of particulars of objections will not be allowed unless there be a certificate by the court or a judge that the same were reasonable and proper.—*Middleton* v. *Bradley*, CH.D. STIRLING, J., 684.

2. *Action for infringement—Dismissed with costs, plaintiff offering no evidence—Certificate that particulars of objection were reasonable and proper—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 29, *sub-section* 6.—Where an action for infringement of a patent has been dismissed with costs, the plaintiffs offering no evidence, the court will not grant a certificate, under section 29, sub-section 6, of the Patents Act of 1883, that the defendant's particulars of objections were unreasonable and proper in the absence of evidence to that effect, nor will the court inquire into the facts of the case for the purpose of obtaining such evidence.—*Mandleberg* v. *Morley*, CH.D. STIRLING, J., 266.

3. *Extension—Foreign patent lapsed—Patents, &c., Act*, 1883, *s.* 25, *sub-section* (4).—Where a British patent granted before the passing of the Patents, &c., Act, 1883, was prior in date to patents for the same foreign invention obtained by the same patentee in seven foreign countries, five of which were still in force, but two of which had lapsed owing to non-performance of the conditions of the grant,

Held, that under section 25, sub-section (4), of the Patents Act, 1883, the Privy Council had a discretion to extend the patent whether or not it had been the first granted, with due regard to the circumstances connected with the foreign patents.

Extension granted, as the evidence did not suggest that the inhabitants of the United Kingdom would be prejudicially affected thereby in their foreign competition.—*Semet and Solvays Patent, Re*, H.L.

4. *Improvements in old machine—Infringement.*—Where a patent had been granted merely for improvements in the mechanism of an old and known machine;

Held, that the patentee was limited to the exact terms of his specification; and that improvements affected by the defendant with the same object, but not in a manner strictly corresponding with the patentee's specification, were not an infringement.—*Brown* v. *Jackson*, P.C.

5. *Licence—Exclusive license—Nonpayment of royalties—Revocability of license—Injunction.*—A patentee in consideration of royalties thereafter to be paid, by deed granted an exclusive licence for the manufacture and sale of the patented articles; and the licensee covenanted to pay the royalties and to push the invention; and they were authorized to grant sub-licenses. The licensee was given express power to determine the licence, but the deed contained no power to the patentee to revoke the licence. The licensee withheld payment of the royalties in consequence of disputes between him and the patentee as to improvements made by the licensee in the patent, to which the patentee objected as deviations from the patent. The patentee thereupon gave notice purporting to revoke the licence.

Held, that the licence was not revocable at the will of the patentee, and that there had been no such breach of the conditions contained in the deed as would justify a revocation.—*Guyot* v. *Thompson*, C.A.

6. *Prolongation—Expiration of foreign patents.*—In considering a petition for the prolongation of a patent in this country the fact that several foreign patents in respect of the same invention have already expired, and that the English patent is the only one surviving, though not an insuperable objection to a prolongation, is one which the Judicial Committee will consider as a serious obstacle to granting a prolongation, unless very strong grounds for doing so are shown.—*Pieper's Patent, Re*, P.C.

7. *Validity—Estoppel—Petition for revocation—Action for infringement—Patent declared invalid—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 26 (4).—In a petition for the revocation of a patent the patentee is not estopped from setting up the validity of the patent by the fact that, in an action for infringement in which the petitioner was the defendant, the patent had been declared invalid.—*Deeley's Patent, Re*, C.A. 517.

PHARMACY:—

Sale of poisons—Medicine containing poison—Proprietary medicine—"Patent medicine"—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 2, 15 *and* 16. The Pharmacy Act, 1868, imposes a penalty of £5 upon any person who sells "poisons" without being duly qualified (section 15), and the articles described in the schedule are to be deemed to be "poisons" (section 2); and section 16 provides that "nothing hereinbefore contained shall interfere with the making or dealing in patent medicines."

The defendant, a grocer, sold an ounce bottle of a proprietary medicine which contained one-tenth of a grain of a scheduled poison. The whole bottle, if taken at once by a child in ordinary health, would certainly be injurious and might be fatal, and to an infant would probably be fatal.

Held, that a proprietary medicine was not a "patent medicine" within the meaning of section 16; and that the defendant had sold a "poison" within the meaning of section 15.

Pharmaceutical Society v. *Piper*, 41 W. R. 447, followed.—*Pharmaceutical Society* v. *Armson*, C.A.

PERPETUITY.—See CHARITY, 4, 11; WILL, 14, 31.

POLICE.—See LICENSING LAW, 6; LOCAL GOVERNMENT, 16.

POOR LAW:—

1. *Commencement of proceedings—Prosecution with "due diligence"—Limitation of time for payment of debt—Justices—Quarter sessions—Taxation of costs out of sessions—Consent—Poor Law (Payment of Debts) Act*, 1859 (22 & 23 *Vict. c.* 49), *ss.* 1, 4—12 & 13 *Vict. c.* 45, *s.* 8.—On an appeal at quarter sessions on the 13th of July, 1892, the present defendants, the E. Union, were ordered to pay to the present plaintiffs the costs of the appeal. No application was made and no consent given to tax the costs out of sessions. In November following the clerk of the peace refused to tax the costs, and on the 7th of January, 1893, the court of quarter sessions, then sitting, made an order for taxation, and on the 26th of January, 1893, the costs were taxed. An unsuccessful attempt was made to quash that order. The present defendants then declined to pay the amount, on the ground that by section 1 of 22 & 23 Vict. c. 49 they were prohibited from paying any debt except within the half-year when it had been incurred, or within three months after the expiration of that half-year. The plaintiffs, on the 2nd of March, 1894, commenced this action against the defendants for a

mandamus, asserting that they were entitled to payment under section 4 of the same Act, because they had, within the time limited by section 1, commenced proceedings before a competent authority to obtain taxation of the costs, and had prosecuted the same with due diligence to final settlement of the claim.

Held, by Lord Halsbury and A. L. Smith, L.J. (Lindley, L.J., dissenting), that the effort by the present plaintiffs to tax the costs in November, 1892, was not the commencement of proceedings within the meaning of section 4, but was an effort to complete other proceedings begun in July. Further, until the sum of money to be paid by the present defendants was ascertained, there was no debt, claim, or demand become due or incurred by the present defendants, and as the costs were ascertained on the 26th of January, 1893, and the action was not begun until the 2nd of March, 1894, the defendants could not lawfully pay the costs.—*Midland Railway Co.* v. *Edmonton Union*, C.A. 309.

2. *Costs—Limitation of time—Judgment ordering guardians to pay costs—Taxation—"Debt, claim, or demand incurred or become due"—Poor Law (Payment of debts) Acts*, 1859 (22 & 23 *Vict.* c. 49), *s.* 1.—By section 1 of 22 & 23 Vict. c. 49, "With respect to any debt, claim, or demand which may be lawfully incurred by or become due from the guardians of any union or parish, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred by or become due, or within three months after the expiration of such half-year, but not afterwards.

Held, that a judgment of the House of Lords ordering guardians to pay the costs of an appeal creates a "debt, claim, or demand" within the meaning of the above section from the time when the judgment is pronounced, and not from the time when the costs are taxed; and, therefore, the liability of the guardians to pay the costs is barred at the end of three months after the expiration of the half-year within which the judgment was pronounced, though the costs are not taxed until after the expiration of that half-year.—*West Ham Union* v. *St. Matthew, Bethnal Green*, C.A. 419.

3. *Pauper in receipt of outdoor relief—Reimbursement of guardians on death of pauper—Ordinary—creditors—Poor Law Act*, 1849 (12 & 13 *Vict.* c. 103), *ss.* 16, 17.—A pauper received outdoor relief from the guardians of the union during the last year of her life. She left a will disposing of certain property, and appointing as her executor a creditor. The guardians, after the death of the pauper, claimed the property as preferential creditors under the Poor Law Act, 1849, s. 16.

Held, that the guardians were ordinary, not preferential, creditors; that they were not entitled to "take and appropriate" the property of the deceased pauper, but were only entitled to be reimbursed in the same way as other creditors, and that the executor creditor had an equal right to be reimbursed.—*Laver* v. *Chesterfield Union*, Q.B.D. 25.

4. *Rating—Appeal—Costs—Assessment committee appearing as respondents—Consent of guardians—Condition precedent—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict.* c. 39), *s.* 2.—It is a condition precedent to the right of the assessment committee of a union to appear as respondents to an appeal against a poor rate that they should have obtained the consent of the guardians of the union as required by section 2 of the Union Assessment Committee Amendment Act, 1864.

Therefore, where an appeal was entered against a poor rate, and the assessment committee obtained the consent of the guardians to appear as respondents thereto, and it was arranged that all appeals against subsequent poor rates made in respect of the same property and upon the same valuation list should be respited from sessions to sessions and should abide the result of the test appeal, and all the appeals were eventually dismissed, with costs,

Held, that the assessment committee, not having obtained the consent of the guardians to appear as respondents to these subsequent appeals were not entitled to the costs incurred by them in respect thereof.—*Reg.* v. *Essex Justices*, C.A. 183.

5. *Rating—Coal mines—Lighting rate—"Land"—"House, buildings, and property other than land"—Poor Relief Act*, 1601 (43 *Eliz.* c. 2), *s.* 1—*Lighting and Watching Act*, 1833 (3 & 4 *Will.* 4, c. 90), *s.* 33.—Coal mines are not "land," but "property other than land rateable to the relief of the poor" within the meaning of section 33 of the Lighting and Watching Act, 1833, and are, therefore, rateable on the higher scale under that Act, although they cannot derive any benefit from the rate.

Decision of the Court of Appeal ([1894] 2 Q. B. 11) affirmed.—*Thursby* v. *Briercliffe-cum-Entwistle Commissioners*, H.L.

6. *Rating—Docks—Docks in two or more parishes—Principle of assessment—Statutory prohibition as to use of part of undertaking.*—Where a system of docks or other undertaking extends into several parishes, the proper method of ascertaining the rateable value is by the "parochial principle" whenever it can be applied—*i.e.*, by ascertaining what are in fact the profits earned by each part of the system by the particular hereditaments in each parish. The principle of first ascertaining the rateable value of the whole of an undertaking and then dividing that value among the several parishes in proportion to the area in each parish is only to be resorted to in cases of necessity.

Decision of the Court of Appeal, 42 W. R. 595, [1894] 2 Q. B. 69, affirmed.

Should an undertaking be forbidden by statute from receiving certain tolls for the use of a portion of its property, it should only be assessed in respect of that portion having regard to the existence of the statutory prohibition: *London County Council* v. *Erith*, 42 W. R. 330, [1893] A. C. 562, 63 L. J. M. C. 9, explained on this point.

Decision of the Court of Appeal (42 W. R. 595) reversed.—*Sculcoates Guardians* v. *Hull Docks Co.*, H.L. 623.

7. *Rating—General district rate—Nonpayment—Proceedings against occupier—Evidence as to boundary of borough—Jurisdiction of justices.*—Where a person is summoned for the nonpayment of general district rate in respect of premises in his occupation, he is entitled to call evidence to show that the premises are not situated within the area for which the rate is made.—*Baglan Bay Tin Plate Co.* v. *John*, Q.B.D.

8. *Rating—Promoters of undertaking—Owners compounding—Deficiency in rates—Liability of promoters—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 133—*Poor Rate Assessment Act*, 1869 (32 & 33 *Vict.* c. 41), *s.* 3.—The owners of houses on land taken by the promoters of an undertaking for the purposes of their works had made agreements under section 3 of the Poor Rate Assessment Act, 1869, with the rating authority to pay the rates instead of the occupiers, subject to being allowed a deduction of twenty-five per cent. from the amount of such rates, and those agreements were in force when the promoters took the premises.

Held, that on the true construction of section 133 of the Lands Clauses Act, 1845, the deficiency in the poor rate assessments, which the promoters were liable to make good, must be computed having regard to the rateable value at the time the special Act authorizing the taking of the premises was passed, and that the promoters were not entitled to claim the deduction of twenty-five per cent. from the amount of the rates levied according to that value. — *Saint Leonard's, Shoreditch* v. *London County Council*, Q.B.D. 598.

9. *Rating—Rateable hereditament—River formed into a canal with new cuts and channels—Towing-path—Exclusive occupation—Ownership.*—By virtue of certain private Acts of Parliament the respondents and their predecessors in title were empowered to scour, enlarge, and deepen a certain river, and to do other acts necessary for improving the navigation, and to make new channels by means of artificial cuts, and to set out towing-paths, and to keep them in repair.

Held, that the respondents were not rateable either in respect of the natural bed of the river or of the towing-paths, it not being shown that they had either the ownership or the exclusive occupation of such paths.

Reg. v. *Proprietors of Mersey and Irwell Navigation*, 9 B. &. C. 95, and *Badger* v. *South Yorkshire Railway Co.* 1 E. & E. 347, approved.

Bruce v. *Willis*, 11 A. & E. 463, distinguished.—*Doncaster Union* v. *Manchester, Sheffield, &c., Railway Co*, H.L.

10. *Rating—Rateable value—Public-house—Evidence as to takings in house—Admissibility.*—On an appeal against an assessment for the relief of the poor, of a licensed public-house in a town, the quarter sessions rejected evidence as to the amount of the takings of the tenant in the public-house, and reduced the rateable value.

Held, that, as there were other licensed houses in the town which could form a standard of comparison for the purpose of ascertaining the rateable value, the evidence as to the takings was not required for that purpose, and was, therefore, properly rejected.—*Dodds* v. *South Shields Union*, C.A. 532.

11. *Rating—Tunnel—Easement—Paramount occupation.*—Where in pursuance of a statute the owner of land granted to a drainage company the exclusive right of drainage through a tunnel and a water-course in his land, with a right of placing works in the tunnel and water-course, and of making other tunnels in connection therewith, reserving to himself mineral and other rights.

Held (reversing the decision of the Court of Appeal), that the statute and grant gave the company not merely an easement, but possession of the tunnels and water-course; that the rights reserved to the owner were subordinate to the rights granted to the company, and that the company were *de facto* in occupation of the tunnels and water-course, and rateable to the poor in respect thereof.

The test of rateability is not whether the rights granted are corporeal or incorporeal, but whether there is an occupation—which is a question of fact. —*Holywell Union* v. *Halkyn Drainage Co.*, H.L.

12. *Rating — Valuation list — Valuation (Metropolis Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 32—*Valuation of individual hereditaments.*—An appeal against "the total of the gross value," or "the total of the rateable value," of a parish under section 32 of the Valuation (Metropolis) Act, 1869, cannot be preferred on the ground that the valuation of individual hereditaments is incorrect. — *London County Council* v. *St. George's, Hanover-square*, H.L.

13. *Settlement—Irremovability—Residence of wife—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 34.—In estimating the period of three years during which a pauper acquires the *status* of irremovability, there cannot be included a period during which the pauper's wife resided by herself within the union before the pauper himself commenced his residence in that union.—*West Ham Union* v. *Cardiff Union*, Q.B.D. 424.

See also LOCAL GOVERNMENT, 7.

POWER OF APPOINTMENT:—

1. *General Power—Proceeds of sale of real estate liable to be reinvested in land—Donee of power of domiciled Frenchwoman—French will—Exercise of power.*—The testatrix, an English subject, who had acquired a French domicile, had a general power of appointment over a fund in England representing the proceeds of sale of English real estate and which were liable to be laid out in the purchase of other lands; the testatrix, by her will will made in French form, gave all her properties and chattels to T. absolutely:

Held, that the will must be construed as an exercise of the power, and that the fund being in form personal estate passed by the will.

Chandler v. *Pocock*, 16 Ch. D. 648, followed.—*Harman, Re, Lloyd* v. *Tardy*, CH. D., KEKEWICH, J.

2. *Limited power—Will executed prior to settlement creating power—Wills Act*, 1 *Vict. c.* 26 *ss.* 24, 27.—Section 27 of the Wills Act refers exclusively to general powers of appointment, and does not apply to special or limited powers. Property comprised in a limited or special power of appointment exercised by will is not real or personal estate comprised in the will within section 24 of the Wills Act.

Re Wells, 42 Ch. D. 646, approved.

Stillman v. *Weedon* considered.—*Doyle* v. *Coyle*, CH.D., M.R. (Ir.).

3. *Objects of power "relations" of illegitimate and childless wife—Apointment amongst children of her "brothers and sisters"—Validity—Exclusive or non-exclusive power—Powers Law Amendment Act*, 1874 (37 & 38 *Vict. c.* 37), *s.* 1.—A testator by his will gave all his property to his wife for her life, and after her death he gave one moiety of the residue "to my wife's relations as she may direct." The wife, who was illegitimate to the knowledge of the testator, and childless, survived him, and by her will purported to exercise the power in favour of children of persons whom she described as her "brothers and sisters," the latter being issue of the marriage of her father and mother.

Held, that, reading the language of the will by the light of the surrounding circumstances, the the testator meant to use the words "relations," not in its primary sense of legitimate relations, but in a secondary sense, as meaning those persons who would have been her relations if she had been legitimate, and that, therefore, the appointment was valid.

Held, further, that the power of appointment was a power of distribution, and not a power of selection; that Lord Selborne's Act, 37 & 38 Vict. c. 37) did not apply, and that the old rule of law established by *Pope* v. *Whitcombe*, 3 Mer. 689, was unaffected by the Act, and consequently that the class relations to take under the appointment was confined to the statutory next of kin of the widow, to be ascertained at her decease.—*Deakin, Re, Starkey* v. *Eyres*, CH.D., STIRLING, J., 70.

4. *Revocation—Joint appointment—Revocation by survivor.*—By a marriage settlement funds were settled upon trust for the children in such shares and in such manner as the husband and wife during their joint lives by deed, with or without power of revocation and new appointment, should appoint; and in default of and subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation and new appointment, or by will, appoint.

The husband and wife made a joint appointment of part of the trust funds, with a proviso that the appointment thereby made was made "subject to the power of revocation and new appointment mentioned in the settlement." After the death of the wife the husband executed a deed revoking the joint appointment and making a new appointment.

Held, that the husband and wife had power in their joint appointment to reserve a power of revocation and new appointment to the survivor; and that such a power of revocation and new appointment had been effectually reserved in the joint appointment. — *Harding, Re, Rogers* v. *Harding*, C.A.

5. *Special power—Execution—General bequest—Intention—Evidence.*—When, on the construction of a will, the court is of opinion that a special power has not been exercised, evidence is not admissible to show intention to exercise it.—*Huddleston, Re, Bruno* v. *Eyston*, CH.D. KEKEWICH, J. 139.

See also MARRIED WOMAN, 5; SETTLEMENT, 7; TRUSTEE, 7; WILL, 15, 18.

PRACTICE:—

1. *Admissions — Payment into court — Executor carrying on testator's business.*—An executor who carried on his testator's business admitted that he had allowed part of his testator's estate directed by the will to be invested, to remain in the business, but alleged that the testator's assets did not cover his liabilities. The testator by his will had directed the executor to carry on the business.

The Court of Appeal (reversing Chitty, J.) refused to order the executor to pay into court a sum of money representing part of the testator's estate that remained invested in the business.

The practice relative to orders for payment into court on admissions considered.—*Neville* v. *Mathewman*, C.A.

2. *Affidavit—Filing—Solicitor—R. S. C., ord.* 38, *rr.* 10, 15.—Every affidavit sworn for the purpose of being used in the course of proceedings should be filed before being used; and if used before filed an undertaking should be given to file as soon as possible. It is the duty of the solicitor of the party on whose behalf the affidavit has been sworn to cause it to be filed.—*Taylor* v. *Gates*, C.A.

3. *Amendment—Jurisdiction—Order made on misrepresentation of facts—Right to rehear—R. S. C.*, 1883, *ord.* 28, *r.* 11.—Where an order which represents the decision of the judge has been finally drawn up, there is no jurisdiction to reconsider it, though it may have been made on a misrepresentation of fact.

Staniar v. *Evans* (35 W. R. 286, 34 Ch. D. 470) questioned.—*Preston Banking Co.* v. *Allsupp*, C.A. 331.

4. *Appeal—Costs—Taxation—Chambers, order in—Divisional Court—Court of Appeal—Judicature Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (1) (4) (5)—*R. S. C.*, 1883, *ord.* 55, *r.* 23.—A summons to review the taxation of a bill of costs is a matter of "practice and procedure," and consequently an appeal from an order on such a summons lies to the Court of Appeal by virtue of section 1 (4) of the Judicature Act, 1894, and not to the Divisional Court.—*Oddy, Re*, C.A. 363.

5. *Appeal—Injunction—Suspension—Application for further suspension—Court to which application should be made.*—A judgment of a court of first instance had been varied by the Court of Appeal, who granted an injunction, but suspended its operation for a certain time.

Held, that an application for a further suspension was rightly made to, and could be disposed of by, the judge of the court of first instance.—*Shelfer* v. *City of London Electric Lighting Co.* (No. 2), C.A.

6. *Appeal—Leave to appeal—Judicature Act*, 1873, *s.* 52—*Judicature (Procedure) Act*, 1894, *s.* 1 (*b*).—The leave of the Court of Appeal or a judge thereof, which is required by section 1, sub-section 1 (*b*), of the Judicature (Procedure) Act of 1894, before an appeal can lie from an interlocutory order made by a judge need not be obtained for an application to vary or discharge an *interim* order made under section 52 of the Judicature Act, 1873.—*Boyd* v. *Bischoffsheim*, C.A. 36.

7. *Appeal—"Matters of practice or procedure"—Jurisdiction of Divisional Court—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-section* 4.—An appeal from the refusal of a judge in chambers to grant an interlocutory injunction is an appeal in a matter of "practice and procedure" within section 1, sub-section 4, of the Judicature Act, 1894, and should be to the Court of Appeal.—*McHarg* v. *Universal Stock Exchange*, Q.B.D. 464.

8. *Appeal—Pauper—Special leave—Security for costs.*—A party who has sued a defendant *in formâ pauperis* in the court below is entitled to appeal as a pauper without either giving security for costs or obtaining special leave so to appeal.—*Biggs* v. *Dagnall*, Q.B.D.

9. *Appeal—Time for appealing—Interlocutory or final order—Summons in administration action—Order for payment to annuitant under will—R. S. C.*, 1883, *ord.* 58, *r.* 15.—In an action for administration in which further consideration had been adjourned, the executors and trustees of the will took out a summons, asking for directions as to whether they were at liberty to make certain payments out of moneys in their hands to an annuitant on account of his interest under the will. North, J., acceded to the application.

Held, that the order of North, J., was interlocutory, and not final, and that, therefore, an appeal from it should be brought within fourteen days.

Salaman v. *Warner* ([1891] 1 Q. B. 734) and *McNair & Co.* v. *Audenshaw Paint and Colour Co. (Limited)* ([1891] 2 Q. B. 502) approved.—*Gardner, Re, Long* v. *Gardner*, C.A.

10. *Appeal—Time for appealing—Special leave—R. S. C*, 1883, *ord.* 58, *r.* 15—*R. S. C.*, 1893, *r.* 27.—Ord. 58, r. 15, of November, 1893, which limits the time for appealing to three months, does not apply to a judgment passed and entered before the rule came into operation.—*Budgett* v. *Budgett*, C.A. 51.

11. *Assignment of debt—Building agreement—Promise by landowner to lend money to builder—Assignment by builder to third person—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 6.—A builder was erecting houses on the defendant's land under an agreement by which the defendant

was to grant him leases of the houses when completed. The builder requiring money to complete the houses, the defendant promised to lend him £250, to be advanced by weekly sums as the work progressed. The houses having been almost completed, the builder, who was indebted to the plaintiffs, by an instrument in writing directed the defendant to pay to the plaintiffs £50 out of the moneys due or to become due from the defendant to the builder, and notice in writing of this instrument was given to the defendant.

Held, that the promise to advance the £250 did not create any "debt or other legal *chose in action*" capable of being assigned within section 25, sub-section 6, of the Judicature Act, 1873.

Judgment of the Divisional Court reversed.—*May* v. *Lane*, C.A. 193.

12. *Attachment—Affidavit in support of—Copy to be served with notice of motion—Form of—R. S. C.*, 1883, *ord.* 41, *r.* 5; *order* 52, *r.* 4.—The copy of the affidavit intended to be used in support of a motion for attachment, and which has to be served with the notice of motion, must state that the order required to be obeyed when served was indorsed with a memorandum pointing out the consequences of neglecting to obey it. If the order when served does not contain such indorsement the service is irregular, and no attachment can issue.—*Stockton Football Co.* v. *Gaston*, Q.B.D.

13. *Attachment—Leave to issue—Notice of motion—Service—No appearance entered—R. S. C.*, 1883, *ord.* 44, *r.* 2; *Ord.* 52, *rr.* 3, 4; *ord.* 67, *r.* 4.—Where the plaintiff knows where to find the defendant, leave to issue an attachment against the defendant will not be granted unless the plaintiff has served the defendant with notice of the motion for attachment, and with copies of the affidavits to be used thereon, even though the defendant has not entered an appearance in the action.—*Bassett, Re, Bassett* v. *Bassett*, CH.D., NORTH J.

14. *Attachment, writ of—Leave to issue—Service of order—Special indorsement—R. S. C., ord.* 41, *r.* 5.—The special memorandum which, under ord. 41, r. 5, is to be indorsed on the copy of a judgment or order served upon a person required to obey the same, is not necessary in the case of a merely prohibitive order—*e.g.*, an injunction to restrain the doing of some act.—*Hudson* v. *Walker*, CH.D NORTH, J.

15. *Bill of sale—Consent to satisfaction—Memorandum of satisfaction—Affidavit to verify signature and consent—Deponent not a solicitor—Ord.* 61, *r.* 26—*Practice—Masters Rules, r.* 25.—On an application in respect of a bill of sale having been made to a master in chambers for his direction to enter a memorandum of satisfaction of the bill, it appeared that the affidavit of verification of signature and consent, although there were no special circumstances, was made by a person who was not a solicitor.

Held, that the mere fact that the deponent of the affidavit is not a solicitor is not of sufficient reason for refusal to enter satisfaction.—*White* v. *Rubery*, Q.B.D.

16. *Chambers—Reference to the court—Appeal—Judicature Act*, 1894 (57 & 58 *Vict.* c. 16), *s.* 1.—In matters of practice and procedure a judge at chambers has now no power to refer a summons to the Divisional Court.

Such a summons cannot be referred to the Court of Appeal, but the proper practice is that the judge at chambers should either make or refuse an order, giving leave to appeal, if necessary.—*Hood Barrs* v. *Cathcart* (*No.* 2), C.A.

17. *Chambers, judge at—"Matters of practice and procedure"—No power of reference—Judicature Act*, 1894 (57 & 58 *Vict.* c. 16), *s.* 1 (4).—Having regard to section 1, sub-section (4), of the Judicature Act, 1894, in matters of practice and procedure, a judge at chambers has now no power of referring a summons either to the Divisional Court or the Court of Appeal; in every such case the proper practice now is for the judge in chambers to adjudicate upon the summons.—*Roberts* v. *Plant*, C.A. 308.

18. *Chambers — Motion to discharge order in chambers—Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 50—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict.* c. 15), *ss.* 1, 4.—The power of a judge of the Chancery Division to hear a motion to discharge an order made in chambers is not affected by the Supreme Court of Judicature (Procedure) Act, 1894.—*Boake* v. *Stevenson*, CH.D. KEK., J., 189.

19. *Commercial Court — Rules of evidence — Transfer of action commenced in Chancery Division to Queen's Bench Division—Judicature Act*, 1894, *s.* 3.—The court established for the trial of commercial causes has no greater power than any other court to dispense with the technical rules of evidence. All its powers are derived under the Supreme Court of Judicature (Procedure) Act, 1894, and the rules made thereunder.

The circumstances under which the court will order the transfer of an action commenced in the Chancery Division to the Queen's Bench Division for trial, considered.—*Baerlein* v. *Chartered Bank of India*, C.A. 692.

20. *Costs—Petition—Summons—Order* 55, *r.* 2 (1).—A petition was presented by a trustee and some of the beneficiaries under a will for payment out of court of part of a sum of over £1,000 paid into court by the railway company, and transfer of the balance to the credit of a partition action in which an order had been made declaring the rights of the parties interested.

Held, that the case fell within the provisions of Ord. 55, r. 2 (1), and the railway company must pay the costs, such costs not to be greater than those properly incurred on a summons adjourned to a judge in chambers and attended by counsel.—*Lancashire and Yorkshire Railway Co., Re*, CH.D. KEKEWICH, J.

21. *Costs—Petition instead of originating summons—Judgment—Order for sale of debtor's interest under* 27 & 28 *Vict.* c. 112, *s.* 4—*R. S. C., ord.* 76, *r.* 1; *ord.* 55, *r.* 9b.—When a judgment creditor in possession had proceeded by petition instead of originating summons under 27 & 28 Vict. c. 112, s. 4, as amended by R. S. C., ord. 55, r. 9b. the costs of proceedings initiated by summons were only allowed.—*Martin and Varlow, Re*, CH.D. NORTH, J. 247.

22. *Costs—Taxation—Copy correspondence—Taxing master's discretion—Statute-barred costs—Allowance to trustees.*—The amount to be allowed for copy correspondence is in the discretion of the taxing master, whose duty it is to ascertain which part of the correspondence, having regard to all the circumstances of the case, is requisite for the proper determination.

Trustees are entitled to be recouped out of the trust estate statute-barred costs which they have properly incurred.—*Budgett* v. *Budgett* (No. 2), CH.D. KEKEWICH, J., 167

23. *Costs—Taxation—Counsels' fees—Three counsel.*—In order to justify the employment of three counsel a case must involve extraordinary complication and difficulty. The chance that all the three counsel may not attend during the whole hearing cannot be taken into consideration, it must be assumed that all three are able to attend throughout.—*Glamorgan County Council* v. *Great-Western Railway Co.*, C.C.R.

24. *Costs—Taxation—Party and party—Immaterial witness—Discretion of taxing-master—Ord.* 65, *r.* 27 (29).—The court will not interfere with the discretion of the taxing-master as to the allowing or disallowing the costs of a witness unless it is satisfied that the taxing-master has not properly considered the matter.—*Oliver* v. *Robins*, CH.D. KEKEWICH, J., 137.

25. *Costs—Taxation—Witnesses expenses—Photographs—Notice to admit—R. S. C.*, 1883, *ord.* 65, *r.* 27 (9) (20) (29) (37) (38).—The costs of witnesses subpœnased but not actually called, are within the taxing-master's discretion; and the taxing-master must exercise his discretion without reference to scales and rules before the Judicature Act, 1873.

Turnbull v. *Janson*, 26 W. R. 815, 3 C. P. D. 264, followed.

Semble, the costs of a photographer called as a witness simply to prove the photographs should not be allowed, unless notice to admit his proof has been given and the other side has refused to admit it.—*East Stonehouse Board* v. *Victoria Brewery Co.*, CH.D. NORTH, J., 585.

26. *Discovery—Inspection.*—Where a party to an action makes an affidavit of documents which he admits relate to the matters in question in the action, but desires to protect some of the contents of those documents from discovery, he is bound to take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question.—*Yorkshire Provident Life Assurance Co.* v. *Gilbert* (*Limited*), C.A.

27. *Discovery — Inspection—Affidavit— Documents annexed—Lunatic — Committee — Final discharge — Documents relating to lunatic's estate.*—Although, under the present practice, documents exhibited to an affidavit are not filed along with the affidavit, that is a mere rule of convenience, and does not affect the right of inspection.

Where, therefore, an affidavit was filed which referred to certain documents as "annexed" thereto, it was held that any person having a right to see the affidavit had a right to see the documents annexed.

The executor of a deceased lunatic asked for an order upon the committee of the lunatic's estate to hand over to him certain documents relating to the lunatic's estate and to the committee's management thereof. The committee had not received a final discharge.

Held, that the application was premature, and must be refused.—*Hinchliffe, Re*, LUN. 82.

28. *Discovery—Inspection — Books of account of rival traders—Application to produce after fully answering interrogatories—R.S.C.* 1883, *ord.* 31, *rr.* 1, 12.—Where the parties to an action are rivals in trade and interrogatories are administered by the one to the other of them, if the court or a judge is satisfied that such interrogatories have been fully and sufficiently answered, and that it would be oppressive and vexatious to compel production of books of account, no order for that purpose will be made.

An action was brought by the Attorney-General at the relation of numerous tramway car manufacturers to restrain a tramways company, incorporated by special Act of Parliament, from manufacturing and supplying rolling stock to other companies by means of capital not authorised to be so applied.

The court allowed the plaintiffs to interrogate as to what capital the defendants were employing in such manufacture, but refused to order the defendants to produce their books of account and documents for the purpose of showing whether the answers which they had given to the interrogatories were true.—*Attorney-General* v. *North Metropolitan Tramways Co.*, C.A.

29. *Discovery—Inspection of documents—Entries in bankers' pass-books—Affidavit of documents disclosing pass-books—Inspection of bankers' books—Jurisdiction to order—Bankers' Books Evidence Act*, 1879 (42 *Vict. c.* 11), *s.* 7.—Where a plaintiff makes an affidavit of documents to which he schedules his banker's pass-books, the defendant is not debarred from obtaining inspection, under section 7 of the Bankers' Books Evidence Act, 1879, of the entries in the banker's books.

Parnell v. *Wood*, 1892, P. 137, distinguished.—*Perry* v. *Phosphor Bronze Co.* C.A.

30. *Discovery — Inspection of documents—Libel—Justification — Particulars — Damages — R. S. C.*, 1883, *ord.* 36, *r.* 37.—In an action for libel where justification is pleaded as a defence, and particulars of such plea delivered, the issues to be tried under that plea are limited to the matters referred to in the particulars;

Consequently, the defendant can only obtain discovery of documents relating to those matters; and the fact that the defendant had also delivered further particulars in support of a plea in reduction of damages, does not enlarge the defendants right of discovery.—*Yorkshire Provident Life Assurance Co.* v. *Gilbert*, C.A.

31. *Discovery — Interrogatories — Allowance by judge—Objection to answer—R. S. C., ord.* 31, *rr.* 1, 6.—A judge by allowing interrogatories under ord. 31, r. 1, does not preclude the party interrogated from taking objections under rule 6 of the same order. Such allowance is in the discretion of the judge from whose order no appeal will be entertained, unless there has been some mistake in principle, or some substantial injustice done.—*Peek* v. *Ray*, C.A.

32. *Discovery — Interrogatories — Relevancy of.*—The plaintiff, the trustee in bankruptcy of C., by his statement of claim alleged that C. and the defendant had carried on business in co-partnership as dealers in landed property, and that certain property conveyed to C. and the defendant as tenants in common had been purchased for the purposes of the said business. The plaintiff claimed a declaration that this property belonged to C. and the defendant as co-partners, and that the defendant was liable to account to the plaintiff for the share of C. therein. The defendant denied that he had carried on business in co-partnership with C., or that the property in question was partnership property. The plaintiff administered interrogatories to the defendant, whereby he asked the defendant, among other things, to give a list of the properties he and C. had been jointly interested in prior to and subsequent to a certain date, and also to state whether there were any, and, if so, what, written articles of agreement between C. and the defendant with reference to the purchase of landed properties.

Held, that these interrogatories were not relevant to the issue, and ought to be disallowed.—*Kennedy* v. *Dodson*, C.A. 259.

33. *Discovery — Interrogatories — Sufficiency of answer—Legal personal representative—Knowledge of solicitor and banker of testator—Inquiry of solicitor or banker.*—In an action against an executor, to recover from the testator's estate moneys paid to the latter in alleged improper exercise of a power more than twenty years before action brought, the executor is not bound to make inquiry of the solicitor or banker to his testator as to the dealings of his testator with the moneys, where it does not appear that the inquiry will result in obtaining information with respect to which the executor is interrogated. —*Alliott* v. *Smith*, CH.D., KEKEWICH, J., 597.

34. *Dismissal of action for want of prosecution—Order for new trial—Default in entering action for new trial.*—Where the Court of Appeal has ordered a new trial, and the party who has obtained the order has not entered the action for trial, the Court of Appeal has no original jurisdiction to entertain a motion to dismiss the action for want of prosecution.

The proper place to make the application is at chambers.—*Robarts* v. *French*, C.A., 258.

35. *Evidence—Documents produced by witness no party to proceedings—Putting in documents* en bloc *or* seriatim—*Referee's report—Motion to vary for rejection of evidence—New trial, analogy of—Order* 39, *r.* 6.—Where documents are produced by a witness who is not a party to the proceedings, the proper course is for an adjournment to be made to enable the parties to ascertain which of those documents are material. The parties are not entitled to put in the whole of the documents *en bloc*, or to ask the witness to produce the documents *seriatim*, and question him thereon.—*Maplin Sands, Re*, C.A.

36. *Evidence—Foreign defendant—Commission to take evidence abroad—Defendant temporarily within jurisdiction.*—The defendant, a foreigner domiciled in Canada, was served with the writ in the action while he was on a temporary visit to England. Subsequently to the issue of the writ negotiations were entered into for a settlement, and the defendant again came to England, but the negotiations fell through and the defendant returned to Canada.

Held, that the defendant was entitled to a commission to Canada to take his evidence.

Ross v. *Woodford*, 42 W. R. 188, [1894] 1 Ch. 38, approved.—*New* v. *Burns*, C.A. 182.

37. *Evidence—Judgment debtor—Examination as to means—Allowance for expenses—Ord.* 37, *r.* 9—*Attachment—Service of copy of affidavits—Ord.* 52, *r.* 4.—A judgment debtor attending before a master for examination under ord. 42, r. 32, is not, by virtue of ord. 37, r. 9, entitled to payment of his expenses in accordance with the scale of allowances applicable to witnesses, but is only entitled to such sum for his expenses as the master may consider reasonable.

Where, on an application for a writ of attachment, the party showing cause took the objection that he had not been served, under ord. 52, r. 4, with a copy of the affidavits to be used in the application, and the judge allowed an adjournment to enable the party to answer them, and on the adjourned hearing ordered a writ of attachment to issue, the Court of Appeal refused to set aside the writ for non-compliance with ord. 52, r. 4.—*Rendell* v. *Grundy*, C.A. 50.

38. *Foreclosure — Debenture-holder — Originating summons.*—A foreclosure order can be made at the instance of debenture-holders on an originating summons, and a writ is not necessary in order to enable the court to make such an order.

Sadler v. *Worley*, [1894] 2 Ch. 170, commented on.—*Oldrey* v. *Union Works*, CH.D. KEKEWICH, J.

39. *Foreclosure—Delivery of possession—Ex parte application.*—Where an originating summons for foreclosure does not ask for delivery of possession the subsequent order for foreclosure absolute and delivery of possession, will not be made *ex parte*.—*Le Bas* v. *Grant*, CH.D. NORTH, J.

40. *Foreclosure—Judgment—Several defendants—One time to redeem—Form of order.*—In the case of a judgment in a foreclosure action, where, in addition to the mortgagor, there are several defendants who have charges on the mortgaged property subsequent to the plaintiff's mortgage, and one time is given for the defendants or any of them to redeem the plaintiff, there should be added to the form of order, No. 22, in 2 Seton, 5th ed., p. 1628, a direction that the defendants or defendant so redeeming the plaintiff are or is to be at liberty to apply for the addition to the judgment of any further amounts and directions consequent thereof which by reason of such redemption the court may think just, and that on such application the defendant so applying is not to give the plaintiff notice thereof.—*Biddulph* v. *Billiter-street Offices Co.*, CH.D. NORTH, J.

41. *Garnishee—Money in hands of sheriff—Judgment for payment of money into court—Modes of enforcing—Fraudulent breach of trust—Debt or liability incurred—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 30. *sub-section* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2—*R. S. C.*, 1883, *ord.* 42, *rr.* 3, 4; *ord.* 45, *r.* 1.—Garnishee proceeding will not lie upon an order for payment of money into court. Where garnishee proceedings are available, money in the hands of the sheriff, the proceeds of an exhibition levied by him, may be attached subject to the rights of the debtor's trustee in bankruptcy under the Bankruptcy Act, 1890, s. 11, sub-section 2.

Costs incurred in an action relating to fraudulent breach of trust, and ordered to be paid to the trustee, are not "a debt or liability incurred by means of any fraudulent breach of trust" within the meaning of the Bankruptcy Act, 1883, s. 30, sub-section 1, and will, therefore, be released by the trustee's discharge in bankruptcy, or by any composition equivalent thereto.—*Greer, Re, Napper* v. *Fanshawe*, CH.D. CHITTY, J. 547.

42. *Injunction—Arbitration—Jurisdiction—Action impeaching agreement containing arbitration clause—Liverpool Corn Trade Association Rules—Judicature Act*, 1873, *s.* 25, *sub-section* (8).—The court has jurisdiction to grant an injunction to restrain arbitration proceedings until the trial of an action in which the agreement containing the arbitration clause is itself impeached.

North London Railway Co. v. *Great Northern Railway Co.* (31 W. R. 490, 11 Q. B. D. 30) and *Wood* v. *Lillies* (61 L. J. Ch. 158, 40 W. R. Dig. 8) explained and distinguished.

Mylne v. *Dickenson* (Coop. Ch. Rep. 195) and *Maunsell* v. *Midland Great Western (Ireland) Railway Co.* (11 W. R. 768, 1 H. & M. 130) approved and followed.—*Kitts* v. *Moore & Co.*, C.A. 84.

43. *Interpleader — Sheriff — Costs.* — Where the sheriff obtains an interpleader order, and the claim made by the third party fails, the sheriff is entitled to have his costs of the interpleader order against

the execution creditor, and the latter has his remedy over for them against the unsuccessful claimant.

Smith v. *Darlow* (32 W. R. 665, 26 Ch. D. 605) followed.—*Todd* v. *McKeevir*, C.A. (Ir.).

44. *Interpleader—Sheriff—Goods seized under fi. fa.—Title of claimant admitted by execution creditor—Delivery of goods by sheriff to claimant—1 & 2 Will. 4, c. 58, s. 6—Common Law Procedure Act, 1860—Ord. 57, r. 1 (b); rr. 16, 17.*—A sheriff, having elected to deliver over goods taken in execution to a claimant whose title to them was properly admitted by execution creditor, sought the protection of the court by means of an interpleader summons.

Held, that the sheriff having thought proper to withdraw from possession, had by so doing excluded himself from the interference and protection of the court.

Kirk v. *Almond* (2 L. J. N. S. Ex. 13) followed. —*Moore* v. *Hawkins*, Q.B.D. 235.

45. *Judgment—Interest not capable of being taken in execution—1 & 2 Vict. c. 110—27 & 28 Vict. c. 112.*—The statute 27 & 28 Vict. c. 112, applies to an interest in land which is incapable of being taken in execution, and a judgment does not operate as a charge upon the land of the debtor until the requirements contained in the statute have been complied with.—*Hood Barrs* v. *Cathcart*, CH.D. NORTH, J. 586.

46. *Judgment — Mortgage — Receiver — Action by mortgagee for mortgage debt—Writ—Special endorsement—R. S. C., ord. 14.*—A mortgagee is entitled to issue a specially-indorsed writ in an action for the mortgage debt, and to apply for judgment under order 14, notwithstanding the fact that a receiver had been previously appointed at the instance of the mortgagee; but on such application leave to defend must be granted to the mortgagor, if it appears that there is a *bonâ fide* dispute as to what sum is due to the mortgagee.

Poulett v. *Hill*, 41 W. R. 503, [1893] 1 Ch. 277, explained.—*Lynde* v. *Warthman*, C.A.

47. *Judgment—Specially-indorsed writ—Application for final judgment—Difficult questions of law involved—R. S. C., ord. 14, r. 1.*—Liberty to mark final judgment on a specially-indorsed writ will not be given where difficult questions of law or fact are in issue.—*Goodchild* v. *Duncan*, Q.B.D. (Ir.).

48. *Liverpool Court of Passage—R. S. C., 1883, ord. 14—Application—Passage Court Rules, 1876, r. 1.*—By rule 1 of the Passage Court Rules, 1876, the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, and such orders and rules as are made, or may hereafter be made in pursuance thereof, shall extend and be applied to all causes and actions in the Passage Court, but so far only as such provisions, orders, and rules respectively are or may be applicable thereto.

Held, that, as there was no machinery in the Passage Court for administering the provisions of order 14, that order was not "applicable to" the Passage Court within the meaning of the above rule.—*Spelman, Ex parte*, C.A. 609.

49. *Mayor's Court—Want of jurisdiction—Appearance by defendant—Waiver of objection—Prohibition.*—Where an action has been commenced in the Mayor's Court the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is.—*Lee* v. *Cohen*, C.A.

50. *Originating summons—Order made in proceedings commenced by originating summons—Service out of the jurisdiction—R. S. C., 1883, ord. 16, r. 40; ord. 55, r. 35.*—The court has no power to order service out of the jurisdiction, upon a person not a party to an action, of notice of an order made in an action commenced by originating summons.

The proper procedure is for the party having the conduct of the proceedings to give notice to the absent person of the proceedings in the action, and then, if such person fails to appear, upon proof that such notice has been given, the court will dispense with service upon him, under ord. 55, r. 35.—*Cliffe, Re, Edwards* v. *Brown*, C.A. 436.

51. *Parties—Compromise—"Proceedings concerning a trust"—Power of court to enforce—R. S. C., ord. 16, r. 9 (a)—Company.*—Three actions were brought by the holders of first mortgage bonds issued to provide funds for the completion of a railway in course of construction, the proceeds of the bonds being in the hands of trustees. The first and third actions were brought by a substantial minority of the bondholders, which minority asked for a return of such proceeds of the bonds as remained in the hands of the trustees, on the ground that the completion of the railway had become practically impossible, and, consequently, the purpose for which the bonds had been issued had failed. The second action was brought by a small majority of the bondholders, who desired to have the remaining proceeds of the bonds expended in continuing the construction of the railway.

Pending the trial of the actions, a petition was presented by the plaintiffs in the first action asking the sanction of the court to a proposed scheme for the compromise of the litigation.

Held (reversing North, J.), that the court, having power under rule 9*a* of order 16 to approve a compromise in the absence of some of the persons interested, and in this case the proposed compromise being beneficial, the scheme would be sanctioned, subject to a sum being set apart to meet the claims of the dissentient bondholders.—*Foreign, American, and General Investment Trust Co.* v. *Sloper*, C.A.

52. *Parties—Joinder of plaintiffs—Breaches of contracts with different plaintiffs—Action by shippers upon similar bills of lading—Ord. 16, r. 1; ord. 18, rr. 1, 8; ord. 70, rr. 1, 2.*—Ord. 16, r. 1, which provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative," does not authorize the joining under one writ of different and distinct causes by various plaintiffs.

Where, therefore, goods were shipped for a particular voyage on the same vessel, the holders of similar bills of lading cannot combine as plaintiffs in one action against the shipowners for damages for short delivery, since the causes of action arise out of separate and distinct transactions.

Decision of the Court of Appeal (42 W. R. 133 [1893] 2 Q. B. 412) reversed.—*Smurthwaite* v. *Hannay*, H.L. 113.

53. *Parties—Joinder of defendants—Joint contractors—Failure to serve one joint contractor after reasonable efforts—Stay of proceedings—R. S. C. ord. 16, r. 11.*—In an action against several joint contractors, all of whom were within the jurisdiction, the plaintiff failed, after making all reasonable efforts to serve one of such joint contractors.

Held, that an order could not be made to stay the action.—*Robinson* v. *Geisel*, C.A.

54. *Parties—Joinder of defendants—Shipowner—Freight—Declaration of lien—Action against consignees — Joinder of shippers — Counter-claim—R. S. C., ord.* 16, *r.* 11—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 493-496.—The owners of a cargo of timber shipped it under a bill of lading for consignment to agents for sale. The shipowner warehoused the cargo with a dock company under the provisions of the Merchant Shipping Act, 1894, with a notice that it was to remain subject to a lien for freight. The consignees deposited the amount of freight claimed with the dock company, with a notice to retain it. The shipowner brought an action against the consignees claiming a declaration that he was entitled to a lien on the sum so deposited and an order that it should be paid to him. The shippers were desirous of making a claim against the shipowner for damage to the cargo and for short delivery. The defendants (the consignees) and the shippers joined in an application that the shippers might be added as defendants under ord. 16, r. 11.

Held, that the shippers might be added as defendants.—*Montgomery* v. *Foy*, C.A. 691.

55. *Parties—Third-party procedure—Indemnity—Ship—Collision—R. S. C.,* 1883, *ord.* 16, *r.* 48.—Plaintiffs having brought an action *in rem* for damages by collision with the defendant's steamer, the defendant's served a third-party notice on the repairers of the defendant's ship, in whose control the defendant's ship was alleged to be at the time of the accident, and claimed to be indemnified by them against liability. The third parties appealed under protest, and the defendant's applied for directions as to the mode of procedure.

Held, that the third-party notice should be set aside and the application for directions dismissed, as (without deciding whether the defendants would have a right of action against the third parties in the event of the defendant's vessel being found to blame) there was no contract, express or implied, with the third parties involving an indemnity with ord. 16, r. 48.—*Jacob Christensen, The,* P.D. & AD.D.

56. *Parties—Third-party procedure—Motion for directions—Liberty to third party to defend—Costs—Form of order—R. S. C., ord.* 16, *rr.* 52, 53.—Where an action was brought against a sheriff for wrongfully seizing the goods of the plaintiff, the sheriff being indemnified by the execution creditor who was brought in as third party, the court for directions made an order that the third party be at liberty to defend by the same solicitor and counsel as the defendant, and should be jointly liable with defendant for the costs of the action, and to be entitled to only one set of costs with defendant as against plaintiff, and to be bound by any judgment in favour of plaintiff; and that no further pleadings be delivered in the action.

Norris v. *Beazley*, 46 L. J. C. P. 515, followed.—*Macbeth* v. *Buller*, Q.B.D. (Ir.).

57. *Parties—Third-party procedure—Notice served by one defendant on another—Mode of objection—Application to set aside notice—Summons for directions—R. S. C.,* 1883, *ord.* 16, *rr.* 52, 55.—Where a third-party notice is served by one defendant on another under ord. 16, r. 55, and the defendant served objections to the question between himself and his co-defendant being tried in the action, his proper course is not to apply to have the notice set aside, but to take his objection on the summons for directions under rule 52.—*Baxter* v. *France,* C.A. 227.

58. *Parties—Third-party procedure—Refusal to give directions as to trial—Effect of—Difficult question of indemnity—Discretion—Ord.* 16, *rr.* 52, 55.—The object of the third-party procedure is to avoid multiplicity of actions, and to have all questions arising in the transaction between the parties determined in the action; and, therefore, where a part of the claim by the defendant against the third party is not a claim for contribution or indemnity, and cannot, therefore, be tried in the action, the judge, in the exercise of his discretion, ought to refuse to give directions under ord. 16, r. 52.

The effect of the refusal to give directions is to dismiss the third party from the action.

Where a difficult and complicated question of contribution or indemnity is raised by the third-party notice, the judge, in the exercise of his discretion, may refuse to give directions.—*Baxter* v. *France* (*No.* 2), C.A. 341.

59. *Payment of money into court—Liability not denied—Verdict for smaller sum—Power to order balance to be paid back to defendant—R. S. C.,* 1883, *ord.* 22, *r.* 5 (b).—Where the defendant does not deny liability, but pays a sum of money into court, and at the trial the jury find a verdict for the plaintiff for a smaller sum, the judge has power, under ord. 22, r. 5 (*b*), to order that the sum awarded by the jury be paid out to the plaintiff, and that the balance be paid to the defendant.

Dunn v. *Devon and Exeter Constitutional Newspaper,* 38 S. J. 351, commented on.—*Gray* v. *Bartholomew,* C.A. 177.

60. *Payment into court—"Money in the hands of trustees"—R. S. C.,* 1883, *ord.* 55, *r.* 3 (d)—*Palatine Court of Lancaster, ord.* 48, *r.* 3 (d).—Upon motion under ord. 48, r. 3 (*d*) of the Palatine Court of Lancaster [corresponding with R. S. C., 1883, ord. 55, r. 3 (*d*)], the court refused to order a trustee to pay into court trust moneys which had been received by him and for which he was responsible, but which were not shown to be then actually in his hands.

In re Chapman, 54 L. T. N. S. 13, 34 W. R. Dig. 90, disapproved.—*Nutter* v. *Holland,* C.A. 18.

61. *Payment into court—Satisfaction of defendant's counter-claim—Order* 22, *r.* 9—*Supreme Court Funds Rules,* 1886, *r.* 30—*Printed form of request for lodgment of money.*—The plaintiff in an action desired to pay a sum of money into court in satisfaction of a claim made in two paragraphs of the defendant's counter-claim, but the Paymaster-General refused to issued the necessary direction to the Bank of England to receive the money on the ground that the printed form of request for lodgment of money authorized for use in the pay office did not contain any statement applicable to the circumstances of the case. On a motion *ex parte* on behalf of the plaintiff for directions as to the payment of the money into court:

Held, that the plaintiff was entitled to make the payment into court, and that a statement which was applicable to the circumstances of the case should be inserted in the printed form of request.—*Hutchinson* v. *Barker,* CH.D. NORTH, J.

62. *Payment out of court—Trustee Relief Act—Petiton—Creditor's action—Further consideration.*—Upon the further consideration of a creditor's action for inquires as to incumbrances upon, and for distribution of funds paid into court under the Trustee Relief Act, an order will be made for payment out of the funds to the persons found entitled thereto, without a petition being presented for that purpose.—*Pullen* v. *Isaacs,* CH.D. NORTH, J.

63. *Pleading—Pleadings after reply—Application for—Notice of such application—R. S. C., ord.* 23, *r.* 2.—An application under ord. 23, r. 2, for leave to plead a special rejoinder to a reply should be made on notice.—*Monck* v. *Smythe*, CH.D. V.C. (Ir.).

64. *Receiver—Earnings of theatre—Equitable execution—Possession—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25 (8).—A theatre company whose real estate consisted exclusively of the equity of redemption of a theatre of which they were the occupying lessees, and where they were carrying on their business, had a judgment debt recovered against them.

Held (1), that the judgment creditor could not have a receiver appointed to receive by way of equitable execution the moneys paid by the public for entrance to the theatre; but (2) that a receiver could and ought to be appointed of the rents and profits of the theatre itself (as distinguished from the theatre business), and that the company should deliver up possession of the theatre to the judgment creditor without prejudice to the rights of the mortgagee.—*Cadogan* v. *Lyric Theatre Co.* C.A.

65. *Receiver—Equitable execution—Equitable reversionary interest in proceeds of sale of land—Jurisdiction—Judicature Act*, 1873 (36 & 37 *Vic,. c.* 66), *s.* 25, *sub-section* 8.—Since the Judicature Acts the court has jurisdiction to grant equitable execution by the appointment of a receiver of an equitable reversionary interest in personalty.—*Tyrrell* v. *Painton*, C.A. 163.

66. *Receiver—Equitable execution*—Ex parte *application.—Jurisdiction.*—A receiver may be appointed by way of equitable execution, upon an *ex parte* application, where the circumstances are exceptional.—*Minter* v. *Kent Land Society*, C.A.

67. *Receiver—Rents and profits of real estate—Recognizance—Default—Liabilitiy of sureties—Extent—Fire policy-moneys—Income of real estate sold—Personalty received for repairs of real estate—R. S. C.*, 1883, *Appendix L., Form* 21.—A surety for a receiver is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal and of the appointment of a new receiver in his place.

Dawson v. *Raynes*, 2 Russ. 466, followed.

A receiver of the rents and profits of real estate having made default,

Held, that the sureties were liable to the above extent for (*a*) money received on a policy of fire insurance on buildings forming part of such real estate; (*b*) dividends on funds in court, being proceeds of sale of real estate liable to be reinvested; and (*c*) pure personalty paid out of court to the receiver for repairs of real estate, and not so applied.—*Graham, Re, Graham* v. *Noakes*, CH.D. CHITTY, J., 103.

68. *Receiver and manager—Continuation of receiver as manager—Form of minutes on motion for judgment.*—Where, on an interlocutory order, a receiver and manager has been appointed, as receiver generally, and as manager until a fixed date, upon motion for judgment in the action, the minutes of judgment should not purport to continue the receiver, but should merely extend the time during which the receiver may act as manager, as he is still in office as receiver by virtue of the former order.—*Davies* v. *Vale of Evesham Preserves*, CH.D. KEKEWICH, J., 646.

69. *Trial—Libel action—Plea of justification—Particulars—Order XXXVI., r.* 37.—Where the defence to an action for libel is justification, and particulars are delivered by the defendants of the matters on which they rely in support of their plea of justification, until some order is made for further particulars the effect of delivering the particulars is to narrow the matters in question in the action to the particulars so delivered; and the defendants' right to have discovery and inspection of the plaintiffs' documents is limited to those matters which are relevant to the questions in issue as cut down by the particulars.—*Yorkshire Provident Life Assurance Co.* v. *Gilbert* (*Limited*), C.A.

70. *Trial—Matters assigned to Chancery Division—Action for dissolution of partnership—Allegation of fraud against defendant—Right of defendant to have issues of fraud tried before jury—Ord.* 36, *rr.* 1, 3, 6, 7.—In an action for dissolution of partnership the plaintiffs by their statement of claim made numerous charges of a serious nature affecting the character of the defendant, including charges of fraud, maintenance, and perjury. The defendant selected five of the most serious of these charges, and applied to the court, asking that issues should be directed to be tried before a judge and a special jury.

Held, that the real issue in the action was whether the defendant had been guilty of such conduct as to render a dissolution of the partnership necessary, and therefore that, even if the defendant should succeed on all such issues, it would not necessarily follow that the partnership ought not to be dissolved, and that the application must accordingly be refused.—*Ehrmann* v. *Ehrmann* (No. 2), CH.D. STIRLING, J.

71. *Writ—Concurrent writ—Service out of the jurisdiction—Irregularity in service—Omission of word "concurrent"—Necessary or proper party—Different cause of action—R. S. C.*, 1883, *ord.* 6, *rr.* 1, 2; *ord.* 11, *r.* 1 (a) *to* (g).—In order to obtain leave to serve a defendant out of the jurisdiction with a "concurrent" writ under R. S. C., 1883, ord. 6, r. 2, and ord. 11, r. 1 (g), it must be shown that the relief asked against him is connected with, though not of necessity the same as, the relief asked against the defendant within the jurisdiction.

The defendant within the jurisdiction must be duly served before service can be allowed on the party out of the jurisdiction (*Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Co.*, 33 W. R. 162, followed); but omission of prior service on the defendant within the jurisdiction can be got over by the court allowing a fresh issue of a "concurrent" writ out of the jurisdiction, and thus beginning again "*de novo*," as can also irregularities in the service of the "concurrent" writ out of the jurisdiction, such as omission of the word "concurrent" in the copy served, or irregularities in the affidavit in support of the application for service out of the jurisdiction, such as its failing to state that in the belief of the deponent the defendant sought to be so served is a "necessary or proper party" to the action.—*Collins* v. *North British Insurance Co.*, CH.D. KEKEWICH, J.

72. *Writ—Service—Service on company—Unregistered company—R. S. C., ord.* 9, *r.* 8.—Service of a writ of summons upon a company registered under the Companies Act, 1862, must be effected as provided by section 62 of that Act, but this does not apply to the case of a company not registered and having no registered office.—*O'Neill* v. *St. Brigid's Well Co.*, Q.B.D. (Ir.)

73. *Writ—Service out of jurisdiction—Application to set aside order—Ord.* 12, *r.* 30—*Judicature Act,* 1894 (57 & 58 *Vict. c.* 16), *s.* 1.—An application by a defendant to set aside an order of the judge at chambers, made *ex parte*, giving leave to serve the writ of summons out of the jurisdiction, must now be made at chambers, and not by motion, either in the Divisional Court or in the Court of Appeal. —*Black* v. *Dawson*, C.A. 435.

74. *Writ—Service out of the jurisdiction—Proper party to action brought against person within the jurisdiction—Action of tort—R. S. C.*, 1883, *ord.* 11, *r.* 1 (g).—Ord. 11, r. 1 (*g*), which allows service out of the jurisdiction of a writ of summons whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction, applies to actions of tort.

Per Lord Esher, M.R.—The court, in exercising the jurisdiction conferred on it by order 11, ought only to allow rule 1 (*g*) to be applied to an action of tort in extreme cases.—*Williams* v. *Cartwright*, C.A. 145.

75. *Writ—Service out of the jurisdiction—Irregularity—R. S. C.*, 1883, *ord.* 11, *r.* 4; *ord.* 2, *r.* 5; *ord.* 70, *r.* 1.—On application for leave for service of a writ out of the jurisdiction, the omission of an affidavit, in accordance with ord. 11, r. 4, that there is a good cause of action is not material when the court is able to see that such is the case.

The indorsement prescribed by Form No. 5 in Appendix A to the Rules of the Supreme Court, for a writ to be served out of the jurisdiction, should be placed upon a writ amended so as to be served out of the jurisdiction. The omission of such an indorsement, however, is only an irregularity, in spite of which the service may be treated as valid under ord. 70, r. 1.—*Dickson* v. *Law*, CH.D. NORTH, J., 596.

76. *Writ—Specially-indorsed writ—Application for judgment—Amendment of indorsement after summons taken out—R. S. C.*, 1883, *ord.* 3, *r.* 6; *ord.* 14, *r.* 1.—On the hearing of a summons under order 14 in an action on a cheque the defendant objected that the writ was not specially indorsed, by reason of its not containing a statement that notice of dishonour had been given. The summons having been adjourned, the plaintiff without leave amended the indorsement by adding a statement that notice of dishonour had been duly given, and at the adjourned hearing the district registrar made an order for judgment.

Held, that the plaintiff had rightly amended the indorsement, and that the district registrar had jurisdiction to make the order.—*Roberts* v. *Plant*, C.A. 308.

See also ADMINISTRATION, 8; ADMIRALTY, 3, 4, 6, 8; BANKRUPTCY, 28; COMPANY, 22, 23, 31, 36, 37; CONTEMPT; COUNTY COURT, 3, 5; HABEAS CORPUS; LUNACY, 3-5; MARRIED WOMEN, 1, 10; PARTNERSHIP, 4-6; SOLICITOR, 13; TRUSTEE, 3, 4, 8.

PRINCIPAL and AGENT:—

Personal liability of agent—Money obtained by duress—Payment by agent to principal before notice of duress—Receiver—Debenture trust-deed.—A trading company executed a trust-deed to secure payment of debentures; the deed empowered the trustees to enter into possession of the property comprised therein, to carry on the business and appoint managers and clerks, and to use the name of the company; it also provided that the trustees might appoint a receiver of the property thereby charged, in same manner as if the trustees were mortgagees within the Conveyancing Act, 1881, and it was further expressly provided that every receiver so appointed should have power to exercise any of the powers previously conferred by the deed upon the trustees; and was to be deemed the agent of the company, and as such to be in the same position as a receiver appointed by a mortgagee under the Conveyancing Act, 1881.

Held, that a receiver appointed by the trustees under this deed and carrying on the company's business in their name, was a mere agent, and that in so doing he did not incur any personal liability. —*Owen* v. *Cronk*, C.A.

See also COMPANY; MORTGAGE, 10; STOCK EXCHANGE, 1.

PRINCIPAL and SURETY:—

1. *Banker and customer—Release of surety—Giving time—Retiring partner—Partnership debt—Covenant to indemnify.*—In 1885 R. and his three partners, who were jointly and severally indebted to the respondent banking company in a sum of over £50,000, dissolved partnership. By the deed of dissolution R. was to cease to carry on the business and the other members were to continue to do so, the debts of the firm were to be paid by the new partnership, and the members thereof covenanted with R. to indemnify him against those debts, provided always that R. should not be entitled to require them to pay, so long as he was kept indemnified. The bank were aware of this. The new firm opened a new account, but the old debt was kept distinct. In 1889 and 1890 the bank agreed to allow the new firm additional overdrafts upon certain terms, but there was in fact no agreement to give time or to alter the arrangements as to the existing liability for the amount of the old debt still unpaid.

R. was also a shareholder in the respondent banking company, and upon the new firm stopping payment the bank claimed a lien on R.'s shares in respect of the balance of the old debt remaining due.

Held (affirming, on different grounds, the decision of the Court of Appeal), that the terms upon which the balance of the old debt was recoverable underwent no alteration, and, consequently, R. was still liable.

Quære, whether the proviso to the covenant of indemnity limiting the rights of the surety prevented the application of the ordinary rule.

Semble, where co-debtors arrange, as between themselves, either at the time when the debt was contracted or afterwards, that one of them shall only be liable as surety, the creditor, after he has notice thereof, must do nothing to prejudice the interest of the surety in any dealing with the principal debtor, or he will thereby release the surety.

Oakeley v. *Pasheller*, 10 Bli. N. S. 548, 4 Cl. & Fin. 207, and *Overend, Gurney, & Co.* v. *Oriental Financial Corporation*, L. R. 7 H. L. 348, discussed. —*Rouse* v. *Bradford Banking Co.*, H.L. 78.

2. *Contribution—Co-surety—Mortgage—Payment off of mortgage debt by surety—Right to prove against estate of co-surety—Mercantile Law Amendment Act,* 1856 (19 & 20 *Vict. c.* 97), *s.* 5.—A surety who, on default being made by the mortgagors, has paid off a mortgage debt, is entitled to the benefit of a claim for the whole debt made by the principal creditors against the estate of a co-surety, although he can only actually recover the proportion due to him from his co-surety.

Judgment of Kekewich, J., 42 W. R. 618, affirmed.

Ex parte Stokes, De G, Bkcy. Rep. 618, followed. —*Parker, Re, Morgan* v. *Hill*, C.A. 1.

3. *Counter security given by principal to surety—Insolvency of surety—Rights as to counter security.*—R. gave a bond to M. to secure the performance of certain duties by F., and F. assigned to R. a policy of assurance of less value than the bond by way of counter-security to R. F. failed to perform the duties and the entire amount of the bond became payable by R. to M. R. died and his estate was insolvent. F. was willing to assign to M. the equity of redemption in the policy and M. was willing to release R.'s estate on obtaining an assignment of the policy from F. and R.'s personal representative.

Held, that M. was entitled to the assignment from R.'s personal representative on R.'s estate being released, and that R.'s personal representative should join in the assignment.—*McMahon* v. *Featherstonhaugh* (No. 2), CH.D. V.C. (Ir.).

See also GUARANTEE; INSURANCE, 1.

PROBATE:—

1. *Administration — Creditor — Limited grant refused—General grant to creditor.*—Upon a motion by a creditor for a limited grant of administration, the court, while thinking that in this particular case it might be a convenient course to make a limited grant to the creditor, declined to depart from the practice in such cases, which requires that a creditor who applies for administration shall take a general grant.—*Sheather, in goods of*, P.D. & AD.D.

2. *Administration—Lunacy of sole administrator—Practice—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116.—Where letters of administration have been granted to a next of kin, and such next of kin becomes insane, the practice is: (1) where lunatic so found, grant to committee for use of lunatic so long as he shall remain so (first grant not impounded); (2) lunatic not so found, but person appointed with general powers under section 116 of the Lunacy Act, 1890, such person treated in same way as committee; (3) person appointed with only specified powers under section 116, not entitled to the grant, and grant made, in this case, to another of the next of kin of the deceased for the use of the lunatic administrator (the first grant being impounded).—*Cooke, In goods of*, P.D. & A.D. 428.

3. *Administration—Will—Beneficiary—Administration with will annexed granted to surviving beneficiary.*—By her will, the testatrix gave all her property to her friend Jane C. B. "for her own use, and also for the education, maintenance, and placing out in business of her son Harry E. B."; but in case the said Jane C. B. should die during the minority of the said Harry E. B., the testatrix directed "the money arising from all the property to be laid out or invested" by her executor "for his use and benefit until he shall attain the age of twenty-one, when whatever remains shall be handed over to him." Jane C. B. died before the testatrix, but after the said Harry C. B. had attained twenty-one. The executor renounced, and, there being no known next of kin of the testatrix, and the Queen's Proctor declining to interfere, the court granted administration with the will annexed to Harry E. B., the surviving beneficiary.—*Arms, Re*, P.D. & A.D.

4. *Contentious proceedings—Compromise—Costs.*—In dealing with costs in cases of compromise of contentious probate proceedings there are three courses which may be adopted: 1. The court may form its opinion of the reasonableness or unreasonableness of the opposition from the course of trial and the evidence actually given before the compromise is arrived at; (2) The court may refuse to make any specific order as to costs; (3) in an certain class of cases the court may itself inquire into the reasonableness of the opposition by calling witnesses or otherwise.—*Ormsby* v. *Good*, P.D. (Ir.).

5. *Practice—Proof in solemn form—Subsequent action—Knowledge of prior proceedings—Right to intervene—Frivolous and vexatious action.*—In the probate court a person is bound by proceedings to which he is no party only when he was cognizant of, and capable of making himself a party to, such proceedings.

The plaintiff, who knew of prior proceedings in which a will of 1883 was proved in solemn form in an action in which undue execution, unsoundness of mind, and undue influence was alleged, now alleged that will to be a forgery, and set up a prior will of 1876, the contents of which had come to his knowledge since the first trial. On a motion by the defendants, the executors of the will of 1883, to dismiss this action as frivolous and vexatious, the plaintiff filed an affidavit of an expert in handwriting, in support of the allegation of forgery, and, in support of the will of 1876, affidavits by himself, by a law stationer's clerk, and by a former clerk to a solicitor in whose office the will of 1876 was alleged to have been prepared and executed. The solicitor denied all knowledge of the will, which, however, the plaintiff alleged had been fraudulently suppressed by the defendants.

The court refused the application to dismiss the action as frivolous, and held that the plaintiff was not bound by the prior proceedings.—*Young* v. *Holloway*, P.D. & AD.D. 429.

6. *Will—Codicil—Document not referred to as existing.*—A testator devised property to trustees in trust to provide an annuity of £3,000 for his wife, setting apart certain funds which they would find "noted" by him. He made two codicils confirming his will. After his death a document was found in his handwriting purporting to be instructions to his executors, and containing the words, "The stocks to be set aside to pay my wife the £3,000 per annum," followed by a list of securities, the total income of which was stated at £3,000. The earliest date which could be attributed to this document was after the will but before the codicils.

Held, that as the will did not refer to the document as existing, the codicils had not the effect of incorporating it with the documents of which probate was to be granted.—*Durham* v. *Northern*, P.D. & AD.D.

7. *Will—Codicils—Identical words of gifts and legacies—Cumulative or substitutional—Revocation.*—A testator by his will appointed his wife and brother executors, and gave certain specific articles to his wife, and gave the residue, subject to her life interest therein, as to £5,000, to A. and remainder to three other sisters. After the will his wife was confined in an asylum, and subsequently he made a codicil revoking the appointment of his wife and brother as trustees and executors and appointing others, giving instructions as to his burial and monument, bequeathing pecuniary legacies, revoking the gift of specific articles to his wife and giving them to his nieces, and reducing the income of his wife in the residue to £300, and giving the residue, subject to the gift of £5,000

thereof to A., to his two brothers. The wife died, and he made a second codicil, containing no reference to the first codicil, but only to the will, but the language was almost identical with the first codicil, as it was prepared by altering a draft of it. It, however, omitted the revocation of the gift of specific articles to the wife and the gift of the residue to his wife for life and £5,000 to A., but directed his trustees to set aside £5,000 out of residue for A., and the amount of one pecuniary legacy was altered after engrossment.

Held, that the testator intended to revoke the first codicil and substitute the second for it, and that probate should go of the will and second codicil only.—*Chichester* v. *Quatrefages*, P.D. & A.D. 667.

8. *Will—Execution—Position of signature—Wills Amendment Act*, 1852 (15 & 16 *Vict. c.* 24), *s.* 1.—The deceased, having obtained a form of will of a married woman lithographed on the first side of a sheet of foolscap paper, filled in her own name and a description of her separate property as "money, furniture, house linen, wearing apparel, and jewellery," which she duly bequeathed to her "sisters and friends." She did not fill in the appointment of executors or the date of the will, but her signature appeared at the foot of the will as well as that of the two witnesses who, according to the evidence, saw no other writing than that on the first page. On the second and third pages, however, there appeared a list of specific bequests in the handwriting of the testatrix to persons, some of whom were her sisters and others her friends.

The court, in an action, granted probate of the will as contained in the first page, and refused to include in the grant any part of that contained in the second or third pages.—*Royle* v. *Harris*, P.D. & A.D. 352.

9. *Will—Execution—Suit for revocation—Plea of undue execution—Evidence of both attesting witnesses*—Omnia præsumuntur rite esse acta—*Costs.*—In a suit for revocation of probate on the ground of undue execution, both the attesting witnesses swore that the will was not signed by them in the testator's presence, but ther evidence did not coincide upon other matters.

Held, that the presumption of law, *Omnia præsumuntur rite esse acta*, must prevail.

The testator died in 1885, leaving a will appointing three of his sons (the plaintiff and defendants) executors. The will was drawn, from an earlier duly executed will, by a retired doctor who had made wills for other poor persons in the locality, there being no solicitor within twelve or fourteen miles, and it was admittedly signed by the testator, with his mark, in the presence of the doctor, who had prepared it, the two attesting witnesses, and a nurse. Of these four persons, the attesting witnesses alone survived. The plaintiff, soon after the funeral, expressed dissatisfaction with the will, and wrote several letters charging his mother and brothers with fraud and undue influence and stated that the estate would be wasted in law if the defendants insisted on upholding the will, probate of which was, however, granted in common form in 1886. Although the plaintiff took legal advice at that time, no active step was taken to set aside the will until 1893. The evidence of the two attesting witnesses was in disagreement on many points, but, upon the main point in contest, they both agreed, namely, that they put their signatures to the will in another room to that in which the testator was, and out of sight of the testator. Their signatures and the mark of the testator appeared on the face of the will, and the attestation clause, which was on the back of the document, was admittedly written in another room and after the mark and signatures had been affixed to the document. One of the attesting witnesses, a doctor, had made affidavits in 1886, in which he stated that the will was duly executed.

The court refused to allow the evidence of the two attesting witnesses to rebut the presumption of law, and gave judgment for the defendants in favour of the will, with costs.—*Dayman* v. *Dayman*, P.D. & AD.D.

10. *Will—Executor—Substitutionary Appointment.*—Testatrix by her will appointed C., T., and S. as her executors, and if either of the three should decline to act, she appointed "in their place B. or F. as executors then to act."

S. renounced probate, and nothing could be ascertained as to the whereabouts or existence of F.

The court granted probate to C., T., and B.—*Bradford, In goods of*, P.D. & AD.D.

11. *Will—Will in German form—German domicile—English assets—German executors—Limited grant of probate to them.*—The testator, a domiciled German subject, died in Germany, leaving a will in German form. In accordance with the laws of that country, and in pursuance of a request in the will, the local German court appointed German executors, who now applied for probate in this country in respect of the English assets of the deceased.

The court made a grant of probate to the German executors, limited to the testator's assets in this country.—*Briesemann, In goods of*, P.D. & AD.D.

See also ADMINISTRATION, 7.

PUBLIC HEALTH.—See LOCAL GOVERNMENT, 1-3, 6, 8, 10-13, 15, 18-22, 25; SOLICITOR, 11; WATER, 5.

QUO WARRANTO.—See LOCAL GOVERNMENT, 17.

RAILWAY:—

1. *Bye-law—Validity of—Passenger travelling without a ticket—Fraudulent intent—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 103, 104, 108, 109—*Regulation of Railways Act*, 1889 (52 & 53 *Vict. c.* 57), *s.* 5—*Statute Law Revision Act*, 1892 (55 & 56 *Vict. c.* 19).—A railway passenger, on the 15th of March, 1894, travelled from Stoke to Macclesfield, and gave up to the ticket collector the return half of a ticket dated the 28th of February, 1894, which bore upon it the words, "available on the day of issue for one journey only." By a bye-law of the railway company "any passenger using or attempting to use a ticket on any day for which the ticket is not available, or which has already been used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." The passenger was convicted under the bye-law, no intention to defraud being alleged against him.

Held, that the bye-law was bad, and that the conviction must be quashed.

Dyson v. *London and North-Western Railway Co.*, 29 W. R. 565, 7 Q. B. D. 32, followed.—*Hufton* v. *North Staffordshire Railway Co.*, Q.B.D. 28.

2. *Carriage contract—Condition indorsed on excursion ticket—Bye-law—Passenger travelling on to a station beyond the terminal station named on ticket.*—The plaintiffs issued excursion tickets from P. to W. by a train which ran as far as H., a station beyond W. On the face of the ticket were the words, in small type, "See back"; and printed on the back

was the following condition: "If used for any other station than that mentioned, the ticket will be forfeited, and the full fare must be paid." The company had a bye-law against passengers rebooking by the train by which they were travelling for the purpose of proceeding on a longer journey. The defendant, took a return excursion ticket from P. to W. Instead of alighting at W., the defendant travelled on to H., and there gave up the first half of the excursion ticket, and tendered as well the ordinary fare, by the same class, from W. to H. The excess fare the company refused. The defendant, on returning from H., within the allowed time for doing so, purchased a ticket to W., and travelled on from W. with the return half of the excursion ticket by the same train, tendering at P. the two tickets as the fare from H. This the company declined to accept;

Held, in an action by the company against the defendant, that, assuming the condition printed on the back of the ticket was known to the defendant, the company could enforce that condition, and that the defendant had, by travelling beyond W., forfeited the ticket, and, consequently, that the company had a right to treat the money paid for it as forfeited, just as if the defendant had abandoned the journey for which the ticket was issued and had taken an altogether different journey.—*Great Northern Railway Co.* v. *Palmer*, Q.B.D. 316.

3. *Carriage contract—Time-tables—Evidence—Delivery of goods—Reasonable time—Unauthorized statement by servant of company.*—Apart from special contract a consignor is bound by the ordinary traffic arrangements of a railway company, whether published or not; and the reasonableness of such arrangements is a matter for the Railway Commissioners, and cannot be left to a jury.

Where a railway company publishes no time-tables of goods traffic arrangements the *onus* of inquiry lies upon the consignor; and where a consignor delivered goods for carriage under an open contract:

Held, that representations made subsequent to the making of the contract by a servant of the railway company not proved to have authority to make such representations were not admissible as evidence of a modification of the contract.—*Tobin* v. *London and North-Western Railway Co.*, Q.B.D. (Ir.).

4. *Compensation—Coal mines lying under railway—Purchase by company of adjacent strata except coal—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77-85.—The provisions of sections 77-85 of the Railways Clauses Consolidation Act, 1845, are not restricted to the case of a company purchasing the surface of land only. Where the company include in their notice to treat certain subjacent minerals, but not the subjacent coal mines, the landowner cannot obtain compensation in respect of his coal mines in the arbitration under the notice to treat, but he must follow the provisions of sections 77-85.

Judgment of Matthew and Kennedy, JJ., *ante*, p. 9, affirmed.—*London and North-Western Railway Co and Gerard's Arbitration, Re*, C.A. 374.

5. *Compensation—Interest on sum awarded as compensation—Conveyance—Claim for interest after execution of conveyance.*—The fact that the owner of lands taken by a railway company had executed the conveyance of the lands without claiming interest on the amount awarded to him as compensation from the time of the company's entering on the lands down to the date of payment of the amount awarded, does not estop the owner from afterwards enforcing payment of such interest.—*Baltimore Railway Co., Re*, CH.D., M.R. (Ir.).

6. *Debenture stock—Borrowing powers—Priority—Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *ss.* 22, 24—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 24.—Section 24 of the Companies Clauses Act, 1863, which enacts that the holders of debenture stock shall not, as among themselves, be entitled to any priority, applies only to debentures issued under the same special Act, and not to all debentures issued by the same company. The 24th section of the Railway Companies Act, 1867, enabling railway companies to issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, applies to all railway companies which have power to raise money by mortgage or bond, although their special Act does not incorporate Part III. of the Act of 1863.—*Mersey Railway Co., Re*, C.A.

7. *Expenses of promoting a Bill in Parliament—Receivers and managers appointed under the Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.—The court, in the absence of consent by all parties, refused leave to the receivers and managers of a railway company appointed under the Railway Companies Act, 1867, to apply a sum of money out of the assets in their hands in promoting a Bill in Parliament which sought to vary the mode of working the railway.—*Mersey Railway Co.* (*No.* 2), CH.D. STIRLING, J.

8. *Injunction—Easement—Severed land—Communication by level crossing—Railway Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.—A railway company provided a level crossing under section 68 of the Railway Clauses Consolidation Act, 1845, as a communication between two portions of the land of R. severed by the railway. R. granted the land on one side to P., and afterwards granted the other part to the defendant. In neither grant was there any express reference to the communication by the level crossing. P. afterwards released to the railway company his right to use the crossing, and the company thereupon fenced off the crossing. The defendant removed the obstruction.

Held, that the railway company were entitled to an injunction to restrain the defendant interfering with the obstruction, but without prejudice to the right (if any) of the defendant or his successors, in case they should be entitled, under or as against the owners or occupiers of the other part of the severed lands, to pass over or use those lands in connection with their own lands.—*Midland Railway Co.* v. *Gribble*, CH.D. WRIGHT, J.

9. *Lands taken compulsorily—User—Erection of chapel—Building estate—Damage.*—Where parts of a building estate was compulsorily taken by a railway company;

Held, that the temporary letting by the company of a small piece of the lands so taken for the erection of a chapel was not an unreasonable user of the land nor inconsistent with the purposes for which the railway company have been formed, the land not being required for the immediate purposes of the railway, and this was so even though some damage was likely to accrue to the owners of the building estate from such a user.—*Onslow* v. *Manchester, Sheffield, &c., Railway Co.*, CH.D. ROMER, J.

10. *Land taken by the company for the purposes of their undertaking—User of land for purposes compatible with their undertaking—Adjoining owner.*—

Where a railway company carry their railway upon arches, the leasing of those arches to tenants for short terms as shops, warehouses, and the like is not a user of the company's property incompatible with the purposes of their undertaking; and an adjoining owner, who sold to the company the land on which the arches are built, cannot restrain the company from such user.

Decision of Malins, V.C., in *Norton* v. *London and North-Western Railway Co.*, 27 W. R. 352, 9 Ch. D. 623, overruled.—*Foster* v. *London, Chatham, and Dover Railway Co.*, C.A. 116.

11. *Negligence—Level crossing—Delay in opening gates — Highway — Obstruction.*— The plaintiff, a medical practitioner, while driving along the public highway, was detained for twenty minutes at a level crossing by reason of the unreasonable and negligent delay of the defendant company's servants in opening the gates.

Held, that the defendant company were liable in damages.—*Boyd* v. *Great Northern Railway Co.*, Q.B.D. (Ir.)

12. *Passenger's luggage—Negligence—Ticket taken by servant—Luggage belonging to master—Right of master to sue.*—The plaintiff's servant took a ticket as a passenger by the defendants' railway, and handed his portmanteau as his personal luggage to one of the defendants' servants, who, in carrying it to the train, negligently dropped it on to the line, and it was run over by a train, and the portmanteau and its contents were destroyed. The portmanteau contained a suit of livery, which was the property of the plaintiff, and which the plaintiff had provided for the servant to wear while in her service. In an action by the plaintiff to recover damages for the loss of the livery.

Held, that, though there was no contract between the plaintiff and the defendants, the defendants were liable to the plaintiff for the misfeasance of their servants, which caused the loss.—*Meux* v. *Great Eastern Railway Co.*, C.A. 680.

13. *Railway Commissioners—Jurisdiction—Ouster of—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss.* 9, 10—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 6.—The exclusive jurisdiction conferred upon the Railway Commissioners by section 6 of the Railway and Canal Traffic Act, 1854, applies only to enactments prior to the date of that Act, and not to any later enactments.

The Barry Dock and Railways Act, 1888, provides that the Taff Vale Railway Co. shall afford reasonable facilities for goods and mineral traffic coming from the undertaking of the Barry Co. at certain specified rates; and that if at any time, on application made by the Barry Co. to the Railway Commissioners, sitting as arbitrators, the commissioners shall decide that the Taff Vale Railway Co. have failed to give such facilities, then certain remedies are specified.

Held, that there was nothing in the special Act or in the Railway and Canal Traffic Act, 1888, to confer exclusive jurisdiction on the Railway Commissioners so as to oust the jurisdiction of the High Court to hear an application under the special Act. *Barry Railway Co.* v. *Taff Vale Railway Co.*, C.A. 372.

14. *Railway Commission—Jurisdiction—Power to order a railway company to build a new station, or to reopen a station which has been closed—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.—The Railway Commissioners have no jurisdiction under section 2 of the Railway and Canal Traffic Act, 1854, to order a railway company to build a new station or to reopen a station which has been closed and pulled down.—*Darlaston Local Board* v. *London and North-Western Railway Co.*, C.A. 29.

15. *Railway Commissioners—Jurisdiction—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *ss*, 9, 10—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 6.—The exclusive jurisdiction conferred upon the railway commissioners by section 6 of the Railway and Canal Traffic Act, 1854, applies only to enactments prior to the date of that Act, and not to any later enactments; and section 9 of the Railway and Canal Traffic Act, 1888, does not give the commissioners exclusive jurisdiction in matters in which the ordinary courts had jurisdiction at common law.—*Barry Railway Co.* v. *Taff Vale Railway Co.*, C.A.

16. *Railway Commission—Jurisdiction—Undue preference — Reasonable Facilities—Waterclosets at stations—Railway Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2.—The railway commissioners have no jurisdiction to compel railway companies to provide free waterclosets at stations for their passengers.

Charging for the use of water-closets at their stations is not a breach on part of a railway company of section 2 of the Railway Traffic Act, 1854, which provides that a railway company shall "afford all reasonable facilities for the receiving and forwarding and delivering of passenger traffic." —*West Ham Corporation* v. *Great-Eastern Railway Co.*, R.C.C.

17. *Railway commissioners—Practice—Complaint by association—Particulars—Increase of rates—Increase on classes of goods.*—A complaint was made to the Railway Commissioners by an association, certified under section 7 of the Railway and Canal Traffic Act 1888, that the rates on certain classes of goods, each class containing a large number of different articles, had been increased by the respondents, a railway company, since the 31st of December, 1892, and that such increased rates were unreasonable. The respondents asked for particulars as to the names of the traders who were represented by the association, and of the traders in respect of whose traffic the complaint was made.

Held, (1) that the association and the railway company being the only parties to the litigation, that the association could not be called upon to give particulars of the traders represented by them; (2) that on such a complaint as to the increase of rates on a class of goods, the railway company might, in the first place, justify generally the raising of the rate for the whole class, and, therefore, that a demand for particulars for the purpose of identification of the specific goods in respect of which the increase of rate might be alleged to be unreasonable, was premature.—*Mansion House Railway Traffic Association* v. *Great Western Railway Co.*, C.A.

18. *Railway Commissioners—Undue preference—Home and foreign merchandise—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.—The effect of the proviso in section 27, sub-section (2), of the Railway and Canal Traffic Act, 1888, that "no railway company shall make, nor shall the commissioners sanction, any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services," is not to prohibit all inequalities in rates as between home and foreign merchandise, but that if the railway

company have proved facts which would justify the admitted differences, had the goods in both cases been home goods, the company are not debarred from relying on those facts as an answer merely because the goods which receive the benefit are of foreign origin.—*Mansion House Railway Traffic Association* v. *London and South-Western Railway Co.*, R.C.C.

19. *Traffic—Carriage of goods—Competing railways—Rates—Excessive rates—Group Rate—Rights of Customer—Forum for adjusting rates.*—The courts of law and not the Railway Commissioners are the proper tribunals to decide the question of an alleged overcharge made by a railway company to a customer.

In a special Act promoted by one railway company and opposed by another, running powers were given to the promoters over the line of their opponents, but were to remain in abeyance so long as certain conditions were observed. Those conditions were that the opponents should afford all reasonable facilities for goods and mineral traffic "at the rates per mile not greater than the lowest rate" charged by the opponents for like traffic to or from C. P. or B.

Held (reversing the decision of the Court of Appeal 42 W. R. 215), that the clause imposed obligations upon the railway company to the individual customer and was not intended as a mere statutory contract between the two rivals railway companies:

Held also, that the rate imposed did not constitute a group rate, but the appellant was entitled to ascertain the mileage rate to each of the three places and to take the lowest of the three as the basis of the rate to be charged.—*Davis* v. *Taff Vale Railway Co.*, H.L.

20. *Transfer of undertaking—Covenants—Personal covenants — Dissolving company — New company—Specific performance.*—A railway company in 1873 took, under the powers of their Acts of Parliament, a conveyance of lands from trustees of a settlement, and, as part consideration of such conveyance, covenanted to make and maintain accomodation works, including the making and maintaining of a wharf or depôt, and also, at any time, on twenty-four hours' previous notice being given, to convey across their line, and deposit on the wharf or depôt, timber, poles, and wood—productions of an adjacent wood. The stipulations of the covenants were never performed, and the owners of the land had made no objection. By an Act of Parliament in 1892 the company was dissolved, and an undertaking was, subject to the contracts, liabilities, debts, and obligations of the dissolving company, transferred to a new company. In 1893 the tenant for life under the settlement brought an action against both of the companies for specific performance of the covenants.

Held (without touching the question as between the two companies), that the covenants were to be specifically performed and carried into execution by the new company.—*Fortescue* v. *Lostwithiel Railway Co.*, CH.D. KEKEWICH, J. 138.

21. *Underground railway — Subsoil taken for tunnel—Right to appropriate and use—Purchase—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18).—Where a railway company is authorized by its special Act to appropriate and use the subsoil and under-surface of lands without taking the surface the company must comply with the provisions of the Lands Clauses Consolidation Act as to the purchase of land. — *Farmer* v. *Waterloo and City Railway Co.*, CH.D. KEKEWICH, J., 363.

See also LANDS CLAUSES ACTS, 3; WATER, 2.

RECEIVER :—

Receiver and manager appointed by court—Personal liability on contracts.—A person who is appointed by the court receiver and manager to carry on a business is *primâ facie* personally liable on contracts entered into by him as receiver and manager, and must look to the assets for an indemnity.

Therefore, where, in an action in the Chancery Division by debenture-holders of a company, the court appointed the defendants receivers and managers to carry on the business of the company, and the defendants ordered goods of the plaintiffs for the purposes of the business, the order being expressed to be for the company and the defendants signing it as receivers and managers.

Held, that the defendants were personally liable for the price of the goods so ordered.—*Burt* v. *Bull*, C.A. 180.

See also COMPANY, 14; LIS PENDENS; MARRIED WOMAN, 6, 8, 12; MORTGAGE, 2; PARTNERSHIP, 6; PRACTICE, 46, 64-68; PRINCIPAL AND AGENT; RAILWAY, 7; TRAMWAY, 1.

RENT-CHARGE :—

Vendor and purchaser—Limited owner—Easement, Sale of—4 Geo. 2, c. 28, s. 5—Lands Clauses Act, 1845, *ss.* 10, 11—*Liverpool Corporation Waterworks Act*, 1855, *ss.* 2, 3.—The Lands Clauses Act, 1845, s. 10, empowers an absolute owner to sell land to the promoters of an undertaking for "an annual rent-charge," and section 11 charges the "yearly rents reserved," upon the rates under a special Act. The Liverpool Corporation Waterworks Act, 1855 (which incorporated the Lands Clauses Act) by sections 2 and 3, enables the corporation to purchase, and enables persons empowered by the Lands Clauses Act to convey lands, to grant lands and easements "at an annual or other rent."

Under the above Acts a life tenant conveyed land and an absolute owner granted easements to the corporation. In both cases a perpetual yearly rent was reserved.

Held, that sections 2 and 3 of the Liverpool Corporation Act extended the provisions of sections 10, 11 of the Lands Clauses Act, and gave to a limited owner the same power of selling for a rent-charge as an absolute owner, and also enabled an easement to be purchased for a rent-charge, so that the rents reserved were charges upon the rates. Although rent cannot issue out of an easement at common law, it may by statute.

Wherever land is sold reserving a rent, that rent may, even if in law a rent sec, since the statute 4 Geo. 2, c. 28, s. 5, be properly called a rent-charge, for there is incident to it a right to distrain.—*Gerard and Beecham's Contract, Re*, C.A.

See also JOINTURE.

RES JUDICATA :—

Money paid under process of law—Right to recover—Summons withdrawn on payment.—Money paid under process of law cannot be recovered by independent proceedings.

The defendants issued a summons against the plaintiff for a sum which they alleged to be due, and the plaintiff paid the amount on the day upon which the summons was returnable. The hearing of the summons was adjourned. The plaintiff subsequently disputed his liability and demanded the return of the money. He, however, took no

steps to defend the summons, which was finally withdrawn.

In an action brought to recover the money.

Held (affirming the decision of Day, J.), that the plaintiff, having had the opportunity of defending the summons and not having done so, could not be allowed to recover money, the payment of which he might have resisted.

Caird v. *Moss*, 35 W. R. 52, 33 Ch. D. 22, explained.—*Moore* v. *Fulham Vestry*, C.A. 277.

See also CONTRACT, 4.

RIVER:—

Riparian owner—Sale of water power—Navigable river.—The fact that a river is navigable will not prevent a riparian owner who buys an interest in its water power from acquiring such right as against the vendor, even assuming that a good title cannot be given as against the public.—*Hamelin* v. *Bannerman*, P.C. 639.

SALE of GOODS:—

1. *Agreement for hire—Possession of goods with consent of owner—Hire and purchase agreement—Pledge of goods by hirer—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *ss.* 2, 9.—By an agreement in writing, dated the 23rd of December, 1892, between the appellant and B., B. agreed to pay a monthly rent or hire instalment of 10s. 6d.—*i.e.*, 10s. 6d. down and thirty-five further payments—for the use of a certain piano, subject to the condition that he might put an end to the hiring at any time by delivering up the piano to the appellant, in which event B. was to remain liable for the arrears of hire (if any) up to the date when the piano was returned. It was further provided that should B. (the hirer) punctually pay the said sum of £18 18s. by the aforesaid monthly instalments, the piano should become the absolute property of B., but until this was done it was to remain the property of the appellant, who might retake possession should the hirer make default.

Held, that the above constituted a contract of hiring terminable at the will of B., coupled with the condition in his favour, that if he should retain the piano until he had made all the aforesaid monthly payments as they fell due, then the piano was to become his absolute property, and, consequently, it was not an agreement to buy the piano within the meaning of section 9 of the Factors Act, 1889.

An innocent pledgee, therefore, receiving the piano from B. before the instalments were all paid, had no defence under that Act against the appellant's claim in an action of trover.

Decision of the Court of Appeal, 42 W. R. 514, [1894] 2 Q. B. 262, reversed.

Lee v. *Butler*, 42 W. R. 88, [1893] 2 Q. B. 318, distinguished.—*Helby* v. *Matthews*, H.L. 561.

2. *Contract—Acceptance—Recognition of pre-existing contract—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-sections* 1, 3.—The plaintiffs and the defendant agreed orally that the plaintiffs should sell, and the defendant should buy, a quantity of hay over £10 in value. The plaintiffs having delivered the hay at the defendant's wharf, the defendant went on board the barge in which the hay had been conveyed, took a sample, and said, "This hay is not up to my sample, and I won't have it." In an action in the county court for non-acceptance of goods, the county court judge found that the defendant had done an act which recognized a pre-existing contract of sale, and therefore there had been an acceptance such as to satisfy section 4 of the Sale of Goods Act, 1893.

Held, that there was evidence on which the county court judge might reasonably so find.

Decision of the Queen's Bench Division, *ante*, p. 270, reversed.—*Abbott* v. *Wolsey*, C.A. 513.

3. *Fraud of third person—Warehouseman—Attornment — Title to goods — Conversion — Measure of damages.*—Sugar, the property of G. & Co., was warehoused with the defendant. F., by fraudulently representing himself to be a customer of G. & Co., obtained an authority from them to the defendant to hold the sugar at the order and disposal of F., who subsequently negotiated a sale of the sugar to the plaintiffs. The defendant sent to the plaintiffs a memorandum stating that he held the sugar on account of F., and would deliver the same to them on F.'s transfer in their favour. The plaintiffs not being satisfied, the defendant wrote across the memorandum the words: "I hold the within at your order and disposal."

Before the sugar was delivered to the plaintiffs the fraud of F. was discovered, and the defendant, acting on the instructions and indemnity of G. & Co., refused to deliver the sugar.

Held, that the defendant was estopped by his attornment to the plaintiffs from denying their title, and that the plaintiffs were entitled to judgment, the damages being the market value of the sugar at the time of the defendant's refusal to deliver.

Whether, without such attornment, the plaintiffs' title was superior to that of G. & Co., *quære.*

Kingsford v. *Merry*, 5 W. R. 151, 1 H. & N. 503, considered.—*Henderson* v. *Williams*, C.A. 274.

4. *Hiring agreement—Delivery by hirer to auctioneer for sale—Receipt in good faith and without notice—"Delivery under any agreement for sale"—"An agreement for sale, pledge, or other disposition thereof"—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 9.—N. obtained possession, under a hiring agreement, of a piano, the property of the plaintiffs. The agreement provided that on the payment by N. to the plaintiffs of a certain sum by monthly instalments, the piano was to become the property of N. After paying some of the monthly instalments, but before the whole sum had been paid, N. delivered the piano to the defendant, an auctioneer, for sale by auction. The defendant sold the piano, and paid the purchase-money, less commission, to N. In an action for wrongful conversion of the piano, the jury found that the defendant had received the piano in good faith, and without notice of any lien or other right of the plaintiffs in respect of it.

Held, that N. had agreed to buy and had obtained possession of the piano within the meaning of section 9 of the Factors Act, 1889; that the word "person" in section 9 was not limited to a mercantile agent, but applied to any person who, having bought or agreed to buy good, and having obtained possession with the consent of the owner, made such a delivery thereof as is mentioned in the section; that the words "agreement for sale, pledge, or other disposition," including a delivery of goods to be sold by the person receiving for the benefit of the person delivering, and that the defendant was, therefore, not liable to the plaintiffs for conversion.—*Shenstone* v. *Hilton*, Q.B.D.

5. *Hiring agreement—Property in goods—Bankruptcy—Bill of sale.*—The respondents supplied an engine to P. upon the terms that P. was to pay a certain sum down, and the balance of the purchase money by eight quarterly instalments. The agreement provided that until all the instalments were

paid P. should not sell, assign, or remove the engine without the leave of the respondents, and that if the instalments fell into arrear the respondents might sue for the whole amount, or might resume possession of the engine and sell it, paying over to P. the balance of the price, if any, beyond what was due to them; and that until all the instalments were paid the engine should remain the property of the respondents. P. allowed the instalments to fall into arrear, and became bankrupt.

Held, that the agreement was not a bill of sale requiring registration under the Bills of Sale Act, and that the assignees in P.'s bankruptcy had no right to retain the engine as against the respondents.

Coburn v. *Collins*, 35 Ch. D. 373, distinguished.—*McEntire* v. *Crossley*, H.L.

6. *Hire and purchase agreement—Possession of goods by hirer—Fraudulent sale by hirer before property has passed—Conviction of hirer for larceny as a bailee—Revesting of title in owner by such conviction—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 24.—Decision of Queen's Bench Division in *Payne* v. *Wilson* (*ante*, p. 250) reversed on appeal, in consequence of the decision of the House of Lords in *Helby* v. *Matthews* (*ante*, p. 561).—*Payne* v. *Wilson*, C.A. 657.

7. *Lien—Delivery—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 25.—Where goods have been warehoused, and the owner has sold them, although the purchaser has not taken possession of the goods, a subsequent document purporting to give the warehousers a lien for sums due to them by the vendor, is not binding upon the purchaser.—*Nicholson* v. *Harper*, CH.D. NORTH, J., 550.

See also FACTOR.

SCOTLAND, LAW of:—

1. *Divorce—Desertion—Reasonable Cause—Scots Act*, 1573, *c.* 55.—In an action by husband against his wife for divorce, on the ground of desertion for the statutory period, it appeared that she had left him because of conduct on his part causing her mental distress sufficient to interfere with her restoration to health, and because of menaces by him sufficient to create in her a well-founded fear of physical restraint, and culminating in an act of violence against her person.

Held, that the wife had reasonable cause for quitting her husband, and that she had a good defence to the action.

Quære, whether in an action for adherence by a husband, misconduct on his part, short of cruelty, or other matrimonial offence, would be a ground for refusing relief.—*Mackenzie* v. *Mackenzie*, H.L.

2. *Husband and wife—Marriage contract—Husband's creditors.*—A husband by an *ante*-nuptial marriage contract bound himself, his heirs, executors, and representatives, whomsoever, to pay his wife an annuity of £1,000 "to be applied by her towards the expenses of my household and establishment during all the days of my life"; the annuity was secured on heritable property, and was declared to be the wife's separate estate free of the *jus mariti*.

Held, that the provision as to the application of the annuity was for the husband's benefit, and that the wife was not entitled to payment of it, as against her husband's creditors.—*Birkett* v. *Purdon*, H.L.

3. *Landlord and tenant—Lease—Compensation for improvements—Notice—Determination of tenancy—Agricultural Holdings (Scotland) Acts* 1883 (46 & 47 *Vict. c.* 62), *ss.* 2 *and* 7.—The Agricultural Holdings (Scotland) Act, 1883, by section 2, confers upon a tenant of an agricultural or pastoral holding a right to compensation for certain improvements "on quitting his holding at the determination of a tenancy": and by section 7, in order to be entitled to such compensation, he must, "four months at least before the determination of the tenancy," give notice in writing to his landlord of his intention to make a claim.

The respondent was tenant to the appellant of a farm under a lease for a term of years which expired as to the houses, grass and fallow land, at the spring quarter; as to the arable land at the separation of the crop of the same year from the ground; and as to the barns, barnyard, and two outhouses, at the spring quarter of the following year. After the spring quarter-day on which he gave up possession of the houses, grass and fallow land, and more than four months before the autumn quarter-day, he gave notice in writing of a claim to compensation for improvements under the Act.

Held, that in a Scotch lease, the expression "separation of the crop" was equivalent to the autumn quarter-day, and that the notice was given in proper time.

Semble, that the retention of the barns, barnyard, and outhouses for a further term of six months, did not constitute an agricultural or pastoral holding within the meaning of the Act.

Wight v. *Earl of Hopetoun* (4 Macq. 729) distinguished.—*Black* v. *Clay*, H.L.

4. *Principal and surety — Guarantee — Mercantile Law (Scotland) Act*, 1856, *s.* 6.—An undertaking to give when required a guaranty for the repayment of money to be lent is a good "cautionary obligation" within the meaning of section 6 of the Mercantile Law (Scotland) Act, 1856, and is binding as a direct obligation.—*Wallace* v. *Gibson*, H.L.

5. *University—Affiliation — Ordinance—Approval by Parliament—Universities (Scotland) Act*, 1889, *ss.* 15, 16, 19, 20.—Commissioners appointed under the Universities (Scotland) Act, 1889, purporting to act under section 16 of that Act, executed an instrument in writing declaring that they did thereby affiliate the University College of Dundee to, and form part of, the University of St Andrews. This instrument was not published or laid before Parliament or submitted for her Majesty's approval as required by section 20 of same Act, in case of all ordinances made by the commissioners.

Held, that, having regard to sections 19 and 20, this affiliation order must be taken to be an "ordinance" and to be subject to the provisions of section 20, and consequently that, for want of due compliance with section 20, it was invalid.—*Metcalfe* v. *Cox*, H.L.

SETTLED LAND:—

1. *Improvements—Cost of where no prior scheme—Payment by tenant for life—Application for repayment out of capital moneys*—45 & 46 *Vict. c.* 38, *s.* 26—53 & 54 *Vict. c.* 69, *s.* 15.—A tenant for life having actually paid the cost of improvements in respect whereof no scheme under section 26 of the Settled Land Act, 1882, had ever been submitted, applied to the court under section 15 of the Settled Land Act, 1890, to be recouped out of capita moneys in the hands of the trustees.

Held, that the court has jurisdiction to allow such recouping; but that, the works having been executed and paid for, the application must be

considered with greater strictness than if the work was still to be done.—*Tucker, Re* (*No.* 2), C.A. 581.

2. *Money in court under Lands Clauses Act—Application of—Land limited to vicar "and his successors"—Glebe land—Terminable rent-charges—Redemption of—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 1, 32—*Settled Land Act*, 1887 (50 & 51 *Vict. c.* 30), *s.* 1—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 69.—By an award made under an Inclosure Act of Geo. III. lands were conveyed to the then vicar of C. "and his successors." A portion of these lands was taken by a railway company in pursuance of their compulsory powers, the purchase-money being paid into court. In 1878, 1879, and 1884, the vicar of C. carried out certain improvements on the glebe, and, to defray the cost of these improvements, with the consent of the then patrons of the living, created rent-charges upon the glebe land, repayable by half-yearly payments during a fixed period. The vicar made application to the court that a portion of the purchase-money might be applied in redemption of the rent-charges.

Held, that the land sold to the railway company was not "settled land" within the meaning of section 1 of the Settled Land Act, 1882; that the word "settlement" in section 32 of the Settled Land Act, 1882, must be read as having the same wide meaning as the word "settled" in section 69 of the Lands Clauses Act; and that, under those two sections, read together, and section 1 of the Settled Land Act, 1887, the court had jurisdiction to grant the application; but that the case was not one in which the court would exercise its jurisdiction in favour of the applicant.—*Castle Bytham* (*Vicar of*), *Ex parte*, CH.D., STIRLING, J., 156.

3. *Sale—Several persons constituting one tenant for life—Separate solicitors—Costs—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-section* 6, *s.* 53—*General order made in pursuance of the Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Schedule I., Part I.*—Upon a sale of settled land by twenty-five persons, who together constituted a tenant for life for the purposes of the Settled Land Act, 1882,

Held, that the parties were entitled to employ separate solicitors, and that costs of separate solicitors for perusing and completing the conveyance must be allowed out of the proceeds of sale.—*Smith, Re, Smith* v. *Lancaster*, C.A. 17.

4. *Tenant for life—Building lease—Covenant by lessee to spend specified sum in repairs—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (10) (*iii.*), 6, 8 (*i.*), 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7 (1).—A lease which contains a covenant by a lessee to expend a fixed sum in doing specified repairs and improvements is a "building lease" within the meaning of sections 2 (10) (iii.) and 8 (i.) of the Settled Land Act, 1882.—*Daniell's Settled Estate, Re*, C.A. 133,

See also LUNACY, 3; SETTLEMENT, 8.

SETTLEMENT:—

1. *Covenant to settle after-acquired property—Purchase out of accumulation and proceeds of sale.*—Property not originally included in a marriage settlement may, owing to the subsequent dealings of the parties, become subject to the covenant to settle after-acquired property.—*Bendy, Re, Wallis* v. *Bendy*, CH.D. KEKEWICH, J., 345.

2. *Issue—Illegitimate child* en ventre sa mère.—An unborn illegitimate child cannot take under a limitation in a settlement to children or issue, even if *en ventre sa mère* at the date of the deed.—*Shaw, Re, Robinson* v. *Shaw*, CH.D. VORTH, J. 43.

3. *Joint Tenancy—Limitation to husband and intended wife, and husband's children by former marriage, and children of intended marriage—Springing use.*—By an ante-nuptial settlement the husband assigned chattels real and chattels personal to the use of himself, his intended wife, the children of the husband by a former marriage, and any issue to be born of the intended marriage.

Held, that the husband and wife, and the children of the first and second marriage took as joint tenants; the class of unborn children to be opened when, and as necessary to include new members.—*O'Hea* v. *Slattery*, C.A. (Ir.).

4. *Jointure—Portions—Jointress postponing her jointure in favour of mortgagee of share of one portion charge.*—Lands were subject to a jointure charge, and as a next charge, to a sum for portions. The second appointee in date of part of the portion money, mortgaged his share, and the jointress postponed her jointure in favour of the mortgagee.

Held, that the postponement was to be treated as an equitable assignment, and that the jointress had not thereby postponed her jointure to the first appointee's share.—*Armstrong, Re*, V.C. (Ir.).

5. *Marriage settlement—After-acquired property—Covenant to settle*—Chose in action *of wife at date of settlement.*—A husband and wife in an ante-nuptial marriage settlement jointly covenanted that in the event of the intended wife during the continuance of the marriage, or the husband in her right, thereafter becoming entitled to any further property the property so acquired should be held on the trusts of the settlement.

At the date of the settlement a fund representing accumulations of the surplus income (accrued during the minority of the wife) of the wife's share of her father's residuary estate, was standing in the names of the trustees of her father's will, and was after the settlement claimed both by the trustees of the settlement and the husband.

Held, that the fund was not bound by the trusts of the settlement.—*Atkinson's Trusts, Re*, CH.D. M.R. (Ir.).

6. *Marriage settlement—"Issue"—Children and grandchildren taking* per capita.—The word "issue" occurring in a marriage settlement, *primâ facie* includes all descendants, and in the absence of some controlling or explanatory context is not to be restricted to children only.—*Hobbs* v. *Tuthill*, CH.D. M.R. (Ir.).

7. *Portion—"Payable on marriage or at such time as settlor should by deed or will appoint"—Misrecital in will—Non-exercise of power.*—A., by a settlement made on his second marriage, conveyed lands to trustees on trust to raise £600 for B., a daughter by his first marriage, "to be paid and payable to B. on her marriage or at such other time as he shall by deed or will appoint," and subject thereto upon the usual trusts for his wife and children of the second marriage.

A. subsequently made his will, whereby he gave all his real and personal estate to the children of his second marriage, "considering that my daughter B. has been sufficiently provided for by my marriage settlement, under which she will be entitled to receive £600 after my death." B. survived the testator, and was unmarried.

Held, that B. was entitled under the settlement to a vested interest in the £600, liable, however, to be devested in the event of her dying unmarried,

and consequently that the portion could not be raised before B.'s marriage.

Held also, that the incorrect recital in the will was not an exercise of the power of appointment.—*Haverty* v. *Curtis*, CH.D. M.R. (Ir.).

8. *Settled land—Sale—Statutory power—Female trustee—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18).—The court may confer authority to sell under the Settled Estates Act, 1877, upon trustees who are women; but it will only do so under exceptional circumstances.—*Peake's Settled Estates, Re*, CH.D. NORTH, J.

9. *Tenant for life—Equitable tenant for life—right to possession—Title deeds—Mortgage—Form of application—New Trustees.*—An equitable tenant for life is usually entitled to possession of the estate, but, if he has charged his life estate, not to the custody of the title deeds; and an application therefore, may be by originating summons.—*Newen, Re, Newen* v. *Barnes*, CH.D. KEKEWICH, J., 58.

10. *Voluntary settlement—Class—Period for ascertaining class.*—The rule in *Andrews* v. *Partington*, 3 Bro. C. C. 401, that in a will, if there be a direct devise or bequest of real or personal estate to the children of A., those living at the testator's death take to the exclusion of those born afterwards, and the class to take will not be enlarged by a gift over on the death of any of the class under twenty-one, nor by a gift over in default of children,

Held, to apply to voluntary settlements.—*Knapp's Settlement, Re, Knapp* v. *Vassall*, CH.D. NORTH, J., 279.

11. *Voluntary settlement—Rectification—Intention—Evidence — Oral evidence.*—The court is not disposed to rectify a voluntary settlement where the evidence of the settlor's intention consists of his statement alone, unsupported by written instructions or the like, notwithstanding that the suggested rectification would bring the settlement more into harmony with precedent.

So held by Kekewich, J.

Decision affirmed by the Court of Appeal on the evidence purely.—*Bonhote* v. *Henderson*, CH.D. KEKEWICH, J., 502; C.A. 580.

See also, BANKRUPTCY, 38, 43; JOINTURE; TRUSTEE, 6.

SHERIFF:—

1. *Judgment* de bonis testatoris—*Executor* de son tort—*Chattels real of deceased—"In the hands of the defendant."*—Under a writ of *fi. fa.* founded on a judgment *de bonis testatoris* against an executor *de son tort*, the sheriff can seize and sell chattels real of deceased in the possession of the defendant.—*Doherty* v. *Nelson*, Q.B.D. (Ir.)

2. *Seizure—Payment made under an execution—"To avoid sale"—Payment to the sheriff made by a stranger—Negligence of sheriff—Notice of payment to the execution creditor—County Court Rules*, 1889, *ord.* 2, *r.* 32—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-section* 2.—On the 1st of October the bailiff seized the goods of a debtor under an execution for more than £20, but at the request of the debtor abandoned possession under an arrangement whereby he was to be entitled to re-enter whenever he thought fit.

On the 3rd of October the bailiff obtained possession of the keys of the premises where the goods were. Later on the same day the father of the debtor of his own accord asked for and obtained the keys from the bailiff on the promise that he would pay out the warrant, which he fulfilled on the following day.

On the 15th of October a bankruptcy petition was presented against the debtor, who was adjudged a bankrupt thereon. The bailiff received notice of the petition, and subsequently paid over the money paid by the debtor's father to the official receiver.

Held, that the execution creditor was entitled to recover the money from the bailiff as money had and received to his use.

Held, also, that the money was not money paid "to avoid a sale" within the meaning of the Bankruptcy Act, 1890, s. 11, sub-section 2, because (1) it was paid to avoid a reseizure, not a sale; and (2) it was not paid by or on behalf of the debtor or out of the debtor's estate.

Held, also, that the money was not money paid "under an execution" within the same sub-section.—*Bower* v *Hett*, Q.B.D. 557.

See also BANKRUPTCY, 2, 4, 5; COMPANY, 11; PRACTICE, 41, 43, 44.

SHIP:—

1. *Bill of lading—Exceptions—Injury to cargo—Negligence "in navigating the ship or otherwise."*—A bill of lading contained a clause exempting the shipowners from liability "for any act, negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise." A quantity of eggs were negligently stowed by the shipowners' servants in contact with hay, whereby the eggs were damaged.

Held, that the words "or otherwise" in the bill of lading included any negligence of the shipowners' servants, and that, therefore, the shipowners were not liable for the damage so caused.

Norman v. *Binnington*, 38 W. R. 702, 25 Q. B. D. 475, commented on.—*Baerselman* v. *Bailey*, C.A. 593.

2. *Bill of lading—Freight—Receipt of goods under bill of lading—Consignee—Lien—Deposit of cargo with warehouseman—Delivery of goods—Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *ss.* 66-72.—Where cargo is deposited by a shipowner with a warehouseman under the Merchant Shipping Act, 1862, subject to a stop for freight, and the consignee deposits the freight with the warehouseman and takes delivery of the goods from him, no contract by the consignee to be personally liable for the freight is to be inferred from his acceptance of the goods, and the Act creates no such personal liability.

In these circumstances a consignee, who is so named in the bills of lading, but who has no property in the goods and takes delivery only as agent for the owner, cannot be sued for the freight.

The decision of the Court of Appeal (*Furniss* v. *White*), 42 W. R. 290, [1894] 1 Q. B. 483, reversed.—*White* v. *Furness*, H.L.

3. *Bill of lading—Pledge—Redelivery of goods in trust for sale—Conflict of laws.*—In the law of Scotland as in the law of England a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge.

The pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to obtain delivery of the merchandize and sell on the pledgee's behalf and account for the proceeds in satisfaction of the debt:

Held, that the pledgee's security was not lost, and that they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors.

Tod v. *Merchant Banking Co.* (10 Ct. Sess. Cas. 4 series 1009) distinguished.—*North-Western Bank* v. *Poynter*, P.C.

4. *Charter party—Bill of lading—Liability of owner on bill signed by captain.*—A charter party in the form of and ordinary time charter had the following provision; "the captain and crew although paid by the owners shall be the agents and servants of the charterers for all purposes whether for navigation or otherwise under the charter; in signing bills of lading it is expressly agreed that the captain shall only do so as agent of the charterers, and the charterers hereby agree to indemnify the owners from all liabilities (if any) that may arise from the captain signing bills of lading, or in otherwise complying with the same."

Held, that this proviso in the charter party did not exonerate the shipowners from liability to the indorsee of a bill of lading signed by the captain; on the ground that the bill of lading so signed did not itself contain a similar provision.—*Manchester Trust* v. *Furness & Co.*, Q.B.D.

5. *Charter party—Bill of lading—Refusal to sign—Penalty or liquidated damages.*—A charter party contained a provision that "the captain shall sign charterer's bills of lading as presented without qualification . . . within twenty-four hours after being loaded or pay £10 for every day's delay as and for liquidated damages until the ship is totally lost or cargo delivered." The captain wrongfully refused to sign bills of lading as presented, but the charterer's could not show that they had sustained any damage by his refusal.

Held, that the clause imposed a penalty and not liquidated damages and that the plaintiffs were only entitled to nominal damages.

Hough v. *Jones*, 5 Ex. D. 115, discussed.—*Rayner* v. *Rederiak tie bolaget Condor*, Q.B.D.

6. *Charter-party — Demurrage — Lay days — "Days."*—A charter-party provided that fourteen running days, Sundays excepted, were to be allowed for loading and unloading, and ten days on demurrage beyond the lay days, at a certain rate per day. Seven days were occupied in loading, and the ship arrived at the port of discharge on Saturday, the 31st of March, and was ready to commence the discharge at 10.30 a.m. The consignees, however, refused to commence the discharge at once, and the discharge only commenced at 1 p.m. on Saturday, March 31, and finished at 9 a.m. on Monday, the 9th of April. In an action by the shipowners to recover two days' demurrage,

Held, first, that though the consignees were entitled to seven whole days for unloading, and were, therefore, not bound to commence the discharge on Saturday, the 31st of March, yet the true inference from the facts was that the consignees had agreed to treat the Saturday as a lay day; secondly, that the lay days meant days from midnight to midnight, and not periods of twenty-four hours commencing at any hour of the day; and that, therefore, the lay days expired on Saturday, the 7th of April, and two days' demurrage was due.—"*Katy*," *The*, C.A. 290.

7. *Charter-party — Discharge—Delivery—Obligation of consignees.*—A charter-party for the carriage of spars from a Norwegian port to London contained a provision that the cargo should be discharged in the Surrey Commercial Docks, the discharge to take place in eight days, the cargo to be taken from alongside at consignees' risk and expense, and the ship "to discharge overside in the river or dock into lighters or otherwise, if required by the consignees."

Held, that the charter-party did not impose on the captain and crew the obligation to get the spars outside the ship and into the lighters, and for that purpose to put men on board the lighters; but that when they had brought the spars within reach of the consignees' men in the lighters it was the duty of the latter to take their part in the first operation of delivering and receiving the goods; and consequently the consignees were liable to pay demurrage for delay caused by reason of their men in the lighters being too few to enable the discharge to be completed within the lay days.—*Petersen* v. *Freebody*, C.A.

8. *Charter-party—Excepted perils—"Strikes and lock-outs of pitmen"—Demurrage—Written clause.*—The defendants chartered the plaintiff's ship to proceed to Ardrossan, the charter-party providing that the ship should there load "in the customary manner, say in twelve colliery working days," a cargo of coals, "to be loaded according to the custom of the port"; "strikes and lock-outs of pitmen and others" being accepted perils. The following written clause was added:—"It is understood that vessel is to be loaded at once, and lay days to count when vessel ready and notice given." The ship arrived at Ardrossan, and gave notice that she was ready to load; but before twelve working days had elapsed a strike broke out at the pit, in consequence of which the ship did not load the cargo of coals till twenty-three ordinary working days had gone by. By the charter-party demurrage was to be paid at the rate of fourpence per registered ton per day. The plaintiff claimed for fifteen days' demurrage.

Held, that the written clause only fixed the time when the lay days began, and that the delay was caused by an excepted peril.—*Petersen* v. *Dann*, Q.B.D. 349.

9. *Collision—Fog—"Fairway" of river—Duty to ring bell at anchor—Thames Bye-laws*, 1880, *art.* 13.—By article 13 of the Thames Bye-laws, 1880, a vessel in a fog "when in the fairway of the river and not under way, shall at intervals of not more than two minutes, ring the bell." The plaintiff's sailing barge having anchored, on account of fog, above and inside the West Blyth buoy in Sea Reach, did not ring her bell at above intervals. She was ran into and damaged by defendants' steamer.

Held, that the barge, as well as the defendant's steamer, was to blame; for the word "fairway" in article 13 means "a clear passage-way by water," and the barge was anchored in a part of the river where it was safe for vessels of moderate draught to navigate, and was, therefore, bound to obey article 13.—*Blue Bell, The*, P.D. & AD.D.

10. *Collision—Liability—Statutory limitation—Special contract—Merchant Shipping Act Amendment Act*, 1862 (25 & 26 *Vict.* c. 63), *s.* 54.—The owners of yachts, in entering them for a race at a regatta, undertook to be bound by certain rules while engaged in the race. The rules provided that the owner of a yacht which disobeyed the rules should be liable for all damages resulting from the breach thereof.

Held, that the rules constituted a contract between the owners of competing yachts, and that the damages recoverable for a breach of the rules were not confined within the statutory limitation of damages enacted by section 8 of the Merchant

Shipping Act Amendment Act, 1862.—*Satanita, The*, C.A. 498.

11. *Collision—Lights—Steamer riding by her chains with anchors unshackled.*—A steamship, finding herself unable to make headway against a gale in the English Channel, unshackled her anchors, banked her fires, shut off steam, and rode head to wind S.W., by her chains. A sailing vessel proceeding down the Channel and heading about S.S.E. close hauled on the starboard tack, mistook the lights for the masthead and green lights of a steamer in motion, and, expecting the steamer to give way, kept on her course, and collided.

Held, that the steamer was alone to blame, as the lights she showed were calculated to mislead, so that the mistake on the part of the sailing vessel was excusable. The steamer, having rendered herself unmanageable, should have shown three red lights, and should have kept steam readily available so as to bring herself promptly under command if occasion required.—*Faedrelandet, The*, C.A.

11. *Collision—Steam vessel anchoring in River Thames—Thames Bye-law*, 1887, *article* 18; *and Bye-law*, 1892, *article* 7 (*c*).—At 7 p.m. in November, the master of the plaintiff's steamship, which was proceeding up Barking Reach, in the Thames, with a flood tide of half a knot, determined to anchor on account of a fog. He stopped the engines, put the helm hard a-port, and having given the ship an angle across the river to the northward, set the engines slow ahead and then full speed astern. When way was taken off the ship he let go the anchor, and upon its holding he ordered the two side lights and the masthead light to be taken in and the riding light to be put up, leaving a stern light showing twenty points still exhibited. The fog just then lifted, and the defendant's steamship coming down the river, seeing the masthead and red light of the plaintiff's ship a little on the port bow, ported. The red light then disappeared, and the plaintiff's ship was seen to be lying across the river, whereupon the engines of the defendant's ship were reversed full speed, but a collision occurred.

Held, that the plaintiff's ship was alone to blame, as when throwing athwart the navigable channel and stopping way, she was within article 18 of the Thames Bye-laws, 1887, and was bound to give four or more blasts of the steam-whistle in rapid succession as long as the danger lasted—*i.e.*, whilst she swung to her anchor. The side lights ought also to have been taken in as soon as the vessel was held by her anchor, and being over 150 feet in length, the second riding light prescribed by article 7 (*c*) of the Thames Bye-laws, 1892, should have been exhibited at or near the stern.—*Wega, The*, P.D. & AD.D.

13. *Collision—Steamship dredging up to dock entrance—Stern-light—Look-out—Whistle—Thames Rules.*—A steamer dropping up the Thames stern first on a dark night for the purpose of going into dock, and exhibiting only her stern light to down-coming vessels is bound to keep a look-out up river, and ought, when she sees a vessel coming down, to give such sufficient signal as will enable the down-coming steamer to avoid her.

Semble, a proper signal under such circumstances would be a prolonged blast of the steam-whistle of not less than five seconds' duration.—*Juno, The*, P.D. & AD.D.

14. *Contract to serve as seaman—Declaration of war by Government owning the ship—Illegality of voyage—Increased danger—Refusal to complete service—Recovery of wages and damages.*—The defendants constructed a vessel of war for the Japanese Government, and placed her in charge of a captain, for the purpose of navigating her to Japan and handing her over to the Japanese Government, whose property she had become upon her completion. The plaintiff contracted with the captain to serve on board the vessel as fireman for the voyage to Japan. Before the voyage was completed war was declared between Japan and China, and the plaintiff, on hearing this, left the ship in consequence of the increased risk. The defendants accepted any responsibility of the captain under his contract with the plaintiff.

Held, that the captain was responsible for the act of the owners, the Japanese Government, in declaring war, and thereby increasing the risk of the voyage, and that the plaintiff was, therefore, entitled to recover from the defendants his wages, for the whole voyage, and also a sum for general damages.—*O'Neill* v. *Armstrong*, Q.B.D. 554.

15. *Co-owners—Transfer by majority of co-owners of their shares to a company—Objection of minority owner—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 8.—The majority of the co-owners of a ship formed a limited company to which they transferred their shares. The minority of the co-owners moved for the sale of the ship in an action of restraint.

Held, that the consent of all co-owners was requisite to sanction the change in the character of ownership; and that in the interest of all concerned a sale of the whole ship ought to be decreed by the court in the exercise of its discretion, under section 8 of the Admiralty Court Act, 1861.—*Hereward, The*, P.D. & AD.D.

16. *Derelict—Recovery by shipowner at port of discharge—Determination of contract of affreightment by abandonment—Cargo owner's right to cargo without payment of freight.*—If a ship is abandoned by her master and crew during a voyage, and the cargo owner exercises his right of treating the abandonment as a determination of the contract of affreightment, the subsequent recovery of the vessel by the shipowner from salvors at the port of discharge will not revive the contract, and the owner of the cargo will be entitled to have it returned to him without payment of freight.

The Cito, 7 P. Div. 5, considered.—*Arno, The* C.A.

17. *Freight—Goods damaged—Dates—Ship sunk but afterwards raised.*—A cargo of dates was shipped under bills of lading making freight payable on right delivery; the ship was sunk on voyage, but was subsequently raised. On arrival at port of discharge the dates were found to be no longer merchantable as dates, although still of considerable value for other purposes — *e.g.*, distillation of spirits.

Held, that freight was not payable in respect of them.—*Asfar* v. *Blundell*, Q.B.D.

18. *Lien on ship—Disbursements by master—Master's liability—Merchant Shipping Act*, 1889 (52 & 53 *Vict. c.* 46), *s.* 1.—Disbursements and liabilities of the master of a vessel which give rise to a maritime lien are those for which, by virtue of his general authority and without express authority, a master can pledge his owners' credit; and a liability cannot be created in the master, within the meaning of section 1 of the Merchant Shipping Act, 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages.—*Orienta, The*, C.A.

19. *Mortgage — Equitable charge — Priorities —*

Notice—Registration—Debenture—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *ss.* 43, 66, 67, 69—*Merchant Shipping Act Amendment Act*, 1862, (25 & 26 *Vict. c.* 63), *s.* 3.—Section 3 of the Merchant Shipping Act Amendment Act, 1862, must be read as if it had been originally incorporated in the Merchant Shipping Act, 1854, and does not nullify any part of the latter Act, which must be construed as explained by the said section. Equitable titles by notice must be recognized, but not preferred to legal titles, and the title of a mortgagee who has a mortgage in the statutory form, and registered will be preferred to a prior equitable unregistered title. —*Black* v. *Williams*, CH.D. VAUGHAN WILLIAMS, J., 346.

20. *Mortgage—Priorities—Commission on sale of ship—Collateral agreement.*—The general principle that a first mortgagee whose mortgage is taken to cover future advances cannot claim in priority over a second mortgagee the benefit of advances made after he had notice of the second mortgage (*Hopkinson* v. *Rolt*, 9 H. L. Cas. 514) applies to the registered mortgages of ships, notwithstanding section 69 of the Merchant Shipping Act, 1854. Where priorities depend, not upon the dates of the instruments, but upon a state of facts wholly independent of the dates of the instruments, that section does not apply.

The M. B. Co., although they arrested the ship, did not take possession of her before the freight was paid.

Held, that they were not liable to account for the freight as mortgagees in possession. Having received it as assignees of freight they were entitled to it as against the second mortgagees, although the assignment was made after notice of the second mortgage.

Commission of 2½ per cent. charged by the mortgagees as part of the expense of the sale of the ship disallowed; it being an established principle that a mortgagee conducting a sale under his power of sale is so far in the position of a trustee that he can make no charge for his trouble in connection with the sale. No agreement between the parties can render such a charge valid.

Commission of 2 per cent. in respect of cash advances stipulated by letter allowed, on the ground that the letters created a valid collateral agreement, which was not void because not in the statutory form, or as clogging or otherwise affecting the redemption.—*Benwell Tower, The*, P.D. & AD.D.

21. *Pilot—Bristol Channel Pilotage District—Port of Bristol—Pilotage Order Confirmation* (*No.* 1) *Act*, 1891 (54 & 55 *Vict. c.* 160).—A vessel lying at anchor about a mile to the north-west of the English and Welsh Grounds Lightship in the Bristol Channel was run into by a steamship proceeding from Bristol to Cardiff, which was in charge of a pilot licensed by the Bristol Corporation for the port of Bristol and the Bristol Channel Pilotage District. One rate is payable for the pilotage of a vessel from Bristol to any part of the Bristol Channel eastward of the Holms.

In the Pilotage Order Confirmation (No. 1) Act, 1891 (54 & 55 Vict. c. 160), the boundary of the port of Bristol between the Holms and Aust is stated to be "from the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester."

Held, that the boundary of the port of Bristol between the Holms and Aust is a straight line between those two places and does not follow the course of the navigable channel.

Held further, that the collision being to the northwestward of such line was not within the port of Bristol, but as it was within the Bristol Channel Pilotage District, within a part of which (namely, the port of Bristol) the employment of a pilot was compulsory, and as one pilotage rate was payable to a part of the district beyond the spot where the collision occurred, the defendants were exonerated from liability for the negligence of the pilot.—*Charlton, The*, P.D. & AD.D.

22. *Pilot—Compulsory pilotage—Coasting trade—Foreign-going ship—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 376, 379—*Order in Council*, 21*st of December*, 1871—*Inland Revenue Act*, 1876 (39 & 40 *Vict. c.* 36), *ss.* 129, 144, 145—*Inland Revenue Act*, 1879 (42 & 43 *Vict. c.* 21), *s.* 9—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 625.—The defendants' steamship made regular voyages from London to Cardiff or other ports in the Bristol Channel with part cargo and part ballast, discharging the ballast in those ports and taking in the remainder of her cargo, and then proceeding to Venice and other Mediterranean ports and returning to London.

On one of such voyages, whilst proceeding down the Thames in charge of a Trinity House pilot, she collided with the plaintiffs' barge in tow of a tug, both vessels were to blame, but the fault so far as the defendants' steamship was concerned was that of the pilot alone.

Held, that the defendants were not liable, as their steamship being a foreign-going ship was not within any of the exemptions in the Merchant Shipping Act, 1854, and was, therefore, bound to employ the pilot.—*Winested, The*, P.D. & AD.D.

23. *Pilot—Qualified pilot — Compulsory pilotage district—Unexempted ship—Pilot for exempted ship—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 2, 353—*Order in Council*, 5*th of February*, 1873. —Section 353 of the Merchant Shipping Act, 1854, imposes a penalty upon every master of any unexempted ship navigating within any compulsory pilotage district, who, after a qualified pilot has offered to take charge of such ship, either himself pilots such ship (not himself possessing a pilotage certificate enabling him so to do), or employs or continues to employ an unqualified person to pilot her, and also upon every master of any exempted ship navigating within any such district who, after a qualified pilot has offered to take charge employs or continues to employ an unqualified pilot to pilot her.

Held, that the expression "qualified pilot" had reference to the class of ship of which the pilot offers to take charge, and, consequently, that the master of an unexempted ship who continued to employ an unqualified person to pilot her, after a pilot licensed only to pilot exempted ships had offered to take charge of her, was not liable to a penalty under the section.—*Stafford* v. *Dyer*, Q.B.D.

24. *Port and harbour— Wreck — Obstruction to harbour—Owner—Harbours Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 56—*Removal of Wrecks Act*, 1877 (40 & 41 *Vict. c.* 16), *s.* 4—*Liability for expenses of removal.*—By section 56 of the Harbours, Docks, and Piers Clauses Act, 1847, "the harbour-master may remove any wreck or other obstruction to the harbour . . . and the expense of removing any such wreck . . . shall be repaid by the owner of the same."

A ship of the appellants became a total loss and was abandoned by the owners. There was no evidence that the loss was caused by their default. The wreck lay in such a position as to be an

obstruction to the harbour of the respondents, and was removed by them. They then brought an action against the appellants to recover the expenses of such removal.

Held, that the appellants were not liable, for that section 56 of the Act of 1847 points to ownership at the time that the expense of removing the obstruction was incurred, not to ownership at the time that the obstruction was created.

Earl of Eglinton v. *Norman*, 36 L. T. Rep. 888; 46 L. J. 557 Ex.) and *The Edith* (11 L. Rep. (Ir.) 270) disapproved.—*Arrow Shipping Co.* v. *Tyne Commissioners, The Crystal*, H.L.

25. *Port and harbour—Unsafe berth—Injury to vessel—Liability of port and harbour authority.*—By a private Act of Parliament the defendants were appointed as guardians of the port and harbour of Wisbech, with prescriptive rights to receive tolls to be applied to improving the harbour and port, and provision was made for the appointment of one or more harbour-masters for regulating the placing and mooring of vessels, and for preventing and removing obstructions. A later Act gave the defendants the same rights over a channel called the New Cut, which had been constructed partly for better drainage and partly in place of the old channel forming part of the port and harbour, and was vested in commissioners. A vessel was berthed in the New Cut, under the direction of the defendants' harbour-master, and sustained damage to her bottom owing to the unfit state of the berth. In an action brought by the shipowners against the harbour authority:

Held, that the defendants were liable for the damage arising from the neglected state of the channel.—*Burlington, The*, P.D. & AD.D.

26. *Salvage—Fire—Services rendered by steamship to vessel lying alongside jetty—Amount of award.*—A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessels, extinguished the fire which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was £9,500. The defendants tendered £200.

The court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another.—*City of Newcastle, The*, P.D. & AD.D.

27. *Salvage—Services priced by salvage agreement not performed—Amount of salvage remuneration due in respect of salvage services rendered to vessel in distress afterwards towed into safety by other salvors—Costs* nomine expensarum.—The right of salvors to receive salvage remuneration does not depend upon whether or not a contract exists entitling them to salvage remuneration. Therefore, where the master of a vessel in distress contracted to pay an agreed sum of £3,000 for being towed into a port of safety by another vessel, and the agreement was not performed, but it appeared that the vessel whose master had agreed to so tow the vessel in distress, had towed her into a somewhat better position than that in which she was first fallen in with, and had thus contributed in some degree to her being ultimately towed into safety by other salvors, the court taking the value of the salved vessel, her cargo and freight, as between £34,000 and £35,000, awarded as salvage remuneration, £3,000 to the salvors by whom the salved vessel had been towed into safety, and £300 to the salvors who had entered into, but not performed, the salvage agreement.

The ultimate salvors were condemned in an amount of costs *nomine expensarum* for not consenting to consolidation of their action with the action of the first salvors.—*Hestia, The*, P.D. & AD.D. 668.

See also ADMIRALTY, 3, 5, 7, 9; PRACTICE, 52, 54, 55.

SOLICITOR:—

1. *Application to committee of Incoporated Law Society—Allegations against solicitor—No* primâ facie *case of professional misconduct—Jurisdiction of committee—Discretion—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13.—On an application under section 13 of the Solicitors Act, 1888, to the committee of the Incorporated Law Society appointed under the Act, that a solicitor might be required to answer allegations of professional misconduct contained in an affidavit, the committee were of opinion that the affidavit disclosed no *primâ facie* case of professional misconduct, and the committee declined to proceed further with the hearing of the complaint.

Held, that an application for a *mandamus* to the committee to hear and determine the matters complained of failed on two grounds—first, that the committee had a discretionary power to decline to proceed with the hearing if they were of opinion that the applicant's affidavit disclosed no *primâ facie* case of professional misconduct; secondly, that there was another remedy open to the applicant equally convenient and beneficial—viz., an application to the court.—*Reg.* v. *Incorporated Law Society*, Q.B.D. 687.

2. *Attachment—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-section* 4.—The balance found due from a solicitor upon the taxation of his bill, and the costs of the taxation, are within the exception of sub-section 4 of section 4 of the Debtors Act, 1869.

In re Rush, 18 W. R. 331, L. R. 9 Eq. 147, followed.—*Solicitor, A, Re*, CH.D. NORTH, J., 490.

3. *Costs—Security for costs—Charging order—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.—The court will not make a charging order for costs under section 28 of the Solicitors Act, 1860, where the solicitor has already accepted security for the costs.—*Groom* v. *Cheesewright*, CH.D. KEKEWICH, J., 475.

4. *Costs—Taxation—Advowson in possession—Freehold Property—Scale—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *General Order, Schedule I., Part I.*—An advowson in possession is freehold property within the meaning of Schedule I., Part I., to the general order made in pursuance of the Solicitors' Remuneration Act, 1881.

On an application to review taxation of a bill of costs in respect of the purchase by private contract of an advowson in possession.

Held accordingly, that the taxing-master had rightly allowed costs according to the scale prescribed by schedule I., and not according to the old system as altered by Schedule II.

In re Steward, 37 W. R. 484, 31 Ch. D. 494, distinguished. — *Earnshaw - Wall, Re*, CH.D. CHITTY, J.

5. *Costs — Taxation — Auctioneer — Commission—Fee paid by client to auctioneer for taking bids merely*

—*Solicitor otherwise conducting sale—Scale fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44), *General Order Clause*, 4—*Schedule I., Part I.*, *r.* 11.—A fee of £2 for every lot sold and £1 for every lot unsold, paid to an auctioneer for merely taking bids at a sale by public auction, is a "commission" within rule 11 of the Rules applicable to the scale charges prescribed in Schedule I., Part I., to the General Order under the Solicitors' Remuneration Act, 1881.

Where such a fee is paid by the vendor to the auctioneer, the vendor's solicitor is not entitled to the scale remuneration prescribed in Schedule I., Part I., for conducting a sale by public auction, but is only entitled to a *quantum meruit*, although the solicitor has done all the work of conducting the sale except the actual receiving of bids in the auction room.

In re Peace & Ellis, 36 W. R., approved.—*Drielsma* v. *Manifold*, C.A.

6. *Costs—Taxation—Delivery of bill—Common order—Bill sent for other purpose—Draft bill of plaintiff's costs sent to defendant's solicitor to enable him to agree costs as part of compromise of action.*—On the 3rd of August, 1894, R. P. commenced an action against W. P., his son and partner, for dissolution of partnership. Notice of motion for a receiver was given, but stood over pending negotiations for a settlement until the 22nd of August. A draft agreement for settlement was sent on the 15th of August by the plaintiff's solicitors to the defendant's solicitors, containing, among other clauses, the following: "The cost of the action and of this agreement and of the notice of dissolution for the *London Gazette*, shall be paid by W. P." On the 17th the plaintiff's solicitors sent to the defendant's solicitors a draft bill of costs for £48 19s., with an explanatory letter saying that they were sent in order that the defendant's solicitors might peruse them before completion, and the amount agreed upon might be inserted in the agreement. On the 21st of August the parties and their solicitors met, and the agreement was signed by the plaintiff and defendant with the words "Such costs being agreed at £45" added at the end of the draft clause set out above. The action was abandoned according to the agreement, and on the 27th of August W. P. obtained the common order to tax the bill so delivered. The plaintiff's solicitors moved to discharge this order.

Held, that the sending the bill under the circumstances stated was not a delivery of a bill within the meaning of the Attorneys and Solicitors Acts, and that, whatever might have been W. P.'s rights to have a bill delivered and taxed on a special application, he was not entitled to the common order to tax, and this order must be discharged with costs.—*Hulbert & Crowe, Re*, CH.D., NORTH, J.

7. *Costs — Taxation — Remuneration — Debenture trust deed—Mortgage—Scale fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44)—*General Order*, 1882, *r.* 2 (a), (c), *Schedule* 1, *Part* 1.—The costs of the preparation and execution of a debenture trust deed, which was intended to be a mortgage security for moneys advanced, but under which no debentures were in fact ever issued, should be taxed under rule 2 (c) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881.—*Bircham & Co., Re*, C.A. 673.

8. *Costs—Taxation—Remuneration—Deduction of title—Mortgage—Leaseholds—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44), *General Order*, *Schedule* 1, *Part* 1.—A mortgagor's solicitor is not entitled to charge the scale fee for deducing title and preparing and completing mortgage where he merely furnishes the mortgagee's solicitors with a statement of the dates and particulars of the several leases of the property and a form of the covenants, which were alike in each case.—*Wellby* v. *Still*, CH.D. KEKEWICH, J., 73.

9. *Costs—Taxation—Remuneration—Lease—Agreement for lease—Lessor's solicitor—Item bill—Taxation by lessee—Scale—Counterpart—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44)—*General Order*, *August*, 1882, *Schedule* 1, *Part* 2.—A lease in writing for a term not exceeding three years at a rack rent, or an agreement for the same, is within Schedule 1, Part 2, of the General Order to the Solicitors' Remuneration Act, 1881.

The lessee, on paying the bill of the lessor's solicitor, is entitled to deduct the costs of the counterpart from the scale charge.

The delivery of an item bill under Schedule 2 for business to which Schedule 1 applies does not entitle the client or party chargeable to insist on taxation under Schedule 2.—*Negus, Re*, CH.D. CHITTY, J., 68.

10. *Costs — Taxation — Remuneration — Lease — Printed form—Scale charge—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44).—Leases following a general printed common form and requiring in each case only to be filled in with the names of the parties, the parcels, a plan, the rent, and so forth, are not subject to the scale charges in Part II., of Schedule I., to the Rules, under the Solicitors' Remuneration Act, 1881.—*Wellby* v. *Still* (*No.* 2), CH.D. KEKEWICH, J.

11. *Costs — Taxation — Remuneration — Purchase under Public Health Act—Sale by voluntary agreement—Scale fee—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 82—*Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44)—*General Order under the Act*, *Schedule I.*, *Part I.*, *r.* 11.—Under a voluntary agreement, which provided that all costs and expenses of the sale and purchase should be paid by the purchasers, land was sold to a local board who acquired it for the purpose of establishing sewage works under the Public Health Act, 1875.

Held, that the sale was a sale under the Lands Clauses Consolidation Act, and that, therefore, by virtue of rule 11, of Part I., of Schedule I., to the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, the scale of charges contained in Schedule I., Part I., did not apply.—*Burdekin, Re*, C.A. 534.

12. *Costs—Taxation—Solicitors application to tax—Balance due from client—Enforcing payment.*—A solicitor who has obtained in the Chancery Division the common order to tax, cannot get payment of the amount found due to him by his client by means of a summons, but must bring an action for the purpose.—*Debenham & Walker, Re*, CH.D. NORTH, J., 699.

13. *Costs — Taxation—Solicitor instituting proceedings against trustees without sufficient communication with them—Personal order as to costs against solicitor—R. S. C., Ord.* 65, *r.* 11.—The solicitors of a beneficiary having instituted proceedings against the trustees without first holding sufficient communication with them, an order was made disallowing the plaintiff's solicitors all costs as against their client.—*Dartnall, Re, Sawyer* v. *Goddard*, C.A. 644.

14. *Costs—Taxation—Vendor and purchaser—Subsale—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44), *General Order*, *Rules* 2 (a) (c). 4.—

Where a solicitor acts for a purchaser who, before completion, sells a portion of the property to a sub-purchaser, the solicitor is entitled to charge his client the scale fee on the whole purchase money for acting as solicitor to the purchaser, and the scale fee on the amount of the sub-purchase-money for acting as vendor's solicitor.—*Read, Re,* CH.D. KEKEWICH, J,

15. *Misconduct—Permitting unqualified person to use name—Punishment—Discretion of court—Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73) *s.* 32.—It being proved to the satisfaction of the court that a solicitor has been guilty of the offence specified in section 32 of the Solicitors Act, 1843—viz., that of permitting his name to be used by an unqualified person—the court has, under that section, no discretion as to the punishment, but is bound to strike the solicitor off the roll.—*Kelly, Re, Incorporated Law Society, Ex parte,* Q.B.D. 191.

16. *Mortgage—Trustee* de son tort.—The solicitors of a mortgagee trustee, though the mortgage money has been paid through them, are not liable for the insufficiency of the security, where the mortgagee trustee acted on his own responsibility in making the advance. — *Brinsden* v. *Williams,* CH.D. NORTH, J.

17. *Partnership—Fraud of partner—Liability of firm—Mortgage transaction—Ordinary course of business—Partnership Act,* 1890 (53 & 54 *Vict. c.* 39), *s.* 11.—The plaintiff, being a client of a firm of solicitors, entered into negotiations for obtaining a loan upon the security of certain real estate to which he was entitled. The transaction was carried out by R., a member of the firm, the money being advanced by the defendants M., who were also clients of the firm. R. represented to the plaintiff that the mortgages required some further security, and suggested that there should be included in the mortgage certain bonds payable to bearer, upon the security of which the plaintiff had, on two previous occasions, borrowed money, the transaction in each case having been carried out by R. on behalf of the firm. The plaintiff accordingly handed these bonds to R., who subsequently misappropriated them and absconded. The defendants M. never required any additional security, and neither they nor the defendants the partners of R., had any knowledge of the circumstances under which he obtained possesion of the bonds. The plaintiff sought to make all the defendants liable for the loss of the bonds.

Held, that the defendants M. were not liable, inasmuch as they had never authorized R. to include the bonds in the mortgage security, and had never ratified what R. had done; but

Held, that the plaintiff's transaction with R. was a transaction with the firm, which rendered not only R., but the firm liable; and that, therefore, the defendant partners of R. were liable to make good the loss to the plaintiff.

Cleather v. *Twisden,* 33 W. R. 435, 28 Ch. D. 340, distinguished.—*Rhodes* v. *Moules,* C.A. 99.

18. *Partnership—Liability of firm for breach of trust of one member—Breach of trust—Constructive trustee—Impounding life interest of* cestui que trust —*Trustee Act,* 1888 (51 & 52 *Vict. c.* 59), *s.* 6—*Trustee Act,* 1893 (56 & 57 *Vict. c.* 53), *s.* 45.—The trustees of a marriage settlement were empowered to vary the investments with the consent in writing of the wife. The original trustees being about to retire and having been requested to vary the investments, the securities were realized and the moneys paid into a bank in the names of the proposed new trustees. The moneys afterwards came under the control of B., one of the partners in a firm of solicitors acting for the wife and for the proposed new trustees, and he, before the appointment of the new trustees had been made, and without any communication with the old trustees invested the moneys upon mortgages of building land in the names of the proposed new trustees. The mortgages were improper securities for trust funds and they resulted in a loss. After the mortgages had been made, the new trustees were appointed by the husband and wife, and in the deed of appointment the mortgages were referred to as constituting the securities for the trust fund. The wife consented in writing to two of the mortgages, but there was nothing to show she knew they constituted a breach of trust. B. had the principal conduct of the business, and his partner had no personal knowledge of the greater part of it. In an action by the wife and infant children against the solicitor B. and his partner to make good the loss of the trust fund,

Held (1) that B. was liable, as if he had actually been a trustee of the settlement, to make good the loss; (2) that upon the evidence, B. in making the investments was acting on behalf of his firm and that B.'s partner was jointly and severally liable with B. to make good the loss; (3) that the life interest which the wife took in the trust fund could not be impounded by way of indemnity to either defendent under section 6 of the Trustee Act, 1888, or section 45 of the Trustee Act, 1893. —*Mara* v. *Browne,* CH.D. NORTH, J.

19. *Retainer—Right of solicitor to terminate—Good cause and reasonable notice.*—A solicitor who is retained to conduct or defend a common law action, in the absence of special contract, undertakes to do so till the termination of the action, and consequently he cannot (except for good cause and after giving reasonable notice) terminate the retainer and decline to proceed further in the action, and then sue for his bill of costs.—*Underwood* v. *Lewis,* C.A.

See also ARBITRATION, 3; BANKER, 2; COMPANY, 8, 35; SETTLED LAND, 3.

SPECIFIC PERFORMANCE :—

Discretion of court—Compromise—Material fact—Non-disclosure by party to agreement.—In the absence of a duty on the part of the plaintiff to disclose material facts within his knowledge, mere non-disclosure of a material fact to the defendant, who has entered into an agreement with the plaintiff in ignorance of such fact, is not of itself a good defence to an action for specific performance of the agreement.

So held, in the case of an agreement for the compromise of an action.

Ellard v. *Llandaff,* 1 Ball & Beat, 241, 12 Rev. Rep. 221, considered.—*Turner* v. *Green,* CH.D. CHITTY, J., 537.

See also CONTRACT, 8; LANDLORD AND TENANT, 10, 11; RAILWAY, 20; VENDOR AND PURCHASER, 3, 5, 10.

STOCK EXCHANGE :—

1. *Broker—Outside broker—Principal and agent—Running stock against client—Differences—Contract with third party.*—In an action by an outside broker against a client to recover the balance of account for stocks and shares alleged to have been bought and sold for him, it appeared as to part of such stocks and shares that the broker appropriated certain stocks that he already held to the client's account, without the latter's knowledge.

Held, that there had been no contracts made by the broker with a third party for the client's benefit, and that, therefore, the broker could not recover differences or commissions in respect of such shares.

Further, as to other stocks and shares it appeared that the broker after buying them for the client resold them without the latter's knowledge, and subsequently bought them back again, but charged the client with the differences, as though such stocks had been kept open on his account, and it was

Held, that no real continuing contracts had been in existence for the benefit of the client, and consequently no real differences had arisen which the broker was entitled to recover from the client.—*Skelton* v. *Wood*, Q.B.D.

2. *Transactions in stocks and shares—Deposit of securities as cover—Gaming and wagering contract—Right to recover securities*—8 & 9 *Vict.* c. 109, *s.* 18.—The plaintiff deposited with the defendants, who were outside brokers, certain securities as cover in respect of transactions in stocks and shares. The transactions resulted in a loss to the plaintiff. In an action by the plaintiff to recover his securities, the jury found that the transactions had been gambling transactions.

Held, that section 18 of the Gaming Act, 1845 (8 & 9 Vict. c. 109), did not prevent the plaintiff from being entitled to recover his securities.—*Strachan* v. *Universal Stock Exchange*, C.A. 611.

THAMES CONSERVANCY:—

Lighterman's apprentice—Vessel of over fifty tons burden—Navigation of same—"One competent man on board and one man in addition"—Bye-law 16 *of the Thames Conservancy—Watermen's and Lightermen's Amendment Act*, 1859 (22 & 23 *Vict.* c. 133), *ss.* 54 *and* 80, *and bye-law* 35 *made under that Act.*—The provision contained in bye-law 16 of the Thames Conservancy, that for the purpose of navigating craft of over fifty tons burden there should be on board at least one competent man "and one man in addition," may be satisfied, as regards the second of the two men, by an apprentice, even though such apprentice be not qualified to take out a licence under section 52 of the Watermen's and Lightermen's Act.—*Gosling* v. *Newton*, Q.B.D. 559.

See also ELECTION LAW, 12.

TITHE:—

1. *Inland Revenue—Income tax assessment for occupation of land—Reduction by commissioners—Right of the owner of the tithe rent-charge to appeal—Income Tax Act*, 1853 (16 & 17 *Vict.* c. 34), *Schedule B.—Title Act*, 1891 (54 & 55 *Vict.* c. 8), *s.* 8, *sub-sections* 1, 3—*Taxes Management Act*, 1880 (43 & 44 *Vict.* c. 19), *s.* 57, *sub-section* 10.—Where an owner and occupier of lands subject to a tithe rent-charge successfully appeals to the commissioners for a reduction of the assessment made by the surveyor under Schedule B of the Income Tax Act, 1853, the owner of the tithe charge has a right of appeal to the commissioners by section 8, sub-section 3, of of the Tithe Act, 1891, if the assessment made by the surveyor has, on appeal, been reduced by them to such an extent that the tithe charge exceeds two-thirds of the annual value of the land as ascertained by the assessment, in consequence of which reduction so much of the tithe rent-charge as is equal to the excess, ceases to be recoverable from the occupier under section 8, sub-section (1).—*Reg.* v. *Barnstaple Tax Commissioners*, Q.B.D. 666.

2. *Recovery of Redemption-money—Valuer employed by the commissioners—Tithe rent-charge—Jurisdiction of the county court—Tithe Act*, 1891 (54 & 55 *Vict.* c. 8), *s.* 10, *sub-section* 4—*Tithe Commutation Act*, 1860 (23 & 24 *Vict.* c. 93), *s.* 39.—A county court judge has jurisdiction, under section 10, sub-section (4), of the Tithe Act, 1891, to hear applications by a valuer duly appointed by the commissioners under the Tithe Acts for the recovery of sums due in respect of redemption-money.—*Reg.* v. *Patterson*, Q.B.D. 127.

TRADE-MARK:—

1. *Registration—Invented word—Geographical name—Eboli—Patents, &c., Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 64; *and* 1888 (51 & 52 *Vict.* c. 50), *s.* 10.—Eboli being the name of a town in Italy, the word Eboline held not to be registrable as a mark for silk piece goods," either as an "invented word" under sub-section (*d*), or as a "word not being a geographical name" under sub-section (*e*) of section 10 (1) of the Patents Act, 1888.

McAndrew v. *Bassett*, 12 W. R. 777, 4 De G. J. & Sm. 380, observed upon.—*Salt (Sir Titus) Trade-Mark Application, Re*, CH.D. CHITTY. J.

2. *Registration—Word "Mazawattee"—Motion to expunge—Deceptive word—Descriptive word—Geographical name—Patents, Designs, and Trade-Marks Acts*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 64, 73; 1888 (51 & 52 *Vict.* c. 50), *s.* 10.—In 1887 D. & Sons registered the word "Mazawattee" as a trade-mark for tea, and in 1890 they registered the same word as a trade-mark for all goods in class 42 except tea. The word "Mazawattee" was compounded of two words—"mazadhar," a Hindoo word meaning "luscious," and "wattee," a Singalese word meaning "garden" or "growth"; the suffix "dhar" in the former word being omitted. It appeared from the evidence that the names of some tea estates in Ceylon ended in "wattee" such as "Mariawattee" and "Agrawattee," but no such estate as "Mazawattee."

Upon a motion to rectify the register by expunging these marks, upon the ground that the word "Mazawattee" was deceptive or descriptive.

Held (affirming the decision of Romer, J.), that the marks were rightly registered, the word being a "fancy word not in common use" within the meaning of section 64 of the Patents, &c., Act of 1883, and an "invented word having no reference to the character or quality of the goods, and not being a geographical name," within the meaning of section 10 of the Patents, &c., Act of 1888.—*Dunsham's Trade-Mark, Re*, C.A. 515.

TRADE-NAME:—

1. *Company—Calculated to deceive—Striking out paragraph of affidavit.*—A foreign company trading in this country is entitled to restrain the use of a name so similar as to be calculated to deceive its customers.

To state that the members of a company which is plaintiff are undischarged bankrupts is irrelevant to the action, and a paragraph containing such an allegation will be struck out.—*National Folding Box and Paper Co.* v. *National Folding Box Co.*, CH.D. NORTH, J., 156.

2. *Passing off defendant's goods as those of plaintiff—Injunction—"Yorkshire Relish."*—The plaintiff and his predecessors had for thirty-four years made and sold a sauce under the name "Yorkshire Relish," these words being printed upon labels on the bottles and upon wrappers. In 1884 the plaintiff registered the words "Yorkshire Relish"

as his trade-mark, but in 1893 the trade-mark was on the application of the defendants, removed from the register. Down to November, 1893, no sauce but that of the plaintiff was in the market under the name of "Yorkshire Relish," but the defendants then began to place on the market a sauce which they called "Yorkshire Relish." This name was printed on the labels placed on their bottles and on the wrappers of the bottles, but the labels differed in general appearance from those of the plaintiff, and there was a statement on both the labels and wrappers that the sauce was made by the defendants.

Held, that the defendants had not sufficiently distinguished their sauce from that of the plaintiff, and that an interim injunction should be granted restraining them using the words "Yorkshire Relish" as descriptive of or in connection with their sauce without clearly distinguishing their sauce from that of the plaintiff.—*Powell* v. *Birmingham Vinegar Brewery Co.*, C.A.

3. *Unregistered trade-mark—Description of goods—Long exclusive user by plaintiff—Marker of similar goods—Right to use same name—Injunction.*—The plaintiffs had for many years, without obtaining any patent, manufactured and sold a particular kind of belting for machinery. It was made of camel hair, and was sold by the plaintiffs and known in the market under the name of "camel-hair belting." The plaintiffs proved that anyone asking in the market for camel-hair belting would be understood to mean their goods. The defendants manufactured and sold a similar belting made of the same material.

Held, that the defendants could not be restrained from selling their goods under the name of "camel-hair belting."—*Reddaway* v. *Banham*, C.A. 294.

TRADE UNION.—See LIBEL, 4, 6.

TRAMWAY:—

1. *Debenture-holder—Receiver and manager—Sale of undertaking—Winding up—Tramways Act*, 1870 (34 & 35 *Vict. c.* 78), *s.* 44—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 199.—The right, which the owners of an equitable charge or lien on property as a security for money, have to a judicial sale of such property, in order to satisfy the charge or lien, does not extend to an undertaking which has been acquired under statutory powers for public purposes, if those purposes will be defeated or seriously affected by a judicial sale.

The term "promoters" as used in the Tramways Act, 1870, does not include debenture-holders.

Held, therefore, that the debenture-holders have no right to exercise the statutory powers conferred by the Tramways Act, 1870, or by provisional orders, on the promoters.

As regards the securities which tramway companies can give, and the remedies of their mortgagees and debenture-holders, such companies are within the principles expounded by Lord Cairns in *Gardner* v. *London, Chatham, and Dover Railway Co.*, 15 W. R. 325, L. R. 2 Ch. App. 201, and by Kay, L.J., in *Blaker* v. *Herts and Essex Waterworks Co.*, 37 W. R. 601, 41 Ch. D. 399.

The power of sale conferred by section 44 of the Tramways Act, 1870, does not enable a tramway company to give its debenture-holders a right to sell the company's tramways and undertaking, nor a right to a judicial sale under the order of the court in an action brought to enforce the security. The court ought not to appoint receivers and managers of such an undertaking, but only a receiver of the earnings thereof.—*Marshall* v. *South Staffordshire Tramways Co.*, C.A. 469.

2. *Local authority—Purchase of part of tramway—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 43.—Under section 43 of the Tramways Act, 1870, a local authority has the right to purchase a tramway within its district within twenty-one years from the special Act or order authorizing its construction, although such tramway has been incorporated by subsequent Acts in a common undertaking with other tramways as to which the right of purchase has not arisen, or which may not be in the district of the authority claiming to purchase, and although the effect of such purchase may be to disconnect the general system of the owners of the tramway. In section 43 of the Tramways Act, 1870, the word "undertaking" is limited by reference to the tramway previously mentioned in the section.—*North Metropolitan Tramway Co.* v. *London County Council*, CH.D. ROMER, J., 552.

3. *Purchase of undertaking by local authority—Terms of purchase—Valuation of tramway—Tramways Act*, 1870 (33 & 35 *Vict. c.* 78), *s.* 43.—By section 43 of the Tramways Act, 1870, which was re-enacted in the private Act of the London Street Tramways Co., it was provided that the local authority might, after the expiration of twenty-one years from the passing of the Act, by notice in writing, require the company to sell to them their undertaking upon the terms of paying to them the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever), of the tramway, and all lands, buildings, works, materials, and plant of the company, such value, in case of difference, to be determined by a referee nominated by the Board of Trade.

Held, on the construction of this section, that the value of the tramways must be measured by the cost of construction subject to a proper deduction for depreciation at the date of the sale, and not on the basis of a rental valuation.—*London Street Tramways Co.* v. *London County Council*, H.L.

TRUSTEE:—

1. *Breach of trust—Request of beneficiary—Equity to have beneficiary's interest impounded as against subsequent assignee—Removal of restraint on anticipation—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 6—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 45.—Where a trustee has committed a breach of trust at the instigation of a beneficiary, his equity to have the beneficiary's interest impounded, even as against a subsequent assignee of that interest, is the same as before the Trustee Acts, 1888 and 1893. Those Acts have not, in such a case, rendered the trustee's rights merely statutory, but have enlarged the discretion of the court. The refusal of a trustee, when committing a breach of trust, to take a mortgage of a beneficiary's interest as additional security for the improper investment does not constitute a waiver of his equity to have the beneficiary's interest impounded. The court will be loth to remove, in the exercise of its discretion, the restraint on anticipation of the interest of a married woman at whose request a trustee has committed a breach of trust, so as to enable such interest to be impounded to recoup the trustee. Such removal of restraint on anticipation was refused where the married woman did not know, and was not informed by the trustees, that the transaction was a breach of trust, and had participated in the benefit arising from the breach of trust.

Ricketts v. *Ricketts*, 64 L. T. N. S. 263, 39 W. R. Dig. 243, explained.—*Bolton* v. *Curre*, CH.D. ROMER, J., 521.

2. *Breach of trust—Limitations, Statute of—Period of statute beginning to run—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-section* (1) (b).—By a marriage settlement made in 1875 money of the wife was vested upon trust to pay the income to her during the joint lives of herself and her husband for her separate use without power of anticipation, and after her death, in case he should survive her, to pay the income to him for life, and after the death of the survivor upon trust for the children of the marriage. No express life estate was given to the wife in case she should survive the husband. A breach of trust was committed in 1884; the husband died in 1885, and in 1890 the wife and her infant children brought an action against the trustees for the breach of trust, to which the defendants set up the defence of the Statute of Limitations under section 8, sub-section (1) (*b*) of the Trustee Act, 1888.

Held, that the wife took by resulting trust an estate for her life in the remainder which was a different estate from the estate for the joint lives limited to her by the settlement; that the life estate did not become an interest in possession until the death of the husband; and consequently that the statute did not begin to run against the wife till then, and was not a bar to her action.—*Mara* v. *Browne*, CH.D. NORTH, J.

3. *Costs—Liability for acting unreasonably—Vexatious and unjustifiable conduct.*—A trustee may be honest, and yet from over-caution or some other cause he may act unreasonably, and if his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he thereby causes his *cestuis que trust* expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his *cestuis que trust.*—*Chapman, Re, Freeman* v. *Parker*, C.A.

4. *Costs—Order making no order as to costs—Effect of on trustee's right to retain—R. S. C.*, 1883, *ord.* 65, *r.* 1.—Upon an originating summons in which the testamentary guardian and next friend of an infant beneficiary under a will was plaintiff, and the executor and trustee of the will was defendant, an order was made containing the words, "and the judge doth not think fit to make any order as to the costs of this action." The defendant, notwithstanding that order, claimed to retain his costs out of the estate.

Held, that the words in the order negatived the *primâ facie* right of the trustee to retain his costs. —*Hodgkinson* v. *Hodgkinson*, C.A. 594.

5. *Executor*—Cestui que trust—*Legatee entitled in reversion—Right to information as to investment of estate.*—A beneficiary entitled to a share in a fund expectant on the death of a tenant for life is entitled to information from the trustees of the will as to the investment of the estate, although the estate may be amply sufficient.—*Dartnall, Re, Sawyer* v. *Goddard*, C.A. 644.

6. *Incumbrance—Priority—Assignments by beneficiary under derivative will—Stop order in suit administering original will—Notice to trustee of derivative will—Settlement—Ward of court—Marriage without consent—Post-nuptial settlement—Consideration.*—For the purpose of deciding the priority of incumbrances, a stop order obtained in an action for the administration of an estate has no greater effect than notice to the trustee of an estate would have had if there had been no action for administration.

Where there is a derivative settlement by a beneficiary under an original settlement, and successive assignments are made of the interest of a beneficiary under the derivative settlement, the assignees should give notice to the trustees of the derivative settlement, whose duty it is to pay over the fund to the assignor, and not to the trustees of the original settlement, though the latter may have the actual control of the fund.

Bridge v. *Beadon*, 15 W. R. 527, L. R. 3 Eq. 664, distinguished; *dictum* of Lord Romilly, M.R., dissented from.

Holt v. *Dewell*, 4 Hare 446, followed.

In re Booth, 1 W. R. 444, overruled.

A ward of court who had married without the consent of the court executed a post-nuptial settlement, which contained (*inter alia*) a covenant by the wife to settle after-acquired property and an assignment by the husband of a policy of assurance.

Held, that the wife's covenant was not merely voluntary, but was founded upon valuable consideration, and might be enforced by the trustees. —*Stephens* v. *Green, Green* v. *Knight*, C.A. 465.

7. *New trustee—Appointment, power of—Donee of power not to appoint himself.*—It is improper for the donee of a power of appointing new trustees to appoint himself.—*Newen, Re, Barnes* v. *Newen*, CH.D. KEKEWICH, J., 58.

8. *Practice—Vesting order—Request to trustee to tranfer stock—Refusal of trustee to transfer within twenty-eight days after request—Petition presented within twenty-eight days — Jurisdiction to hear petition—Liability of trustee for costs—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35 (1) (*ii.*) (*d*), 38—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—A petition praying for a vesting order under section 35 of the Trustee Act, 1893, on the ground that a trustee has refused to transfer stock for twenty-eight days after a request in writing by the person absolutely entitled, will not be entertained by the court if presented before the expiration of such period.

The court has jurisdiction to require the defaulting trustee to pay the costs of a petition claiming such an order.—*Knox's Trusts, Re*, CH.D. KEKEWICH, J., C.A. 442.

9. *Vesting order—No personal representative of surviving trustee—New trustee appointed—Jurisdiction—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 35—*Trustee Act*, 1894 (57 *Vict. c.* 10), *s.* 2.—The surviving trustee of a sum of railway stock died and there was no personal representative of him. New trustees of the fund had been appointed under a power in that behalf contained in the settlement.

Held, that in the absence of a personal representative of the last surviving trustee, there was no jurisdiction under the Trustee Act, 1893, *s.* 35, to make an order vesting in the new trustees so appointed the right to call for a transfer of the stock.

Re Ellis Settlement, 24 Beav. 426, considered.—*Cane's Trusts, Re*, CH.D. M.R. (Ir.)

10. *Vesting order—Will of surviving mortgagee disputed—Uncertainty as to personal representative—Trustee Act*, 1893, *s.* 29 (e.)—Where a surviving mortgagee has died leaving a will, whereby executors are appointed, but the validity of the will is disputed and litigation is pending in respect of it, then, within the meaning of section 29 (*e*) of the Trustee Act, 1893, it is "uncertain who is the personal representative" of the mortgagee, and the mortgagor is entitled to a vesting order under that section.—*Cook's Mortgage, Re*, CH.D. NORTH, J., 461.

11. *Will—Trust for benefit and advancement of legatee—Trustee given discretion as to application—Legatee absolutely entitled.*—A testator gave all his property to trustees upon trust, and directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; and he further directed that the specified sums should be very judiciously invested as they were intended specially for the advancement in life of the respective recipients.

Held, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.—*Johnston, Re, Mills* v. *Johnston*, CH.D. STIRLING, J.

See also BANKER, 2; MORTGAGE, 5; PRACTICE, 22; SOLICITOR, 13, 16, 18; SETTLEMENT, 8; WILL, 15, 18, 24, 30, 31, 33, 34.

VENDOR and PURCHASER:—

1. *Conditions of sale—Condition that defect in prior title, whether appearing in abstract or not, shall not be objected to—Defect in prior title discovered* aliunde—*Action for recovery of deposit.*—A property was sold as an estate in fee simple subject to a condition that the title should commence with a conveyance on sale dated the 23rd of January, 1869, and that the prior title, whether appearing in any abstracted document or not, should not be required, investigated, or objected to.

The purchaser, having discovered *aliunde* a defect in the prior title and founded an objection thereon, took proceedings under the Vendor and Purchaser Act for a return of his deposit.

Held, that the condition was a valid one, and bound the purchaser; and that the purchaser's application for return of the deposit should be dismissed.

Hume v. *Bentley*, 5 De G. & Sm. 520, followed.

Darlington v. *Hamilton*, Kay, 550, 2 W. R. Dig. 88, considered. — *National Provincial Bank of England and Marsh's Contract, Re*, CH.D. NORTH, J., 186.

2. *Conditions of sale—Condition restricting objections to title—Covenant for title.*—On a sale by auction by a mortgagee of a leasehold house, one of the conditions of sale provided that the purchaser should be furnished with an abstract of the lease and of the subsequent title, and should not make any objection in respect of the "intermediate title" between the lease and the assignment, "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the term." Subsequently to the sale the vendor's solicitor communicated to the purchaser information obtained, prior to the sale, from the mortgagor, which tended to throw suspicion on the vendor's title to sell at all.

On a vendor and purchaser summons taken out by the purchaser.

Held, that the condition cast upon the purchaser the burden of proving a defective title, and that to relieve him from his contract it was not enough for him to show merely that the title was doubtful or open to suspicion; and, consequently, that the vendor was entitled to a declaration that a good title had been shown, "according to the terms of the contract."

Sandbach and Edmondson's Contract, [1891] 1 Ch. 99, approved.—*Scott* v. *Alvarez*, C.A.

3. *Conditions of sale—Condition restricting objections to title—Specific performance—Bad holding title—Deposit—Right to return of.*—The plaintiff offered for sale by auction a leasehold house which was purchased by the defendant. One of the conditions of sale provided that the purchaser should make no objection or requisition as to the title between the date of an under-lease and the date of an assignment of that under-lease, but should assume that the assignment vested in the assignee a good title for the residue of the term.

The defendant discovered that, owing to a breach of trust and the fraudulent concealment of a will during the period covered by the condition, the title offered by the plaintiff was positively bad even as a holding title. He, therefore, refused to complete.

The plaintiff brought an action for specific performance, and the defendant counter-claimed for a return of the deposit which he had paid.

Held, that the plaintiff was not entitled to specific performance; and that the defendant was not entitled to a return of the deposit.—*Scott* v. *Alvarez* (*No.* 2), C.A. 694.

4. *Conditions of sale—Outstanding legal estate—Freehold estate assured by form of assurance applicable to copyhold—Voluntary settlement*—Ex post facto *consideration—Equitable title an answer to action of ejectment.*—The conditions of sale of a freehold estate provided that the title should commence with a conveyance on sale dated 1892 deducing the title by recitals from 1844; that it appeared from such recitals that on payment off of a mortgage in 1868 no reconveyance was executed, and that in that year the estate, which was in fact of freehold tenure, was assured to the vendor at the sale in 1892 by a form of assurance applicable only to copyholds, and that the purchaser should raise no objections in respect of these matters or require the legal estate, if outstanding, to be got in, but should be satisfied with the recitals.

By the deed of 1892, which recited that by a voluntary settlement of 1868 the settlor covenanted to surrender the estate, which was subject to a mortgage of £700, to the use of trustees of the settlement upon trust for sale, to pay off the mortgage and thereupon to cause the estate to be conveyed or surrendered so as to vest in the trustees freed from the mortgage, the estate was conveyed by the trustees to the predecessor in title of the present vendor. The mortgage was paid off, but no reconveyance was executed. The estate was purchased by the auctioneer at the present sale, who refused to complete. Upon summons by the vender under the Vendor and Purchaser Act, 1874,

Held, that the purchaser was told he would not get the legal estate; that, although he might claim the legal estate by reason of the covenant to surrender and the declaration of trust for sale, he could not call upon the original settlor to pass the legal estate; but that value had attached to the voluntary settlement by virtue of the subsequent sale in 1892 for valuable consideration; and that the equitable title of the purchaser would be a sufficient answer to any claim in ejectment by the heir or devisee of the orginal settlor, and that the purchaser therefore got a good title according to the conditions.—*Williams and Parry's Contract, Re*, CH.D. KEKEWICH, J.

5. *Conditions of sale—Power of rescission by vendor if requisition not withdrawn*—Bonâ fides *in exercise of such power—Wilful delay in rescinding pending negotiations with another person—Specific*

performance—Return of deposit.—Where, by a contract for sale, power is given to a vendor to rescind if a requisition which he is unable or unwilling to comply with is not withdrawn, such power must be exercised *bonâ fide.* A vendor's decision as to exercising it or not, may not be delayed—*e.g.*, pending the result of negotiations to sell the property, behind the purchaser's back, to a third person. Such delay deprives a vendor of his right to affirm the contract or obtain specific performance of it; and it will, on the purchaser's suit, be treated as rescinded, and his deposit order to be returned.—*Smith* v. *Wallace*, CH.D. ROMER, J. 539.

6. *Gavelkind—Enfeoffment by infant—Insufficient consideration.*—Where a vendor's title to gavelkind lands is derived from a conveyance and enfeoffment of the said lands respectively made by adults and infants, and where the said transaction shows on the face of it that the infants did not receive a proper proportion of the purchase-money paid in respect thereof, a purchaser from the vendor cannot be compelled to accept such title.—*Maskall & Goldfinch's Contract, Re*, CH.D. STIRLING, J., 620.

7. *Interest on purchase-money—Wilful default.*—Delay by the vendor in taking steps necessary to complete his title may amount to "wilful default."

There is no jurisdiction upon a vendor and purchaser summons to grant compensation.—*Wilson and Stephen's Contract, Re*, CH.D. NORTH, J., 23.

8. *Land sold subject to incumbrance — Future interests in incumbrance—Jurisdiction of court to discharge incumbrance—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.—Where land has been sold subject to an incumbrance, the court has jurisdiction, under section 5 of the Conveyancing and Law of Property Act, 1881, to discharge such incumbrance, even though, in doing so, it may be deciding as to future interests therein.—*Freme's Contract, Re, Freme* v. *Hall*, CH.D. KEKEWICH, J., 473.

9. *Plan annexed to particulars—No reference to plan—Note on plan that accuracy not guaranteed—Plan part of contract.*—A vendor put up for sale by auction a piece of land in four lots, which were described in the particulars as having each a frontage of 22 feet and a depth of 98 feet. The particulars stated, "a right of way will be granted to each purchaser over the path at the back." The conditions provided that the conveyance to each purchaser should contain a covenant that he would pay a fair proportion of the cost of maintaining the path at the rear of each lot. A plan was annexed to the particulars, intituled, "Plan of four plots of land to be submitted by auction at the W. Hotel, Margate," and upon the plan was printed a note, "This plan is simply prepared as a guide to intending purchasers, and its accuracy in regard to area, measurements, abuttals, or otherwise is in no way guaranteed." The plan showed four lots extending from a road called Northdown-road to a line representing the boundary wall of the vendor's property, with figures showing depth and frontage, as stated in the particulars. A cross line was drawn across the lots four feet from the wall, but the space between this line and the wall was coloured with the rest of the lots, and the division lines were carried through the space to the wall. There was no express reference to the plan in the particulars or conditions. There was no actual path in existence, and nothing to show what the references to a path in the particulars and conditions meant, except the cross line on the plan. The whole four lots were purchased by two purchasers, who agreed that they did not wish for any right of way over each other's lots. The purchaser of two lots tendered a conveyance of the whole plots shown on the plan, including the space beyond the cross line. The vendor claimed to convey the land only up to the cross line, and to give a right of way over the strip beyond.

Held, that, notwithstanding the note on the plan, it formed part of the contract, and that the purchasers were entitled to the conveyance of the whole plots coloured without the reservation of any right of way.—*Lindsay & Forder's Contract, Re*, CH.D. NORTH, J.

10. *Specific performance—Voluntary conveyance a link in title—Rescission*—13 *Eliz. c.* 5, *s.* 5; 27 *Eliz. c.* 4, *s.* 3.—The mere fact that a voluntary conveyance, prior to the conveyance to the vendor, is a link in the title to land contracted to be purchased, does not entitle the purchaser to repudiate his contract.—*Noyes* v. *Paterson*, CH.D. ROMER, J., 377.

11. *Title—Legal estate in copyholds devised to trustees—Limitation of estate—Executory devise—Vendor and Purchaser Act*, 1874.—A. by his will devised all his freehold and copyhold estates at H. to trustees, their heirs and assigns, upon trust to pay the rents and profits thereof to T. for her life, and after her death to stand possessed of the same upon trust for such person or persons as T. should by her will appoint, and in default of appointment to T. absolutely. The trustees of A.'s will were duly admitted tenants to the testator's copyhold property. T. died in 1893, having by her will directed the trustees thereof to sell the said copyhold estates at H. and assure them to the purchaser thereof. The trustees sold them by auction to B., who objected to the title on the ground that the trustees of A.'s will were dead, that their successors in title had never been admitted tenants on the roll in respect of the said copyholds, and that until the persons entitled were thus admitted there was no one who could make a proper surrender to B. On a summons by the vendors for a declaration that they had shown a good title.

Held, that the direction in T.'s will to sell and assure to a purchaser operated as an exercise of the power of appointment conferred upon T. by the will of A.; that such direction must not be read as taking effect with reference to the legal estate in the copyholds devised to T. in default of appointment; and that the legal estate remained vested in the trustees of A.'s will. Consequently the purchaser's objection was well founded.

Doe v. *Barthrop*, 5 Taunt. 382, distinguished.—*Townsend's Contract, Re*, CH.D. STIRLING, J., 392.

See also BANKRUPTCY, 41; BURIAL, 2; RENT-CHARGE.

VICTORIA, LAW OF:—

1. *Probate—Suit for revocation — Testamentary capacity—Verdict against weight of evidence—New trial.*—In a suit to revoke probate of a will the jury by a majority found that the testator was of unsound mind at the date of its execution.

Held, that the verdict must be set aside as being against the weight of evidence.—*Aitken* v. *McMeckan*, P.C.

2. *Probate duty—Administration—Local situation of testator's assets—Partnership business in colony distinct from general business of firm.*—Where a firm carried on businesses in London, Melbourne, and Adelaide, which were severally treated as distinct

in the partnership agreement and also in the accounts and mode of conducting the same:

Held, that the interest of a deceased partner in the business carried on at Melbourne was locally situate in the colony of Victoria so as to be liable to probate duty in respect of his will.—*Beaver* v. *Victoria Supreme Court Master in Equity*, P.C.

3. *Land tax—Purchaser of a lot less than* 640 *acres—Vendor's claim to proportionate land tax.*—Where the respondent had contracted to purchase from the appellants less than the 640 acres which is the minimum quantity of land liable to land tax under the Land Tax Act, 1877:

Held, that the appellants were not entitled on completion to charge the respondent with the land tax thereon from the date of his possession, either as his proportionate part of the tax paid by them on their entire holding, or as an outgoing contracted to be paid for in respect of his purchase.—*Country Estates Co.* v. *Groves*, P.C.

WARRANTY:—

Contract—Telegram—Warranty given in error—Master of ship—Damages.—The respondent's ship was in a port in Australia under orders to proceed to R. The respondent entered into a contract with the appellants in the United Kingdom to purchase a cargo of coal, to be loaded in Australia. The appellants telegraphed to their agents in Australia as to the terms and conditions of the sale, and added instructions as to the destination of the ship. They had no authority from the respondent to give any orders as to the destination. By a mistake of a telegraph clerk, C. was given as the destination instead of R. The appellant's agents in Australia informed the master of the ship that they had instructions to direct him to proceed to C. The master hesitated to change his destination, and the appellants' agents then gave him a letter "to confirm our verbal instructions as to your destination"—naming C. as his destination—and, continuing, "this letter will be a sufficient guarantee for your proceeding on your voyage."

Held, that the letter amounted to a warranty upon which the respondent could sue for the damages he had sustained through the ship proceeding to C. instead of to R.—*Brown* v. *Law*, H.L.

See also ADULTERATION, 1; MASTER AND SERVANT, 1.

WATER:—

1. *Watercourse—Underground springs—Flow of water—Interference*—Malâ fides—*Purpose of extorting money—Injunction—Bradford Waterworks Act*, 1854 (17 & 18 *Vict. c. cxxiv*) *s.* 49.—Plaintiffs were owners of waterworks which they purchased from a company which had constructed them under a special Act, which authorized the company to take water from the M. springs; section 49 of the Special Act enacted that it should not be lawful for any person other than the company to divert in any other manner than by law they might be legally entitled, any of the water supplying or flowing from the M. springs, or to sink any well or do anything whereby the water of the said spring might be drawn off or diminished. The Act contained no provision for compensating landowners whose rights were affected by section 49. The defendant who owned land adjoining the M. Springs proposed to construct through his own land an underground tunnel with the avowed purpose of draining some beds of stone lying under his land, the effect of which would be to diminish, if not to cut off entirely, the flow of water to and from the M. Springs. The plaintiffs alleged that the defendant's real object was to compel the plaintiffs to buy him off:

Held, (1) that on the construction of section 49 of the Act the defendant was not prevented from doing anything that he was legally entitled to do independently of the Act; (2) that being owner of the adjoining land he was legally entitled to interrupt the water percolating underground through his land to the M. Spring; and (3) that his motives and objects in making the tunnel were immaterial; and an injunction was according refused.—*Bradford (Corporation)* v. *Pickles*, C.A.

2. *Waterworks company—Justices—Demand for payment of water rate—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 70, 74—*East London Waterworks Act*, 1853 (16 & 17 *Vict. c. clxvi.*)—*Railway Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 140.—It is not a condition precedent to the right of a waterworks company to apply to a magistrate under section 140 of the Railway Clauses Act, 1845, for payment of the water rate, that a demand for payment should first have been made and refused.—*East London Waterworks Co.* v. *Kyffin*, Q.B.D.

3. *Waterworks company—Highway—Nuisance—Service pipe to private house—Stop-cock and cover in street—Cover out of repair—Liability to public—Fylde Waterworks Act*, 1861 (24 & 25 *Vict. c. cliv.*)—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 28—*Waterworks Clauses Act*, 1863 (26 & 27 *Vict*, *c.* 93), *s.* 17).—The defendants, who were incorporated for the purpose of supplying water within a certain district, at the request of the occupier of a house, who wanted a supply of water, laid down a service pipe under the street from the water main into the house, and fixed therein a stop-cock under the foot pavement, the stop-cock being protected by an iron box with an iron cover level with the pavement. The plaintiff, while walking along the street, tripped against the cover and was injured. The evidence showed that the injury to the plaintiff was caused by the neglect of the persons responsible for the repair of the cover to repair it; and that the cover could not have been repaired without taking out the iron box and breaking up the pavement.

Held, that, even assuming that the property in the service pipe and stop-cock and cover was in the occupier of the house, inasmuch as the defendants had power under section 28 of the Waterworks Clauses Act, 1847, to break up the street and to repair the cover, and as the occupier had no such power, it was the duty of the defendants to keep the cover in proper repair, so that it should not become dangerous to the public using the street, and that they were, therefore, liable to the plaintiff.—*Chapman* v. *Fylde Waterworks Co.*, C.A.

4. *Waterworks company—Power to break up streets—Land not dedicated to public use—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 29.—Section 28 of the Waterworks Clauses Act, 1847, does not authorize the undertakers of a waterworks company to cut through plates lying on the top of a girder railway bridge carrying a public road, for the purpose of suspending the waterpipes to the girders.—*Glasgow (Provost)* v. *Glasgow and South-Western Railway Co.*, H.L.

5. *Waterworks company — Sanitary authority — Water used to flush sewers—Supply of water—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 52.—A rural sanitary authority in a district, in which there was a waterworks company duly constituted, constructed sewerage works, and

obtained water from other parties than the waterworks company aforesaid to flush such sewers and for other purposes in connection with their drainage works. The waterworks company objected to their proceedings, on the ground that, they being able and willing to supply the water, the local authority's action constituted an infringement of their rights under section 52 of the Public Health Act, 1875.

Held, that the proposed works were not an infringement of the waterworks company's rights, section 51 of the Public Health Act relating only to the supply of water to the general public, and not interfering with the local authority's rights to supply itself with water to be used for its own purposes.—*West Surrey Waterworks Co.* v. *Chertsey Union*, CH.D. NORTH, J., 6.

See also LOCAL GOVERNMENT, 9, 25.

WEIGHTS and MEASURES:—

1. *Coal—Labels on sacks—Representation by vendor—Short weight—Liability—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.—A dealer in coal sent out a cart containing sacks of coal each labelled "56 lbs." The carman on being asked by an inspector of weights the weight of one of the sacks stated it weighed 56 lbs. when it left the dealer's premises. The sack was thereupon weighed and found to weigh less than 56 lbs. The dealer was convicted under section 29, sub-section (1), (2), of the Weights and Measures Act, 1889.

Held, that the conviction was right, for that the label was a representation by the dealer that the sack contained 56 lbs.—*Franklin* v. *Godfrey*, Q.B.D. 46.

2. *Local Government—Validity of bye-law of county council as to the providing and carrying of correct weighing machines by vendors of coal—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 28.—By section 28 of the Weights and Measures Act, 1889, any local authority may from time to time make, revoke, and alter bye-laws (*a*) regulating, for the purposes of this Act, the sale of coal in quantities not exceeding two hundredweight; and (*b*) requiring, either in or generally specified classes of cases, a weighing instrument of a form approved by the local authority to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser.

Under this section the Kent County Council made the following bye-law: "Every coal dealer shall provide, and every person employed by him who shall convey or carry coal for sale or delivery to a purchaser from or out of any vehicle shall carry therewith, a correct and stamped weighing machine of the form approved by the county council, and such persón shall re-weigh the coal upon being requested to do so by the purchaser or anyone on his behalf, or by an inspector of weights and measures."

On an appeal from the decision of justices refusing to convict a coal merchant for not providing a weighing machine, on the ground that the bye-law was invalid, indivisible, and *ultrà vires*,

Held, that so much of the bye-law as required the coal dealer to provide and carry a weighing machine was valid, and that it was within the competency of the appellants to make such bye-law. The bye-law was devisible; whether the latter part of the bye-law as to re-weighing coal was good or not it was not necessary to decide.—*Kent County Council* v. *Humphrey*, Q.B.D. 506.

3. *Measure used for trade—Dealing amounting to trade—Weights and Measures Acts*, 1878, s. 19, and 1889, *s*, 1 (1) (2).—A manufacturer and smelter of lead used a pair of beam scales for checking the weight of the produce of the works after the lead had been made into "pigs." The weights were entered in a book kept at the works. When lead was delivered to the purchasers invoices were invariably sent specifying the weight, and when forwarded by rail consignment notes were also sent specifying the weight.

Held, that this was a weighing instrument used in trade, and must be verified and stamped.—*Crick* v. *Theobald*, Q.B.D.

4. *Measure "for use for trade"—Milk churns—Weights and Measures Act*, 1878 (41 & 42 *Vict. c.* 49), *s.* 25.—A., a farmer, agreed to supply B., a milk dealer, with milk, carriage paid, in London at certain prices per imperial gallon. The milk was delivered in churns fitted with gauges indicating the number of gallons contained in each. The gauges were treated by the railway company as tests of the quantity of milk carried, and by B. as tests of the quantity of milk delivered. An inspector examined two of the churns and found that when filled to the sixteen gallon gauge-mark they contained two pints less than sixteen gallons.

Held, that A. was rightly convicted under section 25 of the Weights and Measures Act, 1878, of having in his possession "for use for trade" a "measure" which was "false and unjust."—*Harris* v. *London County Council*, Q.B.D.

WILL:—

1. *Accumulations—Vested interest payable in future—Charities—Surplus income—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98).—The principle of *Saunders* v. *Vautier*, Cr. & Ph. 240—that, where there is an absolute vested interest made payable to the legatee at a future certain event, with directions to accumulate the interest in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no other person has any interest but the legatee—applies in the case where the legatee is a charity.

A testator bequeathed the residue of his personal estate upon trust out of the annual income to pay certain annuitants; but when and so often as the annual income should not be sufficient for the payment of the whole amount of the annuities, there was to be an abatement among the annuitants. The trustees were to invest the surplus income (if any), and after the death of the survivor of the annuitants to pay and divide the residue between certain public charities according to the amount set after their respective names.

Held, that the charities were entitled to and could call upon the trustees to hand over at the end of each year, the surplus annual income of the residuary estate.—*Wharton* v. *Masterman* (*Harbin* v. *Masterman*), H.L. 449.

2. *Codicil—Republication—Bringing down will to date of codicil—Effect of.*—Although the republication of a will by a codicil brings down the will to the date of the codicil for certain purposes, it does not alter the construction of the will's language.—*Mount Cashel* (*Earl*) v. *Smyth*, C.A. (Ir.).

3. *Codicil—Revocation of gift by codicil—Substitution of fresh gift.*—A testator by his will gave an annuity of £300 to be paid to his grand-daughter A. and to be a charge on certain land, and directed that after her death the said sum of £300 should be raised and paid unto and among such of her children as she should by deed or will appoint, and in default amongst her children equally.

By a codicil to his will, after reciting that he had given to his "grand-daughter A." an annuity of £300, he revoked the devise of the "said" annuity, and "instead thereof" gave to his "grand-daughter A." an annuity of £150 to be payable and charged in the same manner and on the same hereditaments as the said annuity of £300 was in and by his will made payable and charged. The children of the grand-daughter were not referred to in the codicil.

Held, that the effect of the codicil was to substitute an annuity of £150 payable to the grand-daughter A., her appointees and children, for the annuity of £300 given by the will.—*Freme's Contruct, Re, Freme* v. *Hall*, CH.D. KEKEWICH, J.

4. *Construction—Annuity charged on reversion and directed to be paid half a year after testator's decease.*—A testator devised to his son H. certain lands subject to a previous interest, and charged the reversion thus created with the payment in equal half-yearly instalments of an annuity to his daughter S., the first of such payments to become due and be made at the expiration of half a year from the testator's decease.

Held, that the annuity commenced at the testator's decease, but was only charged upon the reversion at the termination of the preceding interest.

Jackson v. *Hamilton*, Ir. 9 Eq. Rep. 430, 3 Jo. & Lat. 702, discussed and followed.

In re Bywater, Bywater v. *Clarke*, 30 W. R. 94, 18 Ch. D. 17, distinguished.—*Williams* v. *Williams*, CH.D. STIRLING, J., 375.

5. *Construction — Bequest—"After the death of A."—Life estate by implication.*—A testator gave his residuary personal estate upon trust from and after the decease of the testator's widow to pay and divide the same equally between the testator's son and two daughters of the testator, with a proviso that if the son or the said two daughters should die in the lifetime of the testator's widow, then a third daughter of the testator was to take absolutely.

Held, that the testator's widow did not take a life estate by implication in the residue, and that there was an intestacy during the life of the testator's widow.—*Springfield, Re, Chamberlin* v. *Springfield*, CH.D. KEKEWICH, J.

6. *Construction—Blended fund—Administration—Realty and personalty—Legacies—Rateable payment.*—When there is a bequest of legacies followed by a bequest of the proceeds of the real and personal estate, the legacies are primarily payable out of the personalty; the real estate is only charged in aid of the personalty. If they are directed to be paid out of a blended fund, then they are payable rateably out of the realty and personalty.

Elliot v. *Dearsley*, 29 W. R. 494, 16 Ch. D. 322, followed.

Gainsford v. *Dunn*, 22 W. R. 499, L. R. 17 Eq. 405 (*dicta* of Jessel, M.R.), discussed.—*Boards, Re, Knight* v. *Knight*, CH.D. NORTH, J., 472.

7. *Construction — Children — Stepchildren.* — A testator who had been married for thirteen years to a wife who had four infant daughters by a former husband, but who had no legitimate children of his own, and had always treated his step-daughters, three of whom married in his lifetime, in every respect as if they had been his own issue, by his will made when he was fifty-nine, and his wife sixty years of age left his property to his children with a provision for the issue of any child dying in his (testator's) lifetime and leaving issue. No children of the testator were born after the date of his will.

Held, that the testator's four stepdaughters took under the gift to his children contained in his will.—*Jeans, Re, Upton* v. *Jeans*, CH.D. NORTH, J.

8. *Construction—Condition in restraint of marriage—Void gift.*—R. by his will gave and bequeathed his residuary personal estate to his trustees upon trust for his daughter M. on attaining twenty-one or marrying, for her separate use for life, remainder for her children, and, in default of issue, over. By a codicil R. declared his will to be that his daughter should not marry, and, in case of her marriage or death, there was a gift over of his residuary estate to the persons who took under the gift over in his original will.

After R.'s death M. married and had children.

Held, that the true construction of the two instruments was that, on the death or marriage, whichever should first happen, or on her death without issue, the property should go over. An illegal condition (as Wigram, V.C., decided, 2 Hare 570) in general restraint of marriage having been imposed as to the life interest, it followed that the same condition was void as to the children's interest, and that, therefore, the children were entitled to the fund in court.—*Morley* v. *Rennoldson*, C.A. 518.

9. *Construction — Disentailing — Resettlement — Money to be invested in land—Hereditament—Equitable conversion.*—A testator gave all the residue of his real and personal estate to A., on condition that A. would disentail and resettle certain property, the subject of a settlement and will, and of which A. was tenant in tail male in remainder. The said property included large sums of money liable, under the limitations of the settlement, to be invested in land.

Held that, in order to comply with the condition in the testator's will, these moneys must be included in the resettlement.—*Basset* v. *St. Levan*, CH.D. STIRLING, J., 165.

10. *Construction—Failure of issue—Die without leaving any male issue—Estate tail or estate in fee simple—Wills Act* (1 *Vict. c.* 26), *s.* 29.—Under section 29 of the Wills Act a devise since that Act to A., his heirs and assigns, with a proviso that in case A. should "die without leaving any male issue" then over, is a devise in fee simple to A., subject to an executory devise over.

Upton v. *Hardman*, Ir. Rep. 9 Eq. 157, 23 W. R. Dig. 257, followed.—*Edwards* v. *Edwards*, CH.D. KEKEWICH, J., 169.

11. *Construction—Gift* per stirpes *or* per capita.—A testator gave real and personal estate to his wife for life, and directed that after her death the income should be equally divided between his brother and sisters therein named; "at the decease of either of my before-named brother and sisters their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in, &c., &c., and to be equally divided between the children of the aforesaid, share and share alike."

Held, that the ultimate gift to the nephews and nieces was a clear gift *per capita*, and could not be controlled by the fact that so long as any brother or sister of the testator was living the income was divisible *per stirpes*.—*Re Stone, Baker* v. *Stone*, C.A.

12. *Construction—Gift to wife for life, and at her death to brothers and sister, share and share alike, at their death to their children, share and share alike.*—

A testator gave all his property to his wife for life and at her death to his brothers and sister share and share alike, at their death to their surviving children, share and share and share alike:

Held, that, subject to the wife's life interest, the testator's brothers and sisters took absolute interests.—*Hyndman* v. *Hyndman*, CH.D. V.C. (Ir.).

13. *Construction—"Issue living"—Child* en ventre sa mère.—A testator by his will gave one moiety of his estate, after the death of his wife, to his daughter K. absolutely in case she had issue living at the death of his wife; but in case she had no issue then living, then a life interest only in such moiety to K. The wife died on the 9th of March, 1895, and on the 10th of March, 1895, K. was confined of a living child.

Held, that K. had issue living at the death of the wife, and, therefore, took the moiety absolutely.

Dictum of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves. 112, at p. 149, followed.—*Burrows, Re, Cleghorn* v. *Burrows*, CH.D. CHITTY, J. 683.

14. *Construction—Limitations applicable to real estate applied to personal estate—Repugnancy—Lapse—Perpetuity—Intermediate income.*—A testator who under a settlement was absolutely entitled (subject to a life estate) to what was in fact the proceeds of real estate under a trust for sale, by his will purported to devise it by name as real estate, together with certain real estates of his own to trustees, to the use of H. for life with remainder to use of H.'s sons successively in tail male with remainder to use of the sons successively in tail of testator's niece, E., with remainder to use of the sons successively in tail of his niece M., with similar remainders to the sons of his niece F. H. survived the testator and died unmarried. The niece M. survived the testator but died unmarried; the niec E. was still alive but unmarried and aged seventy, and the niece F. had two sons, the eldest of whom died before testator.

Held (1) that the proceeds of sale passed under the devise of the land; (2) that there was no lapse by reason of the death of the first son of the niece F. before the testator, and that the second son of F. took the proceeds of sale at the death of the testator for an absolute interest therein, subject to the contingency of the niece E. leaving a son; (3) that the gift to the second son of F. on failure of issue of the first son was not void for perpetuity because the estate must vest, if at all, by the terms of the gift in the lifetime of a person living at death of testator; (4) that the niece E. being now past child-bearing, the second son of F. was entitled to the intermediate income since the death of the life-tenant.—*Lowman, Re, Devenish* v. *Pester*, C.A.

15. *Construction—Power or trust—Power to wife to appoint fund to such of testator's relatives as she should think proper—Life interest in fund given to wife—Wife appointed residuary legatee—Release by wife of power of appointment—Wife not entitled to the fund absolutely.*—Testator gave his residuary personal estate to trustees on trust to invest a sum of £50,000 and pay the income thereof to his wife for life, and subject thereto the whole of his property was to be for his children equally. The will then proceeded: "If I shall not have any children, then as follows: my wife may bequeath or appoint the £50,000 . . . to such of my relatives or next of kin as she shall think proper; the remainder of my property to be divided into forty-three parts." The testator then gave the forty-three parts to certain nephews and nieces, and appointed his wife "to be residuary legatee."

The testator died, having had no children; his wife survived him, and, having executed a release of her power of appointment over the £50,000, claimed to be entitled to the absolute interest in that fund.

Held, that, even assuming that the £50,000 did not pass under the bequest "the remainder of my property," &c., yet that the wife did not, by releasing the power, become entitled to the £50,000 absolutely.

Birch v. *Wade*, 3 Ves. & Bea. 198, and *Salisbury* v. *Denton*, 5 W. R. 865, 3 K. & J. 529, followed.

Bull v. *Vardy*, 1 Ves. jun. 270, explained and distinguished.—*Brierley, Re, Brierley* v. *Brierley*, C.A. 36.

16. *Construction—Substitution of trust by reference—Duplication of trust—Multiplying charges.*—Where there is a trust by reference, then, in the absence of express intention by a testator, the court will not impute to him the intention of multiplying charges upon the trust estate; and, generally, it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated, and so to make a duplication of trusts, as it were, in the nature of charges.—*Trew* v. *Perpetual Trustee Co.*, P.C. 636.

17. *Conversion—Specific devise—Lease of same with option to purchase—Option exercised after testator's decease—Purchase money, destination of.*—A testator, by his will, specifically devised certain freeholds to A. for his life, with remainder over and subsequently made a codicil in which he confirmed his will, but made no reference to the specific devise aforesaid. On the same day that he executed the codicil, but whether before or after that event, did not appear, he granted to B. a lease of the said freeholds, with an option to purchase. B. exercised the option after the testator's death. On the question whether the proceeds of the sale ought to be paid to the tenant for life and remainderman or fall into residue,

Held, that, whether the execution of the lease preceded that of the codicil or not, it must in either event have been on the eve of execution, and, therefore present to the testator's mind when he made the codicil, and this showed a sufficient intention on the part of the testator to pass all his interest in the said freeholds to the specific devisee, and took the case out of the general rule laid down in *Lawes* v. *Bennett*, 1 Cox, 167.

Rule in *Weeding* v. *Weeding*, 9 W. R. 431, 1 J. & H. 424, 431, applied.—*Pyle, Re, Pyle* v. *Pyle*, CH.D. STIRLING, J. 420.

18. *Conversion—Trust for sale—Power to postpone—Profits of business pending sale—Direction as to interim income—Capital or income.*—A testator devised and bequeathed his real and personal estate upon trusts for sale, conversion, and investment of the proceeds upon trust for his wife during her life, and after her death for his children attaining twenty-one. He empowered his trustees to postpone the sale of his real estate and the conversion of his personal estate for such period as to them should seem expedient, and directed that until such sale and conversion the income should belong to the persons who would be entitled under the trusts to the moneys arising from sale and conversion or the income from those monies (as the case might require), if such sale and conversion had actually taken place. The testator at his death, in 1872, was engaged in a business, which was carried on by the executors and trustees until the death of the

widow in 1894, and the profits had been paid to her as annual income.

Held, that the widow was entitled to the whole of the profits as income.

In re Chancellor, Chancellor v. *Brown*, 32 W. R. 465, 26 Ch. D. 42, distinguished,—*Crowther, Re, Midgley* v. *Crowther*, CH.D. CHITTY, J., 571.

19. *Estate* par autre vie—*No special occupant—Executory agreement—No words of limitation—Devolution—Wills Act* (1 *Vict. c.* 26), *s.* 6.—Fee simple estates stood limited to A. (a lunatic so found by inquisition) for life, remainder to B. for life, remainder to C. in tail male. For the purpose of purchasing A.'s life estate, B. and C. agreed by instrument in writing, that the net income of the estates should, during B.'s life, be divided between B. and C. equally. C. died in lifetime of B. before the agreement was fully executed, leaving D., his infant son, who became tenant in tail. By a subsequent agreement in writing between B. and E. (the widow of C.), it was agreed that all the rents and interests to which, under the preceding agreement C. would have been entitled to, if then living, and if the first agreement had been perfected, should, as between B. and D., pass to D. absolutely. By a subsequent deed B., in consideration of the agreements, conveyed his life estate to the use of himself, and E. and their heirs upon the trusts declared in the agreements, with a declaration of trust by E. in favour of D. of all the estates so conveyed to her. B. and D. both survived A. Upon the subsequent death of D.,

Held, that D.'s interest in the moiety of B.'s life estate passed under as an estate *par autre vie* with no special occupant, under section 6 of the Wills Act to D.'s personal representatives, and not to D.'s heir-at-law.—*More-Smyth* v. *Mountcashell*, C.A. (Ir.)

20. *Executor—Legacy to executor—Debt due by executor to testator—Unsigned testamentary paper—Intention.*—Testator appointed a debtor owing him the sum of £100 one of the executors of his will, and bequeathed to him the legacy of £500 in consideration of his undertaking to be his executor and carrying out testator's instructions and wishes to the best of his ability, which instructions were contained in letters addressed to him. After testator's death an unsigned letter was found with his will addressed to the debtor, in which the following words occurred:—"The hundred pounds I lent you does not form part of the money left you; it is cancelled."

Held, that, there having been no communication to the debtor of the intention to cancel the debt, his appointment as executor did not suffice to exonerate him from his obligation to pay, the unsigned letter which professed to release him being a testamentary document improperly executed, which could not be received in evidence.

Strong v. *Bird*, 22 W. R. 788, L. R. 18, Eq. 315, distinguished.—*Hyslop, Re, Hyslop* v. *Chamberlain*, CH.D. NORTH, J., 6.

21. *Forfeiture clause—Life interest—Liable to be deprived — Bankruptcy — Annulment.*— Under the will of his mother H. O. was entitled to a reversionary life interest expectant on the death of his father, but subject to a proviso for the cesser thereof in case he should do or suffer any act or thing whereby he would be deprived or be liable to be deprived of the beneficial enjoyment thereof.

In October, 1894, H. O. committed an act of bankruptcy, and a petition in bankruptcy was presented against him. In November, 1894, his father died. In February, 1895, the Court of Appeal dismissed the bankruptcy petition under section 7, sub-section (3), of the Bankruptcy Act, 1883.

Held, that H. O. had forfeited his life estate.

White v. *Chitty*, 14 W. R. 366, and *Samuel* v. *Samuel*, 12 Ch. D. 153, discussed.—*Otway* v. *Otway*, CH.D. STIRLING, J., 501.

21a. *Forfeiture clause—Reversionary interest—Receiver—Forfeiture clause upon charge or bankruptcy.*—The fact that a contingent reversionary interest to an estate under a will contained a forfeiture clause upon the reversioner charging the same, or upon becoming bankrupt, is not sufficient ground for discharging a receiver appointed in respect of the reversioner's interest, and such appointment does not, of itself, constitute a charge within the clause.—*Campbell* v. *Campbell*, P.D. & AD.D.

22. *Intestacy—Specific devise—Insufficient description—Election.*—If it can be gathered from the words used that a testator intended to give a particular property to a legatee, but owing to the testator having several properties answering the description in the will it is impossible to say, either from the will itself or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the legatee has no option to elect which property he will take.

Tapley v. *Eagleton*, 2 Ch. D. 683, distinguished.—*Asten* v. *Asten*, CH.D. ROMER, J.

23. *Legacy charged on land if personal estate should be insufficient — Deficiency caused by executor's* devastavit—*Executor devisee of real estate.*—Testator devised real estate to S. (who was also his executor), and directed that if his personal estate should prove insufficient to pay certain legacies mentioned the deficiency should be a charge upon the real estate devised to S. The testator's personal estate was sufficient to pay the legacies in full, but was misappropriated by S. and certain of the legacies were not paid by him, but he paid interest thereon to the legatees who had no notice of the *devastavit*. S. mortgaged the real estate devised to him.

Held, that although the testator's personal estate had been originally sufficient and the deficiency was caused by the *devastavit* of the executor, the unpaid legacies became charged on the lands devised to S., and that the legatees were entitled to priority over the mortgagees of S.—*Bradford's Estates, Re*, CH.D. (Ir.)

24. *Leaseholds—Bequest of residue of leasehold property to trustees upon certain trusts—Repairs—Income*—Corpus.—A testator gave all the residue of his leasehold and other property to trustees upon trust to receive the rents and profits thereof, and, in the first place, to pay thereout all the costs, charges, and expenses of the trust, and out of the balance thereafter remaining to pay certain legacies and annuities, which latter were to abate *pro rata* in case of the said balance being insufficient to pay all in full.

The trustees, after notice from the lessors, repaired part of the said leasehold estate at an expense greater than the value of the remainder of the term of the lease.

Held, that the cost of these repairs was payable out of income, and not out of *corpus*.—*Debney* v. *Eckett*, CH.D. STIRLING, J., 54.

25. *Legacy — Demonstrative legacy — Gift of £10,000 New 3 per Cent. Bank Annuities—Codicil—Conversion—National Debt (Conversion) Act*, 1888 (51 *Vict. c.* 2), *s.* 25, *sub-section* 2.—A testator, by

his will, dated the 3rd of October, 1887, gave to trustees £10,000 3 per Cent. Bank Annuities upon trust to make payments out of the income thereof to his wife, and on her death to sell the stock and to divide the proceeds of sale among forty-six named charities; he also gave his residuary estate to beneficiaries therein named. By a codicil dated the 28th of February, 1890, after reciting the above bequest, and that the Bank Annuities had been converted, under the National Debt (Conversion) Act, 1888, into 2¾ per Cent. New Consolidated Stock, he gave the trustees £15,000 of such stock upon trust to make the above-mentioned payments out of income to his wife; and, further, to make annual payments out of surplus income to the charities named; and in all other respects he confirmed his said will. Testator died in March, 1894, his wife having predeceased him.

Held, (1) that there was no gift in the codicil of *corpus* to the charities; (2) that the codicil did not revoke the gift of *corpus* to the charities in the will, as it was a demonstrative legacy, and, therefore, came under the first part of sub-section 2 of section 25 of the National Debt (Conversion) Act, 1888, and not under the second part of that sub-section, which refers to specific legacies only.—*Shepherd, Re, Churchill* v. *St. George's Hospital*, CH.D. KEKEWICH, J., 95.

26. *Legacy — Demonstrative legacy — Inaccurate description—Abatement.*— Testatrix by her will recited that she was absolutely entitled to the sum of "£500 invested in the Australian Bank on deposit receipt and also to the sum of £200 on deposit receipt in Messrs. G.'s, making together the sum of £700"; and she bequeathed to her children specific portions of the "said sum of £700." At the date of the will and also at the date of the testatrix death, the testatrix had not any sum on deposit receipt in Messrs. G.'s, nor any sum on deposit receipt in the Australian Bank, but there were standing in her name eleven shares in the Union Bank of Australia.

Held, that the shares in the Union Bank of Australia passed under the bequest of the sum on deposit receipt in the Australian Bank.—*Moss* v. *Cranfield*, V.C. (Ir.)

27. *Legacy to children to be paid at eighteen years of age—Payment out to children who had attained eighteen, but were under twenty-one—Liberty for children under eighteen to apply for payment of their shares on attaining eighteen.*—Where a testator gives a legacy to children to be paid to them when they respectively attain the age of eighteen years, and directs that their respective receipts at that age shall be sufficient discharges for their shares notwithstanding their minority, the court will order payment of their shares to such children as have attained eighteen, and give liberty to those under eighteen to apply for payment of their shares when they respectively attain eighteen.—*Denekin, Re, Peters* v. *Tanchereau*, CH.D., NORTH, J.

28. *Legacy—Severance—Intermediate income on contingent legacy.*—If a contingent legacy is severed from the rest of the testator's property for the purposes of the administration of the estate, upon the contingency happening the intermediate income will not pass to the legatee; but if the severance is for the purposes of the legacy, the gift of the fund carries the intermediate income upon the happening of the contingency.

In re Medlock, 54 L. T. 828, followed.—*Snaith Re, Snaith* v. *Snaith*, CH.D. NORTH, J.

29. *Marshalling—Residuary gift—Charity—Exception of impure personalty—Intestacy.*—Testatrix, who died in 1879, bequeathed her personal estate to trustees upon trust for sale, and out of proceeds of sale to pay testamentary expenses and debts, and a pecuniary legacy to her niece; and she bequeathed the residue of her personal estate, "saveand except such parts thereof as could not by law be appropriated by will to charitable purposes," to a certain charity.

Held, that the residuary bequest did not operate as a direction to marshal the assets in favour of the charity; that the personal estate (consisting of both impure and pure personalty) should be applied in the payment thereout rateably of the testamentary and funeral expenses and the pecuniary legacy; and that so much of the residue of the personal estate as consisted of impure personalty, passed as undisposed of to the next of kin.—*Somerset, Re, Wegg-Prosser* v. *Wegg-Prosser*, CH.D., KEKEWICH, J.

30. *Precatory trust—Absolute gift—"I wish them to bequeath."*—A testatrix by her will made a bequest in the following terms: "I give, bequeath, and appoint to my dear nieces, Mrs. G. and Lady A., the sum of £2,000 apiece for their sole and separate use, and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew S. and my dear niece Mrs. P.

Held, affirming the decision of Kekewich, J., p. 461, that there was no precatory trust, and that Lady A. took the legacy of £2,000 absolutely.

The rule laid down in *In re Adams and the Kensington Vestry*, 32 W. R. 120, 883, 27 Ch. D. 394, preferred to that laid down in *Malim* v. *Keighley*, 2 Ves. Jun. 333.—*Hamilton, Re, Trench* v. *Hamilton*, C.A. 577.

31. *Remoteness—Trust to work out gravel pits and then sell—Gift of proceeds to unascertained class—Children of child dead at date of will.*—A testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then to sell them with power for his sons to bid at the sale: the proceeds of such sale were to be held on trust for such child or children of the testator "then living," and such issue living of any child then deceased, who, being a son, should attain twenty-one, or, being a daughter, should attain twenty-one or marry, in equal shares *per stirpes*. Until such sale the testator's sons were to be employed in the business. The residue of the testator's real and personal estate was given upon trust for sale and conversion, and to divide the income thereof equally among all his children during their respective lives, and upon death of any such child, whether before or after his own death, to hold the *corpus* whereof the income was or would have been payable to such child upon trust for all or any the children or child of such child, who, being a son, should attain twenty-one, and, being a doughter, should attain twenty-one or marry, and if more than one, in equal shares.

Held, that both the trust for the sale of the gravel pits and the trust declared of the proceeds of sale were void for remoteness.

Held, also, that the children of a daughter of the testator who was dead at the date of his will were not included in the residuary gift.—*Wood, Re, Tullett* v. *Armstrong*, C.A.

32. *Satisfaction—Covenant by testator to pay a certain sum three months after death—Legacy to covenantee of greater amount—No time fixed for payment.*—A. covenanted by deed to pay a sum of

money to B. within three months from his (A.'s) decease.

Held, that, in the absence of clear proof that the consideration for the promise was immoral, the court would not readily assume it to be so, and that the deed was a good deed.

A legacy given *simpliciter* is not a satisfaction of a debt of less amount due to the legatee under a bond and payable within three months from the death of the testator.—*Horlock, Re, Calham* v. *Smith*, CH.D. STIRLING, J., 410.

33. *Tenant for life and remainderman—Shares in Company—Issue of new shares—Option to take allotment in new shares in lieu of dividend on old shares—Exercise of option by trustees—Proceeds of sale of new shares—Capital or income.*—A testator gave his residuary estate upon trust for his widow for life, with remainder to be divided amongst others and with power to the trustees to postpone conversion as long as they should think fit. The testator was possessed of shares in a company, and after the testator's death the company issued new shares, which were offered to existing shareholders in part payment of any dividend for the time being. A dividend was afterwards declared out of profit, part of which was paid in cash and part of which was offered to be paid by the allotment of new shares. The trustees of the testator's will accepted the allotment, and allowed the new shares to be allotted to the tenant for life.

Held, that the company intended to distribute its profits as dividend and not to capitalize them, and that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate.—*Malam, Re, Malam* v. *Hitchens*, CH.D. STIRLING, J.

34. *Ultimate trust in favour of testator's heirs and next of kin—Time for ascertainment of class.*—The ultimate trusts of a testator's real and personal estate were declared to be in favour of his "own right heirs and next of kin according to the nature of the said property," without any reference to an intestacy or the Statutes of Distributions. The several tenants for life of the property, under prior trusts, were moreover restricted from alienating their respective life interests.

Held, that nevertheless the class to take under the ultimate trusts must be ascertained in accordance with the rule established by the House of Lords in *Bullock* v. *Downes*, 9 H. L. Cas. 1, viz., as at the death of the testator, and not at the period fixed by the will for distribution.—*Ford, Re, Patten* v. *Sparks*, C.A.

See also ADMINISTRATION, 2; CHARITY, 4, 9-12 CONDITION; INFANT, 2, 3; LIMITATIONS, STATUTES OF, 8; MARRIED WOMAN, 14; POWER, 1, 2; PROBATE, 6-11; TRUSTEE, 11.

[THE END.]

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